Is Looting Ever Justified?: An Analysis of Looting Laws and the Applicability of the Necessity Defense During Natural Disasters and States of Emergency

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I. Introduction

The 2005 Atlantic hurricane season was inarguably one of the most destructive and active storm seasons in recent history, pummeling both entire states and long-standing storm records.[1] Not only did the Atlantic experience a record of fifteen hurricanes, but the region also saw a record of four category five hurricanes.[2] Three of those category five hurricanes – Katrina, Rita, and Wilma – made landfall on the United States.[3] Hurricane Katrina set a record as the costliest hurricane in U.S. history, and the hurricane season as a whole was the costliest on U.S. record.[4]

While many watched their television sets in awe as these powerful hurricanes ripped through the Gulf Coast states, those living in the region had their lives uprooted. The severe warnings of the impending hurricanes required most residents to flee to safety. However, many stayed.[5] For those who did, particularly residents of Mississippi and Louisiana, during Hurricane Katrina, survival took on a new level of meaning as the basic necessities of life, usually taken for granted, were stripped away.

Take for instance Monica Laguard, a mother left behind in New Orleans to fend for herself and her children after Hurricane Katrina. She was seen three

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[1] Ken Kaye, *Biggest, Costliest Hurricane Season Yet*, Pittsburgh Post-Gazette, Nov. 30, 2005, at A1.

[2] Nat'l Oceanic & Atmospheric Admin., *NOAA Reviews Record-Setting 2005 Atlantic Hurricane Season*, Nov. 29, 2005 (updated Apr. 13, 2006), http:www.noaanews.noaa.gov/stories2005/s2540.htm.

[3] *Id.*

[4] John Pain, *Costliest Season of Hurricanes Ends*, Buffalo News, Nov. 30, 2005, at A6 (indicating that Hurricane Katrina amassed $34.4 billion in insured losses and the storm season as a whole resulted in $47.2 billion in insured losses, while total estimates to rebuild the devastated areas approach $200 billion).

[5] Despite a mandatory evacuation ordered for New Orleans, the mayor estimated that 50,000 – 100,000 of the city's 485,000 residents remained, enduring the wrath of the storm. *A City Weeps*, The Commercial Appeal (Memphis), Sept. 1, 2005, at A1.

days after the hurricane, taking children's clothes and food from a local store.[6] As she sobbed uncontrollably, she simply stated that she needed to return to her children at a local school shelter.[7]

Consider also Terry Hayes, who declared himself a "proud looter" less than a week after Hurricane Katrina struck.[8] He bragged of taking food, water, and ice from local stores and hotels so that he could hand out supplies to the many stranded people staying at the New Orleans Convention Center.[9] He touted that he had provided more help than local officials, and he planned to continue to scavenge for items to relieve the suffering.[10]

Finally, take a look at Terry Dantoni and Yvonne Lee, who were found at a New Orleans pharmacy three days after the hurricane wreaked its havoc on the city.[11] Officials discovered them loading up garbage bags full of pills, and after further investigation, discovered that they had gathered nearly 38,000 pills.[12] They, unlike Monica Laguard and Terry Hayes, were arrested for looting,[13] despite the fact that all four of these people committed the crime of looting as declared by Louisiana statute.[14]

What is society to do with individuals such as these? Do we hold them accountable for their acts of looting[15] and prosecute them accordingly? Do we hope for a "forgiving silence" on the part of law enforcement agents who will sympathetically turn a blind eye to their illegal acts?[16] Or do we offer them a legitimate defense to their criminal acts, condoning their behavior as a necessary evil that they were justified in pursuing given the extraordinary situation they were in?[17]

Opinions on the matter vary widely. While some advocate holding looters accountable to the extent of the law regardless of the items taken and the sur-

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[6] Erin McClam, *What About a Case for Justifiable Looting?*, MEMPHIS COMMERCIAL APPEAL, Sept. 2, 2005, at A5.

[7] *Id.*

[8] Brian Thevenot, *Proud Looter Took a Moment to Brag*, THE TIMES-PICAYUNE (New Orleans), Nov. 18, 2005, at Metro 7.

[9] *Id.*

[10] *Id.*

[11] Michelle Hunter, *Police Recover 58,000 Pills*, THE TIMES-PICAYUNE (New Orleans), Nov. 4, 2005, at Metro 1.

