

The “Reasonable Alternative” Prong of the Necessity Defense

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I. Introduction

384. The necessity defense has been around for hundreds of years, tracing back to the Bible itself.² The role of the necessity defense is to encourage those who are faced with unsound options to choose the one likely to cause the least amount of harm.³ The essential idea of this defense is the utilitarian idea that certain illegal conduct should not be punished because, due to the special circumstances, a net benefit to society has resulted.⁴ One of the elements of the necessity defense, which will be the focus of this Article, is the “reasonable” alternative. In order for the necessity defense to prevail, a defendant must prove that there were no other reasonable alternatives available to him, and thus he was forced to break the law.⁵ This reasonable alternative, or “legal way out” prong, as some courts like to refer to it as, has been analyzed in a number of different cases. Two major contexts in which it has been interpreted are in criminal cases and in civil disobedience cases.

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2 See CHARLES E. TORCIA, *Necessity*, WHARTONS CRIMINAL LAW (15th ed. 2017).

3 See Jenni James, *When is Rescue Necessary? Applying the Necessity Defense to the Rescue of Animals*, STANFORD JOURNAL OF ANIMAL LAW & POLICY (2014).

4 See John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 U.N.H.L. REV. 6, 123 (2007).

5 See DAVID DEMERS, FLORIDA DUI HANDBOOK § 1:12 (2016–17).

385. This Article will first explore the history of the necessity defense itself, including some of the older cases in which it first originated. It will then discuss the policy reasons behind the necessity defense before analyzing the specific elements of the defense.⁶ Specifically, this Article will focus on one of the prongs of the necessity defense — the reasonable alternative prong. It will examine the various approaches courts have taken when analyzing the reasonable alternative prong as well as the differences in how it has been treated in both areas of law.⁷ Finally, it will offer changes and various factors courts should take into account while analyzing the reasonable alternative element and the necessity defense as a whole.

II. History and Development

386. The necessity defense has long been recognized in English and American courts.⁸ Its development is not entirely straightforward and many legal commentators are not in agreement over its development. For instance, one of the most influential British judges of the nineteenth century, Sir James Fitzjames Stephen,⁹ opined that the defense was so vague that judges could lay down any rule they presumed was practical. On the other hand, polymath Sir Walter Scott¹⁰ thought it was a matter of surprise that necessity existed because, “necessity creates the law; it supersedes rules; and whatever is reasonable and just in such circumstances is likewise legal.”¹¹ Despite the complexity of the development of the necessity defense, it has been recognized as common law and has also been adopted as part of the majority of the states’ statutory law.¹² Additionally, the Supreme Court has recognized it as part of the common law.¹³

387. The necessity defense first surfaced in the English courts as early as 1551 in *Reninger v. Fagossa*.¹⁴ This particular case illustrates the necessity defense by referring and citing to the New Testament example of eating sacred bread through necessity of hunger or taking another’s corn. The necessity defense has also been recognized in early

6 See Brent D. Wride, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070, 1071 (1987).

7 *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998).

8 See John Alan Cohan, *Homicide by Necessity*, 10 CHAR. L. REV. 119 (2006).

9 Sir James Fitzjames Stephen, 1st Baronet, ENCYCLOPEDIA BRITANNICA.

10 Sir Walter Scott, HISTORIC UK.

11 See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 289–293 (1975).

12 See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 289–293 (1975).

13 See *Necessity Defense*, THE FREE DICTIONARY.

14 *Reninger v. Fagossa*, 1 Plowd. 1, 75 Eng. Rep. 1 (1551).

federal cases. For instance, in *United States v. Ashton*,¹⁵ a group of sailors charged with mutiny justified their refusal to obey the captain's orders on the basis that the ship was not seaworthy. The court concluded that if the ship was not seaworthy then the sailors' conduct was not criminal.

