

Necessity as a Defence to Crime

*Ian Dennis, Faculty of Laws, University College London**

Introduction

English common law historically has been reluctant to recognise necessity as a general defence to criminal liability. Until quite recently the cases, admittedly few in number, showed the judges deploying a variety of arguments, founded on a mixture of principle, policy and pragmatism, to resist exculpatory claims by defendants that they should not be liable for an offence where it was 'necessary' for them to commit it. Although the judges rarely theorised such a defence with any rigour, tending to use the terms 'justification' and 'excuse' without distinguishing between them,¹ it is reasonably clear that they rejected necessity irrespective of whether it was conceived in the form of a justificatory defence rendering the allegedly criminal act lawful,² or as an excusatory defence eliminating the actor's culpability for the act.³

This historical judicial antipathy to necessity stands in marked contrast to the judges' willingness to develop the related general defences of self-defence and duress *per minas*. Both defences are now well-established at common law, although aspects of the law of duress remain controversial.⁴ Moreover, despite the rejection of a general defence of necessity, the principle that necessity can function as a defence to criminal liability is not unknown in English law. Isolated instances of its acceptance in particular contexts can be found,⁵ and the definitions of certain statutory offences have sometimes been broad enough to enable claims of necessity to be pleaded in answer to charges of those offences.⁶

In recent years this structure of a general exclusion of necessity, ameliorated by a limited number of context-specific exceptions, has become more complex as a result of two developments. The first is the recognition of a form of necessity which has become known as duress of circumstances. This is a defence of general application, closely modelled on the established defence of duress by threats. Its scope and limits are the same as duress by threats, so that, for example, it is not available as a defence to murder or attempted murder. The second development is the recognition of a form of necessity in medical cases. This defence enables medical staff to avoid pos-

* This paper is the first sketch of work in progress. The author would prefer it not to be quoted without permission.

¹ A classic example is the statement by Lord Coleridge CJ in *R v Dudley and Stephens* (1884) 14 QBD 273 that the killing in that case must be murder unless it "can be justified by some well-recognised excuse admitted by the law" .

² *R v Dudley and Stephens* (1884) 14 QBD.

³ *London Borough of Southwark v Williams* [1971] Ch 734.

⁴ Not least the unavailability of duress as a defence to murder and attempted murder; see further below.

⁵ *R v S tratton* (1779) 21 How St Tr 1045; *R v Vantandillo* (1815) 4 M & S 73.

⁶ See P. R. Glazebrook, "The Necessity Plea in English Criminal Law" [1972A] CLJ 87.

sible criminal liability for the consequences of invasive surgery, or other medical procedures, for which a valid consent cannot be obtained. In contrast to duress of circumstances, this form of necessity will be available as a defence to murder. Such developments have encouraged calls for the wider recognition of necessity as a defence in other contexts, such as euthanasia,⁷ or political protest.⁸

However, although the recent developments have the potential to support a wider doctrine of necessity, it is already clear that the English courts' traditional caution in the face of pleas of necessity has not been abandoned. In the recent case of *R v Quayle*⁹ the Court of Appeal rejected claims of necessity advanced by a number of defendants charged with offences relating to the production, possession or importation of cannabis. The basis of the claims was that the defendants, or others whom they wished to help, needed the cannabis for the purpose of pain relief in circumstances where conventional medication was not as effective. The court rested its decision on what it described as "the pragmatic consideration that the defence of necessity, which the Crown would carry the onus to disprove, must be confined within narrowly defined limits or it will become an opportunity for almost untriable and certainly peculiarly difficult issues, not to mention abusive defences".¹⁰ According to the court, the 'narrowly defined limits' for this purpose were those of necessity of circumstances, and they did not extend to cover the defendants' acts. There remains, therefore, considerable tension and uncertainty about the proper nature, scope and limits of a general defence of 'necessity' at common law.

This state of affairs forms the starting-point of this paper. The purpose of the paper is to offer some reflections about the significance of the recent English developments for a general defence of necessity and about how calls for its further extension should be evaluated. I hope this discussion will not be of purely domestic interest. The concept of necessity, and its role as a possible defence to crime, has generated debate in many penal systems. An important example of an issue of general concern is whether necessity, if it is to be recognised at all, should be dealt with in the general part or the special part of the criminal code. This issue arises because necessity presents the criminal law with more competition between values than any other defence. As we shall see, a defining characteristic of necessity is the comparison it requires between 'evils'; the 'evil' (or harm) in the form of the crime that the defendant perpetrated is set against the 'evil' (or harm) he or she sought to avoid. This comparison will require some ranking or ordering of harms in order to carry out any exercise of calculating 'lesser evils' or applying a proportionality test. Who should undertake such an ordering of harms? Should it be the legislature, when it defines the relevant offence in the special part of the code? A sufficiently detailed definition, which includes a comprehensive context-specific set of defences, may leave little room for a generalised defence of necessity. This is particularly so if the legislation includes a set of exemptions, or a regulatory scheme, such as licensing, which is unavailable to the defendant on the facts of the case. Or should the courts

⁷ Suzanne Ost, "Euthanasia and the Defence of Necessity: Advocating a More Appropriate Legal Response" [2005] Crim. L.R. 355.

⁸ Simon Gardner. "Direct Action and the Defence of Necessity" [2005] Crim. L.R. 371.

⁹ [2005] EWCA Crim 1415; [2005] 2 Cr. App.R. 34 (p.527).

¹⁰ *Ibid* para.75.

be free to develop a general principle of exculpation for necessity on a case by case basis? It will be suggested later that the English cases may point towards an intermediate position on the respective roles of the courts and the legislature in the ordering of harms. This will grant necessity limited scope as a general defence, while respecting the primacy of the legislature as the legitimate arbiter of many of the competitions of value that necessity throws up.

I do not aim to provide a comprehensive review of necessity, which would be too large an undertaking. But in order to address the main issues we will first have to clarify some quite basic points about the nature of the defence and its history at common law. The paper begins therefore with a brief discussion of the definition of necessity. What does a defendant mean when he or she says that it was 'necessary' to commit the crime in question? This conceptual question will be discussed along with the related structural question of the place of necessity in the construction of criminal responsibility. The second section of the paper deals with the historical issue of the explanation for what I have described as the traditional judicial antipathy to necessity. Why have English courts been so reluctant to recognise a general defence of necessity when they have been willing to recognise self-defence and duress by threats as general defences to crime? These clarifications will provide some clues to the evaluation of the recent developments and of the claims for the further extension of necessity.