[12] *Id.*

[13] *Id.*

[14] "Looting is the intentional entry by a person without authorization into any dwelling or other structure belonging to another and used in whole or in part as a home or place of abode by a person, or any structure belonging to another and used in whole or in part as a place of business, or any vehicle, watercraft, building, plant, establishment, or other structure, movable or immovable, in which normal security of property is not present by virtue of a hurricane, flood, fire, act of God, or force majeure of any kind, or by virtue of a riot, mob, or other human agency, and the obtaining or exerting control over or damaging or removing property of the owner." LA. REV. STAT. ANN. § 14:62.5(A) (Supp. 2006).

[15] *See* discussion *infra* section III.A.

[16] *See* discussion *infra* section III.C.

[17] *See* discussion *infra* section IV.C.

rounding circumstances,[18] others are more sympathetic and recognize the extreme need precipitating such acts.[19]

The law, however, is silent on the subject. Though the defense of necessity is available to criminal defendants in cases where a criminal act is committed to avoid a greater evil,[20] the defense has never been applied to looting charges.[21] Indeed, the crime of looting is a relatively rare one that exists in only six states, including Louisiana and Mississippi.[22] The absence of case law regarding how the defense might apply to a looting charge is now critical, considering the sheer number of individuals who are charged with looting in the wake of Hurricane Katrina.[23]

This Note advocates a principled approach to applying the necessity defense to crimes of looting. Section II outlines the contours of the necessity defense, defining its various elements and discussing the situations and crimes to which it has traditionally been applied. Section III catalogues the crime of looting, with particular emphasis on the lack of case law regarding criminal looting charges and the role that discretionary enforcement plays in this absence. Section IV offers an analysis of how the necessity defense could be invoked by one charged with looting, with suggestions regarding how the defense could be applied in a sound, limited fashion, restricting it to only those who can demonstrate true need in the wake of a state of emergency. Section V concludes with recommendations for making the necessity defense available to those charged with looting, rather than relying exclusively on discretionary enforcement of the law to protect those like Monica Laguard and Terry Hayes who might find themselves charged as criminal defendants.

II. THE NECESSITY DEFENSE

Criminal law recognizes that there are limited occasions where an actor's otherwise criminal conduct should go unpunished. In response to these situations, the law has developed a variety of defenses available to criminal defendants, including the necessity defense.[24]

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[18] "Looting is looting" and "won't be tolerated." Michael Perlstein, *Looter Patrol to Crack Down in New Orleans*, THE TIMES-PICAYUNE (New Orleans), Oct. 18, 2005, at Metro 1.

[19] The former New Orleans police chief said that law enforcement would tolerate people taking "food and water, and that's because of the necessity of survival." Carlos Campos & Rhonda Cook, *Katrina: The Aftermath: Looting*, ATLANTA J. & CONST., Sept. 1, 2005, at B3.

[20] *See* discussion *infra* section II.

[21] *See infra* notes 132-34 and accompanying text.

[22] *See infra* notes 117-24 and accompanying text.

[23] As of February 7, 2006, 335 looting arrests had been made in New Orleans. Paul Purpura, *'Survival' Looters Get Leniency from DA*, THE TIMES-PICAYUNE (New Orleans), Feb. 7, 2006, at 1. Over 150 looting arrests had been made in two Mississippi cities just over a month after Hurricane Katrina hit. Chris Hamilton, *Looting Can Shake Confidence in Humanity*, SUN HERALD (Biloxi), Oct. 10, 2005, at A7.

[24] James O. Pearson, Jr., Annotation, *"Choice of Evils," Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R.5th 521 § 2(a) (2004).

Stated simply, the necessity defense justifies[25] criminal conduct when the actor is faced with a "choice of evils"[26] and chooses the lesser of two evils by breaking the law. The circumstance giving rise to the "choice of evils" must originate from natural forces rather than human force.[27] Duress, a closely related defense, applies to similar situations where the threat arises from human force.[28] Because the two defenses are so similar, "[m]odern cases have tended to blur the distinction between duress and necessity."[29] This Note will discuss only the defense of necessity, since that is the appropriate defense when looting occurs in the wake of a natural disaster.

A. *Elements of the Necessity Defense*

Necessity is an affirmative defense[30] that requires the defendant to first admit to committing the elements of the offense[31] and then present evidence regarding why the necessity defense should apply.[32] If the judge determines that the defendant cannot prove the elements of the necessity defense as a matter of law, the defendant is not allowed to present the defense to the trier of fact.[33] Thus, without substantial evidence in support of each element of the necessity defense, the trier of fact will be barred from considering the defense at trial.