388. An old case that fully discusses the doctrine of necessity in the context of civil disobedience is *State v. Wheeler*.¹⁶ In April 1917, the Industrial Workers of the World (I.W.W.) called a strike of the copper miners in Arizona. On July 12th, a sheriff, with the help of more than one thousand men, rounded up thousands of strikers, including all of the members of the I.W.W. The strikers were placed on board a freight train that transported them, leaving the strikers captive to federal troops. Eventually, the State charged the sheriff and his men with kidnapping, and one, H.E. Wooton, stood trial. The defendant asserted the defense of necessity, stating that the I.W.W. were an organized conspiracy to overthrow the government and the capitalistic system whose purpose was to destroy the lives and property of the community.

389. The defendant further explained that he and his associates reasonably believed the deportation was necessary for the preservation of life and property. After listening to the arguments, the judge held that the principle of necessity was justified in this case and ruled in favor of Mr. Wooton. The judge explained that the necessity defense "applied to personality as well as to real estate, to life as to property."¹⁷ In order to justify what would have otherwise been an unlawful act on the basis of necessity, it was required to show that the anticipated peril sought to be averted was not disproportionate to the wrong.¹⁸

390. Perhaps one of the most classic cases illustrating the necessity defense in the criminal context is *The Queen v. Dudley and Stephens*.¹⁹ This was another case about sailors stranded at sea. Specifically, the group of seamen were lost at sea for an extended period of time without anything to eat, resulting in the group killing and eating one of the members on board. The group was stranded at sea during a storm with no food or water, except for two one-pound tins of turnips. After approximately two weeks of being stranded with no signs of rescue, two of the boys discussed the possibility of sacrificing one within the group to save the rest. They focused on the helpless victim who supposedly had no family. After killing and eating the boy, rescue eventually came and the seamen were tried for his murder.²⁰

¹⁵ *United States v. Ashton*, 1 U.S. 4 (1760).

¹⁶ *State v. Wooton*, 254 U.S. 281 (1920).

¹⁷ See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 292–293 (1975).

¹⁸ See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 292–293 (1975).

¹⁹ *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

²⁰ *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

391. At trial, the defendants asserted the necessity defense stating that it was necessary to kill the boy in order to ensure the rest of the group’s survival.²¹ The court rejected this argument and found that “the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving him, of any possible chance of survival.”²²

392. A number of state cases have determined that if it is necessary, or reasonably appears necessary, a person may destroy property to prevent the spread of a fire or disease. Other examples in which the courts have held the necessity defense applies include speeding in order to avoid ambush and unlawful arrest, justifying the sale of alcohol without a prescription in an emergency, and permitting a sick child to be withdrawn from school without permission if the parents are acting to save the child’s health.²³

III. Policy

393. The reason for the necessity defense is one of public policy. The essential premise is that “[t]he law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.”²⁴ To summarize, the role of the necessity defense is to encourage those who are faced with untenable options to choose the one likely to cause the least amount of harm.²⁵

394. There has been much debate over whether or not the necessity defense should be made available to civil disobedients as a matter of public policy. There are arguments in favor of this as well as arguments against it. The main arguments in favor of the political necessity defense is that it empowers the jury by allowing individuals to weigh upon controversial political issues. The benefit of an empowered jury is that it fulfills positive legal roles. Another argument in favor of the political necessity defense is that it improves the quality and quantity of public discourse.²⁶

21 See Pavlina Hojecka, *Regina v. Dudley and Stephens*, [THEORY OF JURISPRUDENCE](#) (2006).

22 *Regina v. Dudley and Stephens*, [14 Q.B.D. 273](#) (1884).

23 See Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, [65 J. CRIM. L. & CRIMINOLOGY 289, 292](#) (1975).

24 See Brent D. Wride, *Political Protest and the Illinois Defense of Necessity*, [54 U. CHI. L. REV. 1070, 1072](#) (1987).

25 See Brent D. Wride, *Political Protest and the Illinois Defense of Necessity*, [54 U. CHI. L. REV. 1070, 1072](#) (1987).