Thirdly, the paper will develop some ideas about the adequacy of the distinction between justification and excuse as a means of classifying criminal law defences and generating appropriate rules for the specification of new defences. It will be argued that while the distinction is a useful method of clarifying our thinking about the nature and limits of defences in criminal law in general, it fails to provide a satisfactory account of the proper scope and conditions of necessity. This is because necessity is best conceived as a relatively narrow ground of exculpation, founded on the actor having a particular reason for action, namely the preservation of life or the avoidance of serious injury. However, this reason for action does not support a unified defence of necessity, whether of justification or excuse. Rather it supports two forms of the defence, but neither form is wholly excusatory, or wholly justificatory, in character. The two forms have the same foundation conditions, namely that the action should be necessary, in the sense that there is no reasonable alternative available to the actor, the action should not be disproportionate to the goal to be achieved, and the action should have as its purpose the preservation of a person's life or freedom from serious injury. But although these are necessary conditions for any defence of necessity they are not sufficient by themselves; a defence defined only by reference to these conditions would be too broad. Hence the need for further limiting conditions, which differ in the two forms of the defence. One form is based on the existence of a situation of emergency, the other on the existence of a conflict of duties.

It will be argued that where the actor's reason for action is the preservation of other values, such as the protection of property or other social, economic or political interests, necessity is best treated as a context-specific issue. This is because, as noted above, in such cases a ranking of harms will need to be undertaken that may well involve difficult and contested issues of socio-economic policy. Accordingly, the legislation defining the crime in question should address, in the form of speci-

fied particular defences, when and under what conditions the harm to be prevented by the crime can be excused or justified by action taken to protect other interests from harm. In practice the legislature may sometimes prefer to delegate to the courts the task of deciding these contests between values – a common method of doing this is by defining an offence in terms that include the words “without reasonable excuse” – but it is constitutionally appropriate that the jurisdiction to resolve such conflicts should be conferred on the courts by the legislature and not assumed by the courts.

The concept of necessity

Glanville Williams commented many years ago that it was difficult if not impossible to formulate a general doctrine of necessity with any approach to precision.¹¹ This was and still is true, and part of the explanation for the difficulty is that the very concept of necessity and its place in the structure of criminal responsibility has remained somewhat unclear and disputed. For example, many accounts of criminal law describe necessity as a form of compulsion. On this view it is a plea that a defendant was forced (or obliged) to commit the crime in question because, in the circumstances and all things considered, there was no other reasonable alternative course of action open. The defendant’s will not to commit the crime was overborne. This may well be apt to describe the situation of a person confronted with a life-threatening emergency, but it is questionable whether it is an accurate portrayal of the situation, say, of a doctor weighing up the merits of a particular medical procedure for a patient unable to consent, or of a person deciding whether to commit damage to property in furtherance of a strongly-held political belief. Such cases look more like measured exercises of judgement than coerced responses to danger.

The focus on compulsion has sometimes led to assertions that a plea of necessity should be regarded as a denial of the voluntariness of an act,¹² or as a denial of *mens rea*¹³, but it seems clear that it should be distinguished from both these types of exculpatory claim. Where a defendant is subject to force in the sense of a physical compulsion that is impossible to resist, as where A seizes B’s arm and uses it to hit C, B should escape liability on the basis that his ‘action’ is an involuntary one over which he has no control. There is no *actus reus* committed by B in these circumstances. By contrast, in a case of necessity the defendant consciously wills the act. Although he may have no wish to do it, the act is nonetheless a physically voluntary one that he has chosen to do. Secondly, a voluntary act done under ‘necessity’ is different from an act which a defendant feels ‘forced’ to do as a result of some mental condition or behavioural disorder.¹⁴ In the latter case, if the defendant is to avoid

¹¹ G. Williams, *Criminal Law The General Part* (2nd ed, Stevens, 1961) 728.

¹² See *R v Hudson and Taylor* [1971] 2 QB 202, per Lord Widgery CJ at p206, in relation to an act of perjury done under duress by threats.

¹³ See *R v Bourne* (1952) 36 Cr App R 125, per Lord Goddard CJ at p128, in relation to an act of bestiality done under duress by threats. This view of duress was decisively repudiated by the House of Lords in *Lynch v Director of Public Prosecutions for Northern Ireland* [1975] AC 653.

¹⁴ In *R v Rodger and Rose* [1998] 1 Cr App R 143 the defendants pleaded that it was necessary for them to break out of prison because they had become suicidal as a result of an increase in the ‘tariffs’ of their sentences. The Court of Appeal held that no defence of necessity was available where there was

criminal liability, it should be on the basis of a lack of *mens rea*, or a claim that a mental disorder defence prevents responsibility for the offence being properly attributed to him. A deliberate act, such as killing, or stealing food, or breaking out of prison, done under necessity is still an intentional act for the purposes of a requirement of *mens rea*, even though again the defendant may have had no wish to do it.

Following this line of thought, and putting to one side claims about compulsion, it seems that necessity may properly be represented as a claim that the defendant's conduct was a voluntary intentional response to some external pressure or prompt, which presented a danger of harm that the defendant believed could be averted only by committing the otherwise criminal act. The plea of necessity then derives its moral force as a ground of exculpation from the claims that the external pressure or prompt was sufficiently serious to cause the defendant to act in the way he or she did, and that such action was a reasonable response in the circumstances to avoid the danger. To qualify as a reasonable response the defendant's action must be both necessary, in the sense that there is no other reasonable way of avoiding the danger, and the act done must bear a relationship of proportionality to the danger to be avoided. It is worth noting at this point that the defences of self-defence and duress by threats similarly require a comparison between the 'evil' (or danger) with which a defendant was confronted, and the 'evil' perpetrated by the defendant in order to avert the danger. Indeed, this point has led Clarkson to argue that the three defences might with advantage be combined into a single new defence of 'necessary action', meaning an action by the defendant which, taking into account the context and all the circumstances, was a reasonable and proportionate reaction to the danger with which the defendant was confronted.¹⁵

Expressed in this way, the defence of necessity might, as noted above, be a justification or an excuse, using Fletcher's influential account of the distinction.¹⁶ It is only if further elements are added to the definition of the defence that we begin to see it take on a characteristically justificatory or excusatory form. Sometimes courts will explicitly cast the defence in one form rather than another, with a view to generating the appropriate further conditions of the defence. In *Perka v R*,¹⁷ for example, the Canadian Supreme Court expressly rejected a conception of necessity as a justificatory defence founded on a utilitarian calculation of 'lesser evils'. Instead the court preferred to conceptualise necessity as an excuse available in "emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience". Following Fletcher,¹⁸ the court described such cases as ones of "moral or normative involuntariness", and then set out a number of 'limitations' on the defence. The situation should be urgent and the danger imminent; there should be no reasonable legal alternative to disobeying the law; the harm inflicted must be less than the harm sought to be avoided; any contributory fault on the part of the defendant may disentitle him to the defence on the basis

no extraneous influence on the defendants and "it was solely the suicidal tendencies, the thought processes and the emotions of the offenders themselves which operated as duress".