While the enumeration of necessity defense elements varies depending on the jurisdiction,[34] the typical necessity defense involves four basic ideas: (1)

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[25] Criminal defenses may fall into the general categories of "justification" or "excuse." While similar, the distinction rests in whether society would encourage the criminal behavior given the circumstances. If society would permit or tolerate the otherwise criminal act, the actor is *justified* in committing the act. Common justification defenses are necessity, self-defense and defense of others. Excuses, on the other hand, occur where society would assign blame to the actor's conduct rather than to the actor, thereby *excusing* the unjustified conduct. Common excuses include insanity, involuntary intoxication, and mistake. Joshua Dressler, *Exegis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349 n.124 (1989).

[26] The necessity defense is often referred to as a "choice of evils" because it involves scenarios where the actor must choose between violating the law or enduring a greater harm by complying with the law. *See* United States v. Bailey, 444 U.S. 394, 410 (1980); WAYNE R. LAFAVE, CRIMINAL LAW § 5.4(a), at 477 (3d ed. 2000).

[27] LAFAVE, *supra* note 26, § 5.4(a), at 476.

[28] *See id.* § 5.4(a), at 276-277; Dressler, *supra* note 25, at 1347-48.

[29] *Bailey*, 444 U.S. at 410.

[30] 21 AM. JUR. 2D *Criminal Law* § 159 (1998).

[31] Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1527 (2005).

[32] 21 AM. JUR. 2D *Criminal Law* § 159, *supra* note 30.

[33] *See* People v. Kratovil, 815 N.E.2d 78, 90 (Ill. App. Ct. 2004) (a jury instruction on necessity "is not warranted if the evidence before the trial court is so clear and convincing that the court finds the affirmative defense unavailable as a matter of law"); State v. Recard, 704 So. 2d 324, 327, 329 (La. Ct. App. 1997) (trial court is vested with wide discretion to determine relevant evidence, and evidence irrelevant to a necessity defense is properly excluded from the jury); McMillan v. City of Jackson, 701 So. 2d 1105, 1108 (Miss. 1997) (trial court does not need to consider a defense which is unsupported by evidence); State v. Hudgkins, 606 S.E.2d 443, 447 (N.C. Ct. App. 2005) (judge must give jury instructions regarding a criminal defense if the judge determines there is sufficient evidence to support each element of the defense as a matter of law).

[34] *See, e.g.*, COLO. REV. STAT. ANN. § 18-1-702 (West 2005) (must avoid an imminent harm occurring through no fault of the defendant, where the benefits of avoiding injury clearly

the defendant must have committed the illegal act to avoid a significant harm; (2) the defendant must have reasonably believed that the illegal act was necessary to avoid the potential harm; (3) there must not have been any reasonable alternatives available to avoid the harm; and (4) the harm inflicted by breaking the law must be less than the harm avoided by obeying the law.[35] Many jurisdictions impose the additional requirements that the threatened harm was imminent[36] and that the defendant was not responsible for causing the situation where the "choice of evils" became necessary.[37] Although the elements are significantly interrelated, they will each be discussed separately below.

1. The Illegal Act Was Committed to Avoid Significant Harm

The "harm avoided" test is quite broad, and encompasses a number of potential harms. The harm avoided can be either physical harm or harm to