26 See Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, [39 STAN. L. REV. 1173](#) (1987).

395. Despite the advantages of the necessity defense, there are also drawbacks worth mentioning. For instance, some commentators think that the necessity defense legalizes criminal activity to achieve pursuit of political goals. The argument is that by allowing the jury to decide when it is justifiable to break laws risks turning it into a “quasi-legislature” that can in effect veto already established government policies. Another drawback is that widespread approval of the necessity defense might lead to increased vigilantism.²⁷ Specifically, when it comes to the political necessity defense, commentators have made the argument that it conflicts with democratic values. Another argument centers around the notion that the courtroom might not be the most effective forum to hear political necessity cases.²⁸ Based on these arguments against the political necessity defense, scholars argue that courts should seek to exclude the necessity defense in civil disobedience cases.

IV. Elements and Defense

396. The Model Penal Code has been a template for many criminal statutes. It defines the necessity defense as follows:

(1) conduct which the actor believes to be necessary to avoid an evil to himself or another is justifiable, provided that: (a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear; (2) when the actor was reckless or negligent in bringing about the situation requiring a choice of 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.²⁹

397. Statutes based on the Model Penal Code deviate slightly by putting emphasis on the moral underpinnings of the necessity defense.³⁰ For instance, New York’s statute on the necessity defense describes it as:

necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or

27 See *Is Necessity Necessary? An Analysis of the Applicability of the Necessity Defence in Cases of Civil Disobedience*, UNDERGRADUATE LIBRARY.

28 See Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173 (1987).

29 See *Justification: Necessity — Contours of the Necessity Defense*, JRANK.

30 See *Justification: Necessity — Contours of the Necessity Defense*, JRANK.

developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.³¹

398. Modern versions of the necessity defense somewhat follow the Model Penal Code. For instance, some statutes are clear in that the defense is available whether or not the act was brought about by natural events such as fires, shipwreck, brake failure—or by human agency. Examples illustrating this are cases in which the defendant asserts the necessity defense in prison escape situations. Some statutes even allow the defendant to use the necessity defense to defend against homicide and other serious offenses. A defendant facing murder charges would argue that it was necessary to kill another human being in order to prevent the otherwise inevitable loss of several lives. For example, the necessity defense has been asserted in cannibalism cases in which a group of people have been stranded in the wild or at sea, thus facing the threat of starvation. Older statutes often limit the necessity defense to circumstances in which the individual brings about “nonlethal” harm.³²

399. Since the necessity defense is case-specific, its elements vary considerably among situations and jurisdictions. Generally though, American courts have adopted a “four-prong test” that the defendant must overcome before being able to assert necessity and before the defense ever comes in front of a jury. The first element requires the defendant to show that the offense committed was a lesser evil than that which he sought to avoid by committing the crime. The next element is the “imminence of harm” prong. In order for something to be imminent, there has to be a sense of urgency or there must be a real emergency involving danger to oneself or a third party.

400. The next element a defendant must meet is the “causal nexus” prong. This element requires the defendant to show that the unlawful act was able to successfully avert the danger at hand. The final element, which is the focus of this article, is the “availability of alternatives,” or the reasonable alternative prong. In order for the necessity defense to prevail, the defendant must prove that there were no other legal or reasonable alternative that he could have utilized first. As the research will show, courts tend to interpret this element more narrowly than the other elements.³³ The necessity defense is most often used in criminal cases.

31 See *Justification: Necessity*, [THE COLUMBIA ENCYCLOPEDIA](#) (6th ed. 2019).

32 See *Justification: Necessity*, [THE COLUMBIA ENCYCLOPEDIA](#) (6th ed. 2019).

33 See Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 [STAN. L. REV.](#) 1173 (1987).

V. The Criminal Realm

401. In *U.S. v. Posada-Rios*,³⁴ thirty-five defendants were charged with drug trafficking arising out of a conspiracy that began in 1985. The defendants asserted the necessity defense. With regards to the legal alternative prong, the court stated that one of the defendants, Watson, failed to present evidence of the absence of a legal alternative to drug dealing. In order to establish the absence of a legal alternative, a defendant must show “that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative.”³⁵ The court stated the importance of objectively evaluating the facts when determining whether reasonable alternatives were available to the defendant. The court continued, stating that a “defendant’s subjective belief as to available legal alternatives is not determinative. As long as the defendant’s crises permitted ‘a selection from among several solutions, some of which did not involve criminal acts,’ . . . the necessity defense must fail.”³⁶