¹⁵ CMV Clarkson, "Necessary Action: A New Defence" [2004] Crim LR 13.

¹⁶ *Rethinking Criminal Law* (Little Brown, Boston, 1978).

¹⁷ (1984) 13 DLR (4th) 1.

¹⁸ *Op cit.*

that if his actions brought about the situation that ensued he was not really “confronted with an emergency which compelled him to commit the unlawful act he now seeks to have excused”.

The decision to recognise necessity in the form of an excuse was founded on a principle of respect for human autonomy. Dickson J observed that the defendant’s choice to break the law in such a case is not a ‘true choice at all; it is remorselessly compelled by normal human instincts’. The instincts in question were described as those of self-preservation or altruism, as noted above. The court agreed with Fletcher that it is unjust to punish morally involuntary conduct of this type since there is no other viable or reasonable choice available to the defendant. Equally, it can be argued that since such conduct cannot realistically be deterred, punishment can serve no consequentialist purpose.

Such arguments point up the analogy between necessity and the defences of self-defence and duress by threats. Glazebrook has drawn attention to the fact that in all three situations the defendant has a choice. He can remain passive in the face of the danger or threat, letting events take their course, or he can respond to the danger or threat by taking action which, in the absence of circumstances of justification or excuse, will be an offence. Wilson has developed the analogy by suggesting that the three defences share a common template, namely that “the actor reacted reasonably to allay the unjust threat of harm”.¹⁹ From this perspective self-defence and duress by threats can be viewed as distinct forms of a broad conception of necessity, and this view gains support from dicta in some of the judgments in the recent English cases.²⁰ Emphasising these links between the three defences reinforces the point that necessity is a protean concept, since self-defence is commonly considered a justificatory defence whereas duress by threats is commonly considered as an excuse.

However, as Wilson notes, it is not the case that the defences can therefore be collapsed into a unified defence of ‘necessary action’ that exists whenever a person acts reasonably and proportionately to prevent the harm with which he or another is unjustly threatened.²¹ Following Horder²² and Uniacke,²³ Wilson suggests that the defences are driven by different moral agendas. Thus:

“In duress the cost of conformity to law is having to make an unreasonable personal sacrifice. In necessity the cost of not acting in a way which may involve wrongdoing is a yet greater evil or harm, rendering it morally imperative to act in that fashion. In self-defence legal permission is granted to a person to take necessary and proportionate steps to resist, repel or ward off an unjust threat posed by another person”.

It is perhaps the judges’ awareness of such different moral agendas that may help to account for the very different development of necessity at common law from self-defence and duress by threats. Relatedly, we should also note some differences and

¹⁹ W. Wilson, *Central Issues in Criminal Theory* (Hart Publishing, 2002) 293.

²⁰ See *R v Martin* (1989) 88 Cr App R 343; *R v Shayler* [2001] 1 WLR 2206; *Re A (Conjoined Twins)* [2000] 4 All ER 961; *Safi* [2003] EWCA Crim 1809.

²¹ It may be inferred therefore that Wilson would not support Clarkson’s later proposal for just such a new defence: see n 16 above.

²² J Horder, “Self-Defence, Necessity and Duress: Understanding the Relationship” (1998) 11 Canadian Journal of Law and Jurisprudence 143.

²³ S Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (CUP, Cambridge, 1994).

similarities in the defendant's normative position in the three situations. In cases of self-defence and duress by threats the defendant is confronted by a danger created by another person. In all cases of duress by threats, and nearly all cases of self-defence,²⁴ the creation of the danger involves wrongdoing by the other person,²⁵ of which the defendant is the innocent victim. The defendant's moral claim to sympathetic consideration of his dilemma may be stronger in such cases because it may be unfair to expect him to suffer the threatened harm without resistance. Some situations of necessity may also result from the wrongful conduct of others, when the strength of the defendant's moral claim to a defence is likely to be similar. But some situations of necessity are the product of events and natural disasters for which no one is at fault. In such cases the defendant may again be an innocent victim of circumstances. However, there is now no background wrongdoing to reinforce the claim that it is unfair to punish the defendant for choosing to take action to avert the danger and not bear the costs of fate passively. On the other hand, some situations of necessity may place the defendant in a situation where he or she owes conflicting duties to others. Whatever the defendant does or not do in the situation involves giving one duty preference over the other. The claim then is not so much for sympathetic treatment of a dilemma, but for vindication of the defendant's resolution of the conflict. As we shall see, some cases of duress by threats may equally give rise to a conflict of duties.

The history of necessity: judicial objections to a general defence

The leading authority at common law on necessity is *R v Dudley and Stephens*.²⁶ The facts of this famous case are too well-known to require more than the briefest of summaries. Four survivors of a shipwreck, three men and a boy, were cast on to the high seas in an open boat. After 18 days, with no more food or water, and no apparent prospect of rescue, the two defendants killed the boy. The three men lived off his body for four days until they were picked up by a passing ship. On returning to England the defendants were tried for murder. Their defence was necessity, on the basis that the only way any of them could survive in the circumstances was by killing one of them for the others to eat. The trial process in this case was highly unusual. The judge asked the jury for a special verdict, consisting of the answers to certain factual questions which the judge posed. The case was then adjourned to a court of five judges for a decision as to the defendants' liability for murder based on the jury's answers. The decision was that the defendants had no defence of necessity and were liable for murder.²⁷ Given this unusual process the precise *ratio decidendi* of

²⁴ The qualification allows for the rare cases where a person is unlawfully attacked by a child under the age of criminal responsibility, or a person suffering from a mental disorder sufficient to exempt him or her from liability for the attack.

²⁵ I do not deal in this paper with the issues arising where there is no danger in fact, but the defendant mistakenly believes that a danger exists (ie that he is being threatened or unlawfully attacked).