outweigh the desirability of following the law); HAW. REV. STAT. § 703-302 (2003) (must avoid imminent harm which is greater than that avoided by following the law, where the defense is not excluded by law or legislative purpose and the defendant was not reckless or negligent in bringing about the situation); 720 ILL. COMP. STAT. ANN. 5/7-13 (West 2002) (defendant must be without blame in causing the situation and must have reasonably believed his action was necessary to avoid a public or private injury); ME. REV. STAT. ANN. tit. 17A § 103 (1983) (must avoid imminent harm, and defendant must have believed action taken prevented a larger harm than following the statute); MO. ANN. STAT. § 563.026 (West 1999) (must avoid imminent harm, defendant must not have caused the situation, and the harm avoided is less than the harm sought to be prevented by law); MONT. CODE ANN. § 45-2-212 (2005) (defendant acted to avoid reasonably certain imminent death or serious bodily harm); N.H. REV. STAT. ANN. § 627:3 (1996) (defendant must have acted to prevent harm which would have been greater than the harm sought to be prevented by statute, but defense not available if defendant was reckless or negligent in bringing about the situation); N.Y. PENAL LAW § 35.05 (McKinney 2004) (defendant must act to avoid imminent harm, must not bring about the situation, and the harm avoided is less than the harm sought to be prevented by law); OR. REV. STAT. ANN. § 161.200 (West 2003) (defendant must avoid imminent harm which would be greater than the harm inflicted by violating the law); TENN. CODE ANN. § 39-11-609 (2003) (defendant acted to avoid imminent harm, and the need to avoid harm is clearly outweighed by the harm the statute sought to prevent); WIS. STAT. ANN. § 939.47 (West 2005) (defendant acted to avoid imminent public disaster, death, or great bodily harm); Cleveland v. Anchorage, 631 P.2d 1073, 1078 (Alaska 1981) ("1) The act charged must have been done to prevent a significant evil; 2) there must have been no adequate alternative; 3) the harm caused must not have been disproportionate to the harm avoided."); State v. Hastings, 801 P.2d 563, 564 (Idaho 1990) (defense requires threat of immediate harm where defendant is blameless in bringing about the situation, there were no less offensive alternatives available, and the harm caused was not disproportionate to the harm avoided.); Commonwealth v. Pike, 701 N.E.2d 951, 957-58 (Mass. 1998) (defendant acts to avoid imminent harm, reasonably believes his action will avoid harm, no legal alternatives exist, and the defense has not been precluded by the legislature); State v. Owen, 693 A.2d 670, 672 (R.I. 1997) (defendant did not meet the necessity defense requirements that he was confronted with a personal danger, and no legal alternatives were available); State v. Cole, 403 S.E.2d 117, 119 (S.C. 1991) (defendant was faced with imminent danger of death or serious bodily harm through no fault of his own, and there are no legal alternatives); State v. Rome, 452 N.W.2d 790, 792 (S.D. 1990) (defendant had "reasonable fear of death or bodily harm so imminent . . . that . . . the desirability of avoiding the injury outweighs the desirability of avoiding the public injury arising from the offense committed") (quoting State v. Miller, 313 N.W.2d 460, 462 (S.D. 1981)).

[35] *See* Martin, *supra* note 31, at 1535-36.

[36] *See id.* at 1567; LAFAVE, *supra* note 26, § 5.4(d), at 484.

[37] LAFAVE, *supra* note 26, § 5.4(d), at 486.

property, and it can be potential harm to the defendant or to another person the defendant sought to protect.[38] Moreover, the criminal act must have been committed specifically to avoid the threatened harm; mere accidental, unforeseeable avoidance of harm through a criminal act will not qualify.[39]

One harm that has been specifically excluded from the list of recognizable harms a defendant may seek to prevent is economic harm.[40] The seminal case declaring this policy, *State v. Moe*,[41] involved a Depression-era raid on a grocery store.[42] The offenders were a group of unemployed people who demanded that the chairman of a local commissary increase their flour allowance.[43] When their request was denied, they entered a local store and proceeded to take groceries without paying.[44] The individuals were convicted of grand larceny and riot[45] but argued they should have been allowed to present evidence related to their economic conditions at the time of the riot to justify the behavior.[46] The court saw no merit in the argument, since economic necessity was not a recognized criminal defense.[47] To allow the defense in such a case "would leave to the individual the right to take the law into his own hands."[48] A later court added a more concrete gloss to this rationale, declaring that to allow an economic necessity defense would encourage all those who experienced financial troubles to steal.[49]

The necessity defense can be criticized based on this element alone, since obeying the law is in itself a higher goal that many believe should always be adhered to no matter the circumstance.[50] Some argue that if one had the ability to conform to the law, moral culpability should hold him responsible for violation regardless of the reason.[51] Fortunately, the necessity defense does not rely on this element alone, so such a stringent analysis does not end the inquiry into whether the necessity defense applies to a particular defendant.

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[38] *Id.* at 481-82.

[39] *Id.* at 482.

[40] Martin, *supra* note 31, at 1588. The economic necessity defense, while generally unrecognized as a criminal defense, is sometimes disallowed because the defendant cannot prove other elements of the defense, such as imminent threat of harm or lack of legal alternatives. *See* People v. Fontes, 89 P.3d 484, 486 (Colo. Ct. App. 2003) (denying the necessity defense to a man who attempted to cash a forged check in order to provide food for his three children with serious health problems, where he could have obtained food elsewhere and where the threat to his children's health was not sufficiently imminent). Despite case law, some commentators argue that theft of food is justified if necessary to avoid starvation. *See* Martin, *supra* note 31, at 1558; John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 398 (1999).

[41] 24 P.2d 638 (Wash. 1933).

[42] *Id.* at 639.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 638.

[46] *Id.* at 639-40.

[47] *Id.* at 640.