402. In its analysis of the legal alternative prong, the court briefly discussed various criminal cases. For instance, in *United States v. Panter*,³⁷ a convicted felon was working as a bartender. He was assaulted by a patron who was heavily intoxicated and who had previously been convicted of murder. After some arguments amongst the two, the patron threatened to kill Panter, pulled out a knife, and stabbed him in the stomach. In an effort to protect himself, Panter reached under the bar, grabbed a gun and shot his attacker. The court held that the defense of necessity was available to Panter in defending against a charge of possession of a firearm by a felon because there was no time for Panter to take any lawful action to avoid being killed. Since there was no time for Panter to pursue a different alternative instead of pulling the trigger and killing his attacker, the necessity defense prevailed.

403. Contrasting with *Panter*, the court discussed the facts of *United States v. Harvey*³⁸ and *United States v. Harper*. In *Harper*,³⁹ the defendant, also a convicted felon, had purchased firearms to protect himself and his fiancée after he had been the victim of robbery several times. The court’s analysis of the legal alternative prong was slightly different in this case. Here, it stated that the necessity defense was not available because there was no evidence that Harper was in danger of any “imminent” bodily harm when he purchased and possessed the gun. The court reasoned that Harper had reasonable legal alternatives available to possessing a firearm. For instance, he could have notified the police of the threats.

34 *U.S. v. Posada-Rios*, 158 F.3d 832 (1998).

35 *U.S. v. Posada-Rios*, 158 F.3d 832, 874 (1998).

36 *U.S. v. Posada-Rios*, 158 F.3d 832, 874 (1998).

37 *United States v. Panter*, 688 F.2d 268 (1982).

38 *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986).

39 *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971).

404. In *Harvey*, the defendant, again a convicted felon, argued that he was in fear for his life because a rival church faction in his small hometown had engaged in “shootouts” and that Harvey had been threatened by members of the faction who wanted him to leave town. The court refused to uphold the necessity defense because Harvey’s evidence did not show that any present or immediate threat prevented him from calling the police. The court analogized Watson’s case to *Harper* and *Harvey* and reasoned that Watson presented no evidence of any imminent threat.⁴⁰

405. Another case in which the court interpreted the reasonable alternative element and ultimately found there to be other alternatives available is in the context of a deportation case. In *United States v. Dicks*,⁴¹ the defendant was convicted of illegal reentry following deportation. The defendant, Mr. Dicks, appealed his conviction for illegally re-entering the United States after having been previously deported in violation of 8 U.S.C. § 1326(a), (b)(2). The defendant argued the necessity defense. Specifically, the defendant claimed he suffered from the AIDS virus and was receiving ineffective treatment in Jamaica. As a result, he was “near dead at the time” and illegally re-entered the United States in order to receive the proper treatment at a medical center in New York.⁴²

406. The State made the court aware that the defendant did not make an application for re-entry under his true name with the Attorney General, and thus did not “try to find a legal alternative to his predicament.”⁴³ In response to this, the defendant argued that given his life-threatening condition, petitioning the Attorney General was not a “reasonable legal alternative.”⁴⁴ The court agreed with the State and concluded that petitioning the Attorney General for re-entry would have been a viable and reasonable legal alternative to illegal re-entry.⁴⁵

407. In contrast to the cases above in which the court found there were other alternatives available is the case of *Bozeman v. State*.⁴⁶ In this case, the defendant appealed a felony conviction of driving while license suspended, revoked, or cancelled. He claimed he was entitled to the necessity defense. At the time of the traffic stop, there was a female passenger who appeared severely intoxicated, along with open containers of alcoholic beverages visible in the interior of the car. According to the defendant, his ex-wife came over to his residence in hopes that he would help her search for their daughter who had run away. The defendant got in the passenger seat of his ex-wife’s car and drove off with

40 *U.S. v. Posada-Rios*, 158 F.3d 832, 874 (5th Cir. 1998).