²⁶ (1884) 14 QBD 273.

²⁷ They were sentenced to death, but the sentence was later commuted to six months imprisonment. Such a dramatic reduction strongly supports the argument that this was a test case designed to rid the

Dudley and Stephens is obscure, and at least three views are possible: necessity was no defence to any crime, necessity was no defence to murder, necessity was no defence to murder on the facts as found by the jury.

The court's reasoning appears to have taken the following form: a deliberate killing was murder unless there was some well-recognised justification/excuse; the only possible justification/excuse in this case was 'necessity', but the necessity argued for by the defendants was not what the law had ever recognised as necessity that could justify/excuse homicide; examination of the previous authorities showed that the only necessity which would justify/excuse homicide was self-defence against physical attack, where the law in effect acknowledged the instinct of self-preservation in a situation of immediate peril; there was no physical attack by the boy in this case.

On this basis the case arguably rejected necessity as a defence in criminal law at all, and certainly appeared to reject it as a defence to homicide.²⁸ In his judgment Lord Coleridge CJ set out three objections to a defence of necessity in homicide cases. Firstly, the necessity for which the defendants argued rested on a principle which allowed a person to be judge in his own cause of the value of his life:

"Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own". This, in Lord Coleridge's view, was plainly unacceptable, both in ethics and law. Certainly it would seem to go a long way towards acknowledging that 'might is right'; it would, in Lord Hailsham's crude but memorable phrase, make it "lawful for the strongest of the four men to eat his way through the whole crew of the drifting boat in order to be rescued himself".²⁹

Secondly, and developing this point, to allow the defence would result in a divorce of law and morality. According to Lord Coleridge, the correct ethical principle in the defendants' circumstances was the duty of self-sacrifice. "To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it."³⁰ To illustrate the duty he gave the examples of war and shipwreck, referring in the latter case to the duty of the captain to the crew, and of the duty of the crew to the passengers, to save others before themselves. Accordingly, in his view it was not correct to maintain that there was any absolute or unqualified necessity to preserve one's life. In other words, the defendants could claim no moral right, much less a duty, to save their lives by killing an innocent person who presented no threat to them. A law which allowed a defence to murder in the circumstances of the case would therefore be immoral.

law of a maritime custom that cannibalism was acceptable as a last resort in cases of shipwreck. See Simpson, *op cit*.

²⁸ Although certain passages in the judgment leave this unclear, for example, Lord Coleridge's reference to the jury's finding that it was no more necessary to kill the boy than any of the others, which seems to leave open the possibility of a defence where fate had selected the person who was doomed to die in any event.

²⁹ *R v Howe* [1987] 1 All ER 771, 779, citing a footnote to the report of *Dudley and Stephens*, attributed to Grove J.

³⁰ (1884) 14 QBD 273, 287.

Lord Coleridge's third objection to the principle of necessity invoked consequentialist concerns over possible widespread reliance on any general defence of necessity with the accompanying risk of spurious defences which it would be difficult to check. He said "...it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime".³¹ Fear of a general defence of necessity being abused is a recurring theme in English judgments; a recent example is the statement of the Court of Appeal in *R v Quayle* that the possibility of "abusive defences" is one of the pragmatic considerations for confining any defence of necessity within narrowly defined limits.³²

A further judicial objection to necessity is what Norrie has described³³ as the 'Pandora's box' problem. This is the concern that a general defence of necessity would allow the raising of all kinds of social, economic, or political arguments to justify or excuse crime. Judges envisage defendants setting up a variety of competing values against the importance of obeying the criminal law. This would require courts to engage in the task of ranking harms or 'evils': the harm or evil with which the defendant was confronted and the harm or evil the defendant committed to avoid the danger. One concern about this process is the pragmatic one that it may be very difficult to carry out where the relative harms are incommensurable. A second concern, noted earlier, is that the process of weighing competing values may be inconsistent with the legislative policy regarding the crime in question. This will be particularly apparent where the relevant legislation contains a scheme of regulation which includes special defences that take no account of generalised 'necessity'. Thirdly, there is a concern that property rights in particular would be destabilised. In *London Borough of Southwark v Williams*³⁴, a civil case, the defendants, who were homeless, had trespassed on to the plaintiff council's property where they were now squatting. In answer to an action for possession of the property the defendants pleaded necessity since they were desperate and had nowhere else to live. Rejecting this plea, the Court of Appeal said:

"If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut...the plea would be an excuse for all sorts of wrongdoing. So the courts must for the sake of law and order take a stand. They must refuse to admit the plea of necessity to the hungry and the homeless; and trust that their distress will be relieved by the charitable and the good".

Necessity, justification and excuse

The defence of necessity in the form which has become known in English law as duress of circumstances is available under the following conditions:³⁵ there must be a danger of immediate, or at least imminent, death or serious injury to the defendant

³¹ *Ibid* 288.

³² [2005] EWCA Crim 1415; [2005] 2 Cr App R 34 (p 527).

³³ A. Norrie, *Crime Reason and History* (2nd ed, Butterworths, 2001) 159.

³⁴ [1971] Ch 734.

³⁵ For discussion and the relevant authorities see JC Smith and B Hogan, *Criminal Law* (11th ed by D Ormerod, OUP, Oxford, 2005) 296-315.

or to a member of the defendant's family or to a person for whom the defendant feels responsible; the danger must cause the defendant to commit the offence with which the defendant is charged; there must be no reasonable alternative method of avoiding the danger in the circumstances; the defendant did not voluntarily expose himself to the danger; the defendant's act was not disproportionate to the danger; a person of reasonable firmness in the defendant's position would have acted in the same way. The defence is not available to charges of murder or attempted murder.

These conditions track closely those of the defence of duress by threats. This is appropriate when one considers the similarity of the situations the defendant is placed in, and the defendant's normative position in these situations. In both situations he or she is confronted with an emergency involving a risk of very great harm, where official protection or help is unlikely to be forthcoming in time to prevent the harm occurring, and the defendant cannot fairly be expected to make the sacrifice that will be involved in obeying the law rather than trying to avert the danger. In *R v Conway*,³⁶ for example, D drove away at speed when two men approached his car whom D reasonably believed to be intending to do serious injury to his passenger. A defence of duress of circumstances to a charge of reckless driving was held to be open to D on these facts. The result would have been the same if it had been the passenger who had threatened D with serious injury if he did not drive as he did. Moreover, in some cases it may be hard to draw a clear dividing line between the two types of duress, as in *R v Martin*,³⁷ where the defendant's mentally unstable wife threatened to commit suicide if D, a disqualified driver, did not drive their son, who was late for work, to his workplace. This was a coercive threat but directed against the duressor herself rather than against the defendant or a third party.

Put in these terms this form of necessity looks like an excusatory defence. Its moral basis is that the defendant is not fairly to be blamed for giving way to the instinct for self-preservation in an emergency, where the nature of the danger is such as to override the will not to commit the offence. The condition of 'no prior fault', that is, that the defendant should not have voluntarily exposed himself to the danger, reinforces the theory that this is a defence which eliminates the defendant's culpability in committing the offence in the situation in which the defendant found himself. The defendant's moral status as an object of sympathy and understanding would be significantly weakened, if not destroyed, by say, the fact that he had voluntarily joined a criminal gang which then used coercive threats against him.

However, in one scenario at least, the defence takes on a justificatory cast. This is where the threat is directed against a third party to whom the defendant owes a legal duty of care. Suppose that a hypothetical Mrs Martin holds a knife to their baby's throat and threatens to cut it unless her husband drives the son to work. D now has a conflict of duties: the duty to obey the law by not driving while disqualified versus the duty to obey the law by taking steps to preserve the health and welfare of his child. His normative position is now different from the case where his choice lies between obedience to the law and self-preference. In the latter case he has no duty to preserve his own life, as *R v Dudley and Stephens* made clear. But where his baby is threatened D's moral claim is stronger than a claim simply that he

³⁶ (1988) 88 Cr App R 159.

³⁷ (1989) 88 Cr App R 343.

should not be blamed for doing as he did. It is a claim that he acted rightly in the circumstances to safeguard his baby's welfare. In a situation of a conflict of duties D might well wish to maintain that as a legal subject the law should either indicate to him which duty is to be preferred, or, if that is not possible in the circumstances, then it should respect his choice, given that he could not discharge both duties.

But such an unqualified claim, tempting though it might be to make it, is too strong. It takes no account of the proportionality of D's response to the danger. It must be a condition of the moral claim that the action taken by D to discharge the duty to his baby is not disproportionate to the harm to be averted. This can be demonstrated in the following way. The scenario given in the previous paragraph is an easy one, because on any theory of harms the 'evil' done by D is so much less than the evil threatened. It looks like a clear case where a consequentialist 'lesser evils' analysis will settle the conflict of duties. Indeed most people would unhesitatingly condemn D if he had resisted the threat and refused to drive, with the result that the baby's throat was cut. But what if the evil D is required to do is of the same order as the evil threatened? Suppose that the hypothetical Mrs Martin threatens to cut the baby's throat if D does not immediately kill their neighbour E, whom she loathes. D again has a conflict of duties, but the conflict is now much sharper because the content of the duties is effectively the same: it is a case of a duty not to take E's life versus the duty not to allow the baby's life to be taken. Intuitively we might say that he cannot fairly be blamed for choosing to preserve his baby, and ought therefore to have at least an excuse in this situation.³⁸ However, can D claim to be justified in killing the neighbour to save his baby, on the basis that natural love and affection entitles him to prefer his duty to the baby in circumstances where the harm done and the harm threatened are formally equal? It is not now a case of lesser evils, but D's act is not disproportionate to the evil threatened.

We must then consider a third situation where D's act is disproportionate to the evil threatened. Mrs Martin threatens to cut the baby's throat unless D kills E and E's family, which D is in a position to do. The conflict of duties is the same as in the previous case, but on a consequentialist analysis the numbers make a difference. D cannot claim to be justified in killing three or four to save one. The harm done is greater than the harm threatened. If D then invokes natural love and affection in support of a claim that his baby's life is more valuable to him than the lives of any number of others, he must still face the proportionality problem. Our moral sense is that D's duty to the baby cannot entitle him to go to any lengths he wishes to protect the value to him of his baby's life, even given the strength of his interest in its maintenance. We would demand that a line must be drawn somewhere. We might then wish to argue that if all human lives are equally valuable, D is entitled to his preference in a situation where one life, and only one life, must be lost. The argument might then continue that D's moral preference, even given its basis in natural love and affection and even given the importance we attach to the preservation of family relationships, is not strong enough to defeat the moral claims of more than one in-

³⁸ *Pace* current English law, which would refuse a defence of duress to murder whatever the threat. The Law Commission has recently recommended a change to the law so as to allow duress as a defence to murder, albeit with a reverse onus on the defendant to prove the defence.

nocent person to the preservation of their lives. D would not therefore be justified in killing more than one person to save his baby.

The proportionality problem still arises if D simply claims to be excused rather than justified in killing E and his family in this third scenario. Reasonable people might not be expected to be heroes when it comes to making sacrifices of themselves, but we might argue that they can fairly be expected to act with restraint when it comes to inflicting sacrifices on innocent third parties. This is where the idea that acts done under extreme duress, whether by threats or circumstances, are 'morally involuntary' may be misleading. The term might suggest acts over which D has no sufficient element of control for purposes of attribution of blame. But, as we have seen above, acts done under duress are physically voluntary, intentional, and D is only too well aware of the consequences of the acts. Moral involuntariness must therefore be interpreted as a relative term;³⁹ we need to leave space for the principle that, granted the constraints placed by the duress on D's freedom of action, D cannot be permitted a completely unbounded response to the duress. In short, he cannot inflict harm that is disproportionate to the harm with which he is threatened and reasonably expect to be acquitted of all blame.

These considerations suggest that standard justification and excuse theory is of limited value in determining the scope and limits of this form of necessity. Although cases of duress by threats and duress of circumstances look on their face like claims of excuse in emergency situations, some at least of those cases involving conflicts of duty are arguably claims of justification. From the perspective of D's normative position it may not matter a great deal how the defence is theorised,⁴⁰ since both justification and excuse will be subject to the requirement of proportionality.