41 *United States v. Dicks*, 338 F.3d 1256 (11th Cir. 2003).

42 *United States v. Dicks*, 338 F.3d 1256, 1257 (11th Cir. 2003).

43 *United States v. Dicks*, 338 F.3d 1256, 1257 (11th Cir. 2003).

44 *United States v. Dicks*, 338 F.3d 1256, 1258 (11th Cir. 2003).

45 *United States v. Dicks*, 338 F.3d 1256, 1257 (11th Cir. 2003).

46 *Bozeman v. State*, 714 So. 2d 570 (1998).

her. The defendant initially did not realize his ex-wife was intoxicated until he began to notice her erratic driving. Upon realizing his ex-wife was impaired, he got behind the wheel instead and stated that his intention was to drive her home and then resume the search for his daughter on his own.

408. In analyzing the reasonable alternative element, the court took the defendant's testimony into consideration. For instance, the court found that the defendant did not intentionally or recklessly place himself in a position of having to later choose to drive when he agreed to search for his daughter with his ex-wife. Additionally, the court concluded that the defendant's testimony indicated that he believed he had no viable alternatives to driving since he stated he had no money for a cab that evening. Given these circumstances, the court ultimately concluded that there were no other reasonable alternatives except to drive with the suspended license and thus, the necessity defense should have prevailed.⁴⁷

409. Another criminal case in which the reasonable alternative element is interpreted slightly different is a federal case, *United States v. Cannabis Cultivators Club*.⁴⁸ The issue in that case was whether or not the defendants' admission to distributing marijuana to seriously ill persons following physician's recommendation violated federal law, 21 U.S.C. § 841(a). One of the defendants' argument included the common law defense of necessity. Regarding the reasonable alternative prong, the defendants argue that because the harm to be averted was imminent and life-threatening, supplying cannabis to their members was necessary to prevent the harm. They stated they had no other reasonable alternative because for many people, legal drugs simply do not work in effectively treating their symptoms and they have no legal or safe alternative to obtaining marijuana.⁴⁹

410. In response to the argument, the federal government stated the defendants did have a legal and reasonable alternative here — a petition to reschedule marijuana from a Schedule I to a Schedule II controlled substance. The Court went on to state that rescheduling to Schedule II would permit physicians to prescribe marijuana for therapeutic purposes. The Court did clarify that it need not dispositively decide whether a reasonable alternative exists. In order for the defense to be available to the defendants in this case, they would have to prove that each and every patient to whom it provides cannabis to is in danger of imminent harm; that the cannabis will alleviate the harm for that particular patient; and that the patient had no other alternatives. The Court ultimately found that the medical necessity defense was not appropriate here.⁵⁰

47 *Bozeman v. State*, 714 So. 2d 570, 571–72 (Fla. 1st DCA 1998).

48 *United States v. Cannabis Cultivators Club*, 5 F.Supp. 2d 1086 (N.D. Cal. 1998).

49 *United States v. Cannabis Cultivators Club*, 5 F.Supp. 2d 1086 (N.D. Cal. 1998).

50 *United States v. Cannabis Cultivators Club*, 5 F.Supp. 2d 1086, 1092 (N.D. Cal. 1998).

VI. Civil Disobedience?

411. The necessity defense is also often asserted in civil disobedience cases. Civil disobedience may be defined as “open and purposeful law-breaking that is politically motivated and normally accompanied by the actors’ sense of moral indignation and duty.”⁵¹ It involves intentionally breaking a law in order to enact social or political change. In order for an act to be considered civil disobedience, the actor must accept whatever penalty is imposed for violation of the law. A few famous civil disobedients include Martin Luther King Jr., Rosa Parks, and Mahatma Gandhi.⁵²

412. There are two kinds of civil disobedience—direct and indirect. The distinction between the two is not always clear-cut. Direct civil disobedience involves the intentional violation of a specific law that is challenged as unjust. Indirect civil disobedience is the most frequent form of protest. It involves the violation of a law which is not itself the object of protest. The purpose of indirect civil disobedience is to mobilize public opinion, usually through symbolic action. An example that illustrated indirect civil disobedience is defendants trespassing and blocking access of shipments to a nuclear power plant. The act is not committed to protest the trespass law under which the defendants are charged, but rather to protest under the use of nuclear power. Indirect civil disobedience could also target an unjust policy of a business organization, scientific laboratory, government facility, military contractor, or other entity.