With that in mind let us now turn to consider the second type of 'necessity' recognised recently in English law. This is necessity in a medical context. In *F v West Berkshire Health Authority*⁴¹ the House of Lords held that it would be lawful for doctors to sterilise a mentally handicapped woman unable to give consent to this procedure, in circumstances where she was at risk of pregnancy and would be severely distressed by the process of pregnancy and childbirth. This was not a duress of circumstances case. It was not an emergency situation in which the doctors' will not to carry out the procedure (which would of course be a very serious assault in the absence of consent) was overborne. Rather the doctors came to a fully considered medical judgment as to how they should discharge their duty to the woman to act in her best interests. Their judgement was to the effect that in the circumstances the sterilisation was a lesser evil to the woman than pregnancy and childbirth would be, and that the sterilisation was necessary in the sense that contraception was not a viable alternative. On standard justification/excuse theory this claim is clearly a justification. The act would be lawful if carried out with the woman's consent, and the court's authorisation that the procedure was necessary took the place of the consent that was unobtainable. Since the act was justified the doctors could of course be lawfully assisted by staff who did not themselves owe duties to the woman to act in her

³⁹ For other problems with the concept of moral involuntariness see Clarkson, *op cit* 15-16.

⁴⁰ As Walker LJ noted in *Re A (Conjoined Twins)* [2000] 4 All ER 961, 1064.

⁴¹ [1989] 2 All ER 545.

best interests. It is worth noting that the 'danger' to the woman in this case was serious mental trauma. I will return to the significance of this shortly.

This case was applied by the House of Lords in *R v Bournewood Community and Mental Health NHS Trust*⁴² to justify the compulsory detention for treatment and care of a severely mentally handicapped man unable to consent to being given treatment and care. Again this was considered to be in his best interests, and in the circumstances the loss of liberty through detention in a place where the man was relatively happy was a lesser evil than allowing him liberty in the community where he was considered to be at risk of self-harm.

In both of these cases the medical staff were faced with a conflict of duties. They had a duty not to inflict a harm (sterilisation, loss of liberty), but they also had a duty of care to the person in question, which included safeguarding the person from a risk of other harm. However, since both duties were owed to the same person the conflict could be resolved by asking what was in the person's best interests, all things considered. The respective harms resulting from intervention and non-intervention were commensurable and could be graded in terms of seriousness.

The third of the modern cases was more difficult. This is the much-discussed case of *Re A (Conjoined Twins)*.⁴³ Jodie and Mary were a pair of conjoined twins, joined at the lower abdomen. According to the medical evidence, Jodie was capable of an independent existence if separated from Mary and had good prospects of a normal life. Mary was not viable if separated because her vital organs (heart, brain, lungs) were not properly developed and were effectively useless. Mary was kept alive by Jodie's heart which was circulating oxygenated blood for both bodies through a common aorta. The strain this placed on Jodie's heart would increase as the twins grew and would cause the heart to fail within three to six months, resulting in the death of both. It was agreed that an operation to separate them was certain to kill Mary immediately. The parents of the twins, who were Roman Catholics, refused consent to the operation, whereupon the medical staff caring for the twins sought a declaration from the court that they could lawfully carry out the operation. The family and medical law aspects of this complex case lie outside the scope of this paper. The problem for the criminal law was that the killing of Mary by separating her from Jodie would be murder under English law unless some defence could be found. This was problematic and caused the three members of the Court of Appeal considerable difficulty. The judges agreed that the operation to separate the twins would be lawful,⁴⁴ but their reasoning differed in some respects. All three took the view that this was not a case of a killing excused by duress of circumstances; the situation was not an emergency, there was no overbearing of the doctors' will, and in any event this defence was not available to murder. They preferred to regard the defence as one of justified necessity, but their conceptions of the necessity in question were not the same.

Ward LJ first argued that the case might be treated as one of justified defence of Jodie against the 'threat' presented by Mary.

⁴² [1998] 3 All ER 289.

⁴³ [2000] 4 All ER 961.

⁴⁴ The operation was then carried out. Mary died, but Jodie survived and is believed to be well and living a normal life.

“Mary is killing Jodie. That is the effect of the incontrovertible medical evidence...Mary uses Jodie’s heart and lungs to receive and use Jodie’s oxygenated blood. This will cause Jodie’s heart to fail and cause Jodie’s death as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs?”⁴⁵

This expansive notion of self-defence, or the private defence of another, against unjust⁴⁶ threats has strong academic support,⁴⁷ but it is problematic. As a matter of language, the concept of ‘defence’ presupposes an ‘attack’. The central case of self-defence is force that is necessary to ward off an intentional unlawful use of force by another. By making the attack the attacker changes his normative position vis-à-vis the defender. He forfeits the moral right that he would otherwise have not to be subjected to force from the defender, and the defender is permitted by the state, which normally insists on having a monopoly on the use of lawful force, to use force if it is immediately necessary and the state is not then in a position to provide protection against the attack. All this is a long way from the facts of *Re A*. It is commonly said that self-defence must extend to the use of defensive force against a person exempted from criminal responsibility by reason of age or mental disorder, but such cases still involve a voluntary act of violence directed against the defender. In *Re A* Mary was not an actor at all. Not only was her mind not in control of her body, her body was not even making any involuntary movements against Jodie. She was simply attached to Jodie whose body was maintaining Mary’s existence. Jodie may well have a moral claim against the continuation of this state of affairs, but this cannot be on the basis that Mary has forfeited her moral claim against the use of force by her conduct in relation to Jodie. There is no conduct. Walker LJ thought it absurd to label Mary an unjust aggressor in this situation,⁴⁸ and it is submitted that this is correct.

Ward LJ’s second approach was to focus on the doctors’ conflict of duties.⁴⁹ He pointed out that they owed duties to both twins to promote their best interests, but the interests of the twins conflicted. Jodie’s life prospects would be greatly improved by separation, whereas Mary’s limited life prospects could only be preserved by remaining attached to Jodie. The ‘best interests’ doctrine as applied in the *F* and *Bournewood* cases, which involved trading off harms and benefits to the only person involved, could not therefore be used. But the conflict of duties still had to be resolved, at which point Ward LJ invoked the principle of lesser evils. Since Mary was in any event marked out by fate for an early death it was a lesser evil for her life to be ended by separation now than the evil of both twins dying in a few months time. It seems clear, from the careful phrasing of his judgment, that he was not intending to lay down any broad utilitarian principle of necessity. His reasoning was tied closely to the facts of the case and conditioned on the imperative of resolving

⁴⁵ [2000] 4 All ER 961, 1016-1017.

⁴⁶ An unjust threat, according to Horder, is one for which there is no objectively justified moral reason: “Self-Defence, Necessity and Duress: Understanding the Relationship” (1998) 11 Canadian Journal of Law and Jurisprudence 143, 149.

⁴⁷ Horder, *ibid*; J Rogers, “Necessity, Private Defence and the Killing of Mary” [2001] Crim LR 515.

⁴⁸ [2000] 4 All ER 961, 1067.

⁴⁹ *Ibid* 1015-1016.

the conflict of medical duties. Walker LJ also focused on the conflict of duties and referred to proportionality as a means of resolution of the conflict.⁵⁰ In his view the operation, involving the certain death of Mary, was proportionate to the harm to be avoided of the likely death of both within a relatively short time.

This analysis, like the analysis adopted in the earlier medical cases, gives little or no support for any broad principle of justificatory necessity in English law. However, a broader principle can be found in the judgment of the third judge, Brooke LJ. Adopting the principle suggested by Stephen,⁵¹ Brooke LJ held that necessity is a defence where the act is needed to avoid inevitable and irreparable evil, no more is done than is reasonably necessary for the purpose to be achieved, and the evil inflicted is not disproportionate to the evil avoided.⁵² He did not restrict the principle to the context of a conflict of duties, or to the medical context. Accordingly it would be capable of providing a defence to murder in some much-discussed problem cases. A mountaineer A is roped to a colleague B who slips and falls off an icy cliff. B cannot climb up the rope since he is dangling in space and A is unable to pull him up. They are stuck with no prospect of rescue. If A does nothing they will both freeze to death. A cuts the rope with the result that B falls to his death but A survives. A would not be guilty of murder on this principle. Similarly, suppose that a ferry capsizes and passengers are thrown into freezing water. They begin to climb up a rope ladder to safety, but one man becomes immobile on the ladder through panic and fear. The passengers still in the water cannot get past him and he will not move. Eventually they push him off the ladder and make their escape. The man is not seen again and is presumed drowned. The passengers would not be guilty of murder.⁵³ Terrorists hijack an aircraft and direct it to fly into a tower block, intending that thousands of people should die. The prime minister orders the air force to shoot down the aircraft before it reaches the block. Everyone on board the aircraft is killed. The prime minister and the air force would not be guilty of murder.⁵⁴

All these cases can be distinguished from *R v Dudley and Stephens* on the basis that fate has selected victims who cannot be saved in any event, but if they are sent to their inevitable deaths more quickly others who would otherwise perish as well can be saved. Brooke LJ's principle of necessity would seem to suggest that the killings in all these cases are justified, as the killing of Mary was justified as a matter of medical necessity. But it is worth noting that these problem cases are all situations of emergency involving a danger of death. It might plausibly be said that in each of the situations the wills of the actors not to commit murder are overcome by the pressure of events. If this is so, we seem to be back in the realm of excuses rather than justifications. To test this we could ask whether the man on the ladder in the second case could lawfully resist being pushed off it. Orthodox theory would say

⁵⁰ *Ibid* 1065-1067.

⁵¹ Sir James Stephen, *Digest of the Criminal Law* (4th ed, 1887) p9.

⁵² [2000] 4 All ER 961, 1052.

⁵³ This much-discussed scenario is based on a real-life incident that is said to have occurred after the sinking of the car ferry *Herald of Free Enterprise* at Zeebrugge in 1987: see JC Smith, *Justification and Excuse in the Criminal Law* (Stevens, London, 1989) Ch 3.

⁵⁴ For discussion see M Bohlander, "In Extremis – Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law" [2006] Crim LR 579.

that if the passengers are justified in pushing him off he cannot lawfully resist, but if they are (merely) excused he can. There is no authority on the point, but both views are plausible. In favour of the man on the ladder having the right to resist are the facts that he has not attacked the people in the water and he owes them no duty to preserve their lives. From his perspective he is faced with an unjust threat; judgements about his ability to defend himself should not be determined by the normative position of the passengers.⁵⁵ On the other hand his immobility represents a threat to them which, from their perspective, is unjust, and there is therefore an argument that in attempting to push him off the ladder they are acting in self-defence.⁵⁶ Since self-defence is generally thought to be a justification rather than an excuse, their use of force against him is justified and he has no right to resist.

Evaluating necessity: proportionality, the balancing of harms and the democracy issue

The principle of necessity set out by Brooke LJ in *Re A (Conjoined Twins)* is an act-utilitarian principle. It is not a statement of the classic 'lesser evils' form of necessity found in some penal codes⁵⁷ because it appears to allow for harm to be done equal to that which is threatened, as long as the harm done is not disproportionate, which seems to mean is not greater than the harm threatened. The principle has some intuitive appeal on the unique facts of *Re A*, where part of the harm threatened (the death of Mary) was certain to occur within a relatively short time, but the remainder of the harm threatened (the death of Jodie) could be averted by means which involved accelerating the death of Mary.

However, there are problems with such an act-utilitarian principle. One of them is the potential devaluing of personal autonomy. Suppose P, a hospital patient, urgently needs a blood transfusion to survive, but she has a very rare blood group. As it happens, Q, the patient in the next bed, has the same rare blood group, but refuses to make a donation of blood even though she could do so without risk to herself. May D, the doctor treating P, take the blood from Q without her consent? The blood is needed to avoid "inevitable and irreparable evil", and the harm done in the form of the assault on Q to obtain the blood is not disproportionate to the harm threatened of P's death. Is the assault on Q "no more than is reasonably necessary to achieve the purpose of preventing P's death"? Everything then turns on the one word "reasonably". A test of reasonableness is a flexible standard that invariably requires an accommodation of competing values. But in states that subscribe to liberal democratic values personal autonomy is not something that can be freely traded against other values. Persons have rights to be treated as ends in themselves and not as means to the achievement of other social goals.⁵⁸ Accordingly, if Q chose

⁵⁵ Clarkson, *op cit* p19.

⁵⁶ For a close analysis see Horder, *op cit* 151 *et seq.*

⁵⁷ See, *eg*, the American Law Institute's Model Penal Code s 3.02.

⁵⁸ It is not my purpose in this paper to enter the philosophical debates about rights and utility, which others are much better qualified to do. My own thinking owes much to the work of Ronald Dworkin.

to assert her autonomy by refusing her consent to give blood that would normally be the end of the matter, but the principle adopted by Brooke LJ, applied without qualification, would leave the matter in doubt.