413. Trespass is one of the most frequent laws violated but protestors commit other acts such as malicious mischief, obstruction of passage, assault, arson, or theft as a means of protesting an entirely separate issue or policy. The distinction between direct and indirect civil disobedience matters because case law holds that the necessity defense is available only to defendants charged with direct civil disobedience.

414. The civil disobedient asserting the necessity defense can admit violating the law and, in turn, shift the legal debate on the justness of a conviction under the circumstances. The necessity defense also allows the civil disobedient to voice his motive for breaking the law. With regards to the reasonable alternative element pertaining to civil disobedience cases, courts’ application of the absence of the element has barred civil disobedients from bringing their necessity claims to the jury.

415. Generally, courts have denied the necessity defense in civil disobedience cases because there were legal alternatives available to protestors. Oftentimes, courts will refer to the notion that the defendants had “legal alternatives,” but usually courts hold

51 See James L. Cavallaro, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CALIF. L. REV. 351 (1993).

52 See *Is Necessity Necessary? An Analysis of the Applicability of the Necessity Defence in Cases of Civil Disobedience*, UNDERGRADUATE LIBRARY.

that this factor requires proving that there were no other legal alternatives. Courts have little sympathy for the argument made by protestors that legal processes to redress grievances are inadequate or ineffective.

416. From the perspective of civil disobedients, while “reasonable” legal alternatives often do exist, they will not be effective in abating the evil in question, particularly in light of the imminence threat, which, from the perspective of the protestors, casts a special urgency on the need for change. Protestors who have strong beliefs are of the standpoint that the danger of nuclear accidents or other perils are so serious that it would be disingenuous to suggest that legal alternatives such as seeking redress with political officials, or publishing arguments in the media, or even obtaining a civil injunction, are reasonable.⁵³

VII. Civil Disobedience Cases

417. In *People v. Gray*,⁵⁴ the defendants, who were part of Transportation Alternatives, were charged with disorderly conduct as a result of blocking a bridge roadway. The defendant’s motive for blocking the roadways was to prevent “asphyxiation of New York” by automobile-related pollution. Specifically, they sought to prevent unnecessary illness and death caused by pollution. The defendants asserted the necessity defense and the Court ultimately ruled in their favor stating that the People failed to disprove the elements of the necessity defense.

418. In arriving at its conclusion, the Court analyzed the reasonable alternative element. This court’s view on the reasonable alternative is that by assuming that there are always other alternatives available would defeat the purpose of the entire necessity defense. The Court stated that here, the defendants testified to making several attempts to avoid the harm. The Court also found that the position of Transportation Alternatives was that if they could get a public hearing on the issue, they would end their protests. However, when they realized they wouldn’t get the opportunity to have a public hearing, they resorted to blocking the roadways. Taking all of this into consideration, the Court stated that the group was excluded from the decision making process concerning the closing of a very important roadway for nonpolluting forms of transportation. The Court looked to all of the efforts taken by the defendants and reasoned that they did not reasonably believe they didn’t have any other legal alternatives.⁵⁵

53 See James L. Cavallaro, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CALIF. L. REV. 351 (1993).

54 *People v. Gray*, 150 Misc. 2d 852, 857–71 (NY City Crim. Ct. 1991).

55 *People v. Gray*, 150 Misc. 2d 852, 857–71 (NY City Crim. Ct. 1991).

419. Some courts have taken a different position when analyzing the reasonable alternative factor. *United States v. Schoon*⁵⁶ involved a group of people obstructing activities of the Internal Revenue Service Office in Arizona as well as failing to comply with an order from a federal police officer. The court held that it was implying a reasonableness standard in judging whether legal alternatives exist but stated that “where the targeted harm is the existence of a law or policy, our precedents counsel that this reasonableness requirement is met simply by the possibility of congressional action.”⁵⁷ Regarding indirect civil disobedience, the court stated that the necessity defense does not apply to indirect civil disobedience cases because legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action. It stated that congressional action can always mitigate this ‘harm,’ [i.e., the policy sought to be mitigated by protestors]. The Court held that a legal alternative would be to appeal to Congress even though lobbying Congress might be “futile,” and “regardless of the likelihood of the plea’s success.”⁵⁸ Ultimately, Schoon held that the necessity defense should not apply in cases of indirect civil disobedience.⁵⁹

420. In *United States v. Quilty*,⁶⁰ the defendants were arrested for trespassing on military property. Specifically, the defendants were participating in a peaceful “prayer meeting” on Rock Arsenal. The defendants had previously been warned with a “Bar Letter” after they previously participated in an anti-nuclear demonstration on the same premises. The letter essentially stated that they were banned from entering the premises and that if they violated this, they would be subject to a fine or imprisonment. The defendants asserted the necessity defense. The court reiterated the principle of the necessity defense and in taking their argument into account, the court considered the reasonable alternative prong. It mentioned that it is close to impossible to argue that nuclear war is not a more serious harm than a peaceful or unlawful anti-nuclear prayer demonstration. However, the court also pointed out that it’s just as impossible to argue that there are not reasonable alternatives to violating the law under which the defendants were arrested. The court listed examples of other alternatives for the propagation of the anti-nuclear message such as in the nation’s electoral process, by speech on public streets, in parks, in churches and lecture halls, and in auditoriums. Ultimately, the court rejected the defendants’ claim of necessity in relying in part upon the reasonable alternatives prong. The court stated that the availability of these reasonable alternative means of expression precluded a successful necessity defense.⁶¹

⁵⁶ *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991).

⁵⁷ *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991).

⁵⁸ See James L. Cavallaro, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CALIF. L. REV. 351, 376 (1993).

⁵⁹ *United States v. Schoon*, 971 F.2d 193, 199–200 (9th Cir. 1991).

⁶⁰ *United States v. Quilty*, 741 F.2d 1031 (7th Cir. 1984).

⁶¹ *United States v. Quilty*, 741 F.2d 1031, 1032 (7th Cir. 1984).

VIII. The Future

421. The reasonable alternative element of the necessity defense is a critical element which should be given great weight by the courts when determining if the defense should be available to the defendant. As the research shows, the necessity defense is often asserted both in criminal cases as well as in civil disobedience cases. The reasonable alternative element has been interpreted differently by various courts in both of these areas of law. The necessity defense as a whole should be treated differently in criminal cases versus civil disobedience cases.

422. An important factor a court should consider when determining if the necessity defense should be available to a defendant is the defendant's *mens rea*. In most civil disobedience cases, the civil disobedient breaks the law in order to further their political goals or protect the environment. In cases such as these, courts should be somewhat lenient when allowing these defendants to assert necessity. On the other hand, in criminal cases, defendants attempt to assert necessity as a way to escape culpability for crimes they have committed against society. Courts should be more cautious when allowing criminal defendants to claim necessity.

423. As the research shows, courts do a good job at looking at the totality of the circumstances before determining if the necessity defense should apply. Some of the relevant questions courts should continue to consider when a defendant raises the necessity defense include: Was the defendant in a life threatening situation? What was the defendant trying to achieve by asserting the necessity defense? Is the defendant a first-time offender? How severe was the crime committed?

424. One of the first steps courts should take before allowing a criminal defendant to assert necessity is paying attention to the severity of the crime committed. Is the defendant being charged with a felony or a misdemeanor? When defendants are charged with very serious crimes such as rape and murder, courts need to be hesitant and continue to pay close attention to the circumstances surrounding the offense. This is where the legal alternatives prong needs to be given special analysis. Criminal defendants who are charged with serious crimes should have jump through more hurdles to show that there were absolutely no other alternatives they could have taken.