A second problem is the scope of necessity based on utility. How far should a defendant be permitted to assert that the protection of interests other than the preservation of life or freedom from serious injury required him to commit crime? Should the protection of any interest suffice, as long as it can be said that the action taken was not disproportionate to the danger to that interest? Two problems arise. The first is the difficulty of determining proportionality when disparate values are involved. This is particularly acute where the crime in question is victimless, and the aim of the law is to protect some communitarian value. If we return to the recent case of *R v Quayle* we must ask how, precisely, a court is to decide whether acts of producing or importing cannabis are proportionate to the defendants' interest in achieving effective pain relief. Turning the issue into a question of fact for a jury to decide (a classic English solution) would be wrong because it simply ducks a problem that the law itself should resolve, and in addition it opens up a further problem of inconsistent results in similar cases. This problem of trying to balance competing but disparate values, particularly when public benefit is opposed to private interest, is no doubt what the Court of Appeal had in mind when it said in *R v Quayle* that necessity, unless confined within narrow limits, would become an opportunity for 'almost untriable and certainly peculiarly difficult issues'.

A third problem with utility-based necessity is what Gardner has called the democracy problem.⁵⁹ Justificatory defences, whether based on lesser evils or proportionality, require courts to determine priorities of values and interests. Another way of putting this is to say that these defences may require courts to carve out exceptions to criminal prohibitions for defendants bent on pursuing other interests to which they attach greater value. Should courts do this? If the crime in question is subject to detailed legislative regulation, with carefully defined exceptions, permitting a further defence of 'necessity' appears to be flouting the will of the legislature by rewriting the measure in question. This point weighed heavily with the Court of Appeal in *R v Quayle*. The court set out the extensive legislation on the relevant drug offences and highlighted the express provision made for research into the possible medical benefits of cannabis use. It then said that whether this regime was inappropriately restrictive was a matter for the government and Parliament to resolve; the court's role was to give effect to it as long as the law remained unchanged. The point is a powerful one, although it should not be forgotten that in some jurisdictions constitutional rights of citizens, and the implications of human rights legislation, may require some modification of the traditional judicial acknowledgment of the legitimacy of criminal law determined by the democratic process.

If the democracy point is taken seriously we need ask how it is that we can recognise *any* defence of necessity, even one restricted to a narrow range of situations. It is suggested that a coherent approach to determining the proper scope of a general defence of necessity brings us back to the issue of how harms may be ranked. For this purpose the most useful ranking of harms is the 'living standards' analysis

⁵⁹ S Gardner, "Necessity's Newest Inventions" (1991) 11 Oxford Journal of Legal Studies 125.

suggested by von Hirsch and Jareborg.⁶⁰ This shows us a way forward on necessity. Space does not permit a full explication of this analysis; its broad thrust is to argue that the seriousness of harms can be measured according to the typical effect of particular crimes upon the living standards of the typical victim. The victim has identifiable interests which may be violated or threatened by the typical case of the crime in question; such interests may be affected to varying degrees in the typical case of that crime. On this analysis the worst crimes are those which affect a victim's interest in physical integrity (health, safety and the avoidance of physical pain) at the level of subsistence (meaning survival with maintenance of elementary human functions). On this approach the suffering of death or serious injury can easily be demonstrated to be the most severe harms that can occur to the typical victim from a crime against the person. There may therefore be broad agreement that most people, if confronted with the prospect of becoming a victim and having their interests invaded to this degree, will unhesitatingly give way to the instinct for self-preservation and cannot generally be blamed for doing so. In other words, in any competition of values, the preservation of self from death or serious injury is likely to be a generally accepted priority.

If this is right, and there is such a degree of consensus about values, it is appropriate for courts to recognise the exculpatory power of the instinct for self-preservation. This has been done for many years in the law of self-defence where the instinct for self-preservation is reinforced by a comparison of the normative positions of the self-defender and the attacker. The latter, as we have seen, can be said to have forfeited by his aggression the right to be treated with equal respect for the value of his autonomy. The element of such forfeiture is missing in duress and necessity cases where action is taken against an innocent third party rather than the wrongdoer, and also in self-defence cases where the attacker is not culpable. But in emergency situations involving life or death/serious injury choices, the common normative position of defendants in all three defences is that they are confronted with unjust threats or dangers. A general principle of necessity to preserve life and freedom from serious injury can be recognised because this is the most serious harm and takes priority over all others. Other competitions of value involving priorities of various socio-economic goals should be the domain of the legislature as matters of democratic judgment. As we have seen, the relevant legislation may require schemes of regulation, codes of practice, licensing etc. which it is not for the courts to devise. In non-emergency situations 'necessity' should only ground a defence where the actor is subject to a conflict of duties which the law must resolve. Even then the action taken, which would otherwise amount to a crime, usually a very serious one, should be action for reasons of preservation of life or freedom from serious injury.

At this stage we can return to Suzanne Ost's argument⁶¹ for the extension of necessity to euthanasia administered by doctors to terminally ill patients who have requested this. This does not come within the narrow principle suggested for necessity. It is not a situation where a doctor is acting for the preservation of life, but for the converse aim of destroying life. The latter aim, benign though it may be in the

⁶⁰ A von Hirsch and N. Jareborg, "Gauging Criminal Harms: a Living Standard Analysis" (1991) 11 Oxford Journal of Legal Studies 1.

⁶¹ *Op cit* n 7 above.

circumstances, sets up an acute competition of values: the preservation of life versus the relief of pain and suffering and the allowing of a patient to die with dignity at a time of their choosing. Moreover, this is not a one-off competition of values like the unique circumstances of *Re A*. The question of medical euthanasia will recur with sufficient frequency to make it essential that there should be general rules to resolve the competition. It is not for judges to devise those rules in such an ethically sensitive area. If this form of mercy killing is to be legalised the issues of principle and policy should be fully debated through the democratic process, in a way that is not possible in the litigation context. Religious groups and medical professional organisations are two obvious examples of the many stakeholders who would expect to participate in such a debate. We can be confident that if euthanasia were ever to be become legal in England it would be under a detailed legislative scheme of regulation, quite possibly with accompanying 'soft law', in the form of a code of practice. The construction of such a scheme is not a task that the courts can, or should, take on.

It is equally clear that the principle suggested here would not permit the use of necessity as a possible justification for direct action for political purposes, as Gardner has proposed.⁶² It is easy to see that, for example, allowing necessity in answer to a charge of disclosing secret information on the basis that D wished to draw attention to the shortcomings of the security services and improve their performance, would raise acute problems about competitions of value, proportionality, and the respective roles of the courts and the legislature. Necessity is best conceived as a very limited defence to crime.

⁶² *Op cit* n 8 above.