425. In the *Dudley* case, the defendants were prevented from asserting the necessity defense when they argued that they committed the "lesser of the two evils" by killing a boy in order to avoid dying of starvation.⁶² While it is important to preserve one's life, it should not give someone else the right to take away another's life even in pressing circumstances. Despite this, courts should still be weary of the facts and circumstances surrounding the offense. For example, if the defendant is charged with murder but can

⁶² *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

prove that he was acting in self defense, the necessity defense should prevail. The court in *Posada-Rios* alluded to this when referencing the *Panter* case. In *Panter*, even though the defendant was a convicted felon, he was able to prove that the aggressor attacked him first and threatened to kill him. The court in that case found that there were no other legal alternatives *Panter* could have taken in that moment, and thus, the necessity defense was appropriate.⁶³

426. *Bozeman* illustrates cases where courts should adopt a broader stance when determining that the necessity defense applies. The defendant in *Bozeman* was charged with the misdemeanor crime of driving on a suspended license. There, the court held that there were no other reasonable alternatives the defendant could have taken besides getting behind the wheel of the car instead of allowing his intoxicated wife to drive and potentially endanger lives. In arriving at its ultimate conclusion, the court took into account the defendant’s testimony. This leads into another factor courts should consider—whether or not the defendant has a prior record. Is this the defendant’s first offense or is he or she a repeat offender? Is the defendant credible? In this case, the defendant was charged with the misdemeanor crime of driving with a suspended license, but what about when a defendant is charged with a more serious crime? It is important to evaluate each witness’ testimony closely.

427. In regards to civil disobedience cases, American courts have taken a strict approach when interpreting the necessity defense. The necessity defense should not be as limited in civil disobedience cases as it is in criminal cases. In civil disobedience cases, defendants usually break the law in order to serve the greater good or protect the environment. In criminal cases, defendants typically use this same argument and claim that they chose the “lesser of the two evils” by breaking the law. However, in civil disobedience cases, the civil disobedient does not typically commit a crime in the same sense. Individuals are not normally harmed by the civil disobedient’s actions as opposed to the criminal defendant’s actions.

428. In cases of civil disobedience, it is sometimes hard for the actors to seek out other alternatives. In *Schoon*, the court noted that one of the alternatives the civil disobedients could have taken was to lobby Congress.⁶⁴ Although this sounds like an ideal solution it might be easier said than done. For example, the average civil disobedient might not know how to achieve this or what resources to utilize. While courts should be more open to allowing the civil disobedient to use the necessity defense, it is important to keep in mind the policy arguments against the necessity defense. For instance, the actions of civil disobedients sometimes contradict policies and ordinances currently in place by legislators and other public officials (i.e, trespass). A solution is to allow the civil

⁶³ *United States v. Posada-Rios*, 158 F.3d 832, 874 (5th Cir. 1998).

⁶⁴ *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991).

disobedient to have thier voice heard so that they do not have to resort to breaking the law.

IX. Conclusion

429. Overall, the necessity defense can be asserted in both criminal cases and in civil disobedience cases. There are several elements that a defendant must prove before being able to assert necessity, one of which being the legal alternative prong. The defendant must be able to show that there were no other alternatives besides the unlawful act committed. The necessity defense and the reasonable alternative prong are interpreted rather strictly in both areas of the law. This article sets forth the notion that courts should continue to be hesitant when allowing a criminal defendant to use the necessity defense, but should be more lenient in allowing a civil disobedient to assert the political necessity defense. Courts should require criminal defendants to go above and beyond to show that there were no other reasonable alternatives to the crime committed. Some possible factors courts should consider in criminal cases are: the severity of the crime committed, whether or not the defendant is a first-time offender, and the circumstances of the offense.

430. Regarding civil disobedience, courts should keep in mind the policy implications of allowing civil disobedience to assert the defense. One important possible avenue that could be used to circumvent this is to give the civil disobedient access to voice his opinion instead of resorting to breaking the law and thus, defeating established policies already in place.