[48] *Id.*

[49] State v. Ratliff, No. 1873, 1991 WL 110257 (Ohio Ct. App. June 20, 1991) (denying the necessity defense to a woman convicted of accepting welfare checks while simultaneously working).

[50] *See* Parry, *supra* note 40, at 421.

[51] *Id.*

2. The Defendant Reasonably Believed the Illegal Act Was Necessary to Avoid the Potential Harm

This element is often described as the causation element, requiring the defendant to demonstrate that the illegal act was committed in reasonable anticipation that a greater harm would be avoided.[52] In this regard, the defendant's intention to avoid harm plays a critical role in this inquiry. However, regardless of the defendant's subjective intention to avoid harm, if the trier of fact objectively determines that such illegal conduct could not reasonably result in the avoidance of the harm, the necessity defense will fail.[53]

3. No Reasonable Alternatives Were Available

This is perhaps the keystone element of the necessity defense, as the Supreme Court has declared that "[u]nder any definition of [necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law . . . the defense[ ] will fail."[54] Many attempts to invoke the necessity defense fail on this element, since courts can usually identify a number of judicially appropriate alternatives that would have enabled the defendant to avoid the potential harm without committing criminal behavior.[55]

Examples of "reasonable alternatives" are prolific throughout the law. A man who brings whisky to church to treat his wife in case she has heart trouble – on doctor's orders – is guilty of violating a law prohibiting liquor in churches because he and his wife had the option of staying home.[56] One who drives while intoxicated to rush another to the hospital is not justified in doing so when sober individuals are available to drive.[57] A woman cannot abscond with her child in violation of a custody order to protect the child from sexual assault when the woman could refer the matter to social services or to the courts.[58] A person is not justified in using marijuana to treat glaucoma when laser surgery or medicated eyedrops are viable options to alleviate the pain.[59] A felon in possession of a firearm during rampant looting cannot claim the necessity defense because he had the option of staying home or seeking the help of neighbors to protect himself.[60] A bail runner cannot bring a gun on school grounds in pursuit of fugitive when he could leave the gun safely off-campus or notify the police.[61] A political protestor cannot invoke the necessity defense because "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action."[62]

Given the voluminous legal alternatives which courts can opine on after the defendant has acted, rarely will an illegal act be deemed necessary and

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[52] *See* Martin, *supra* note 31, at 1579.
[53] *See id.* at 1580; *see also* LAFAVE, *supra* note 26, § 5.4(d), at 482-83.
[54] United States v. Bailey, 444 U.S. 394, 410 (1980).
[55] *See infra* notes 56-62 and accompanying text.
[56] Bice v. State, 34 S.E. 202, 203 (Ga. 1899).
[57] Stodghill v. State, 892 So. 2d 236, 239 (Miss. 2005).
[58] State v. W.M.S., 465 S.E.2d 580, 583 (S.C. Ct. App. 1995).
[59] People v. Kratovil, 815 N.E.2d 78, 89 (Ill. App. Ct. 2004).
[60] United States v. Carter, No 92-50557, 1993 WL 339762, at *2 (9th Cir. Sept. 2, 1993).
[61] State v. Haskins, 585 S.E.2d 766, 771 (N.C. Ct. App. 2003).
[62] United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1992).

without alternatives. Indeed, this is an often cited failed element in civil disobedience cases where defendants attempt to invoke the necessity defense to justify criminal behavior in efforts to stop governmental harms.[63]

4. The Harm Inflicted by Breaking the Law Was Less Than the Harm Avoided by Obeying the Law

This element encapsulates the heart of the "choice of evils" dilemma.[64] It envisions a situation in which a person must either obey the law but suffer great harm, or break the law and thereby avoid the harm.[65] Faced with such a situation, we presume that society prefers that the person break the law to avoid the greater harm.[66]

The inherent difficulty with this element is the fact that it requires a person to weigh the evils of two options with little evaluative measures.[67] First, it is arguably difficult to define what might constitute "harm."[68] Such an effort inevitably involves subjective opinions that are not uniformly held within society.[69] An act declared a crime by a legislature would qualify as a harm, although that logic requires society to accept legislators' and judges' determinations of harms.[70] In the absence of legislative or judicial determination, whether a particular harm qualifies as a "harm" under the necessity defense remains elusive.[71]

Second, even if society could agree on a universal list of harms, when a person is faced with two competing harms, subjective opinions will again differ regarding which is the lesser harm.[72] Sometimes one harm will clearly be greater than the other,[73] but more often than not, the valuation of harms will be unclear. In those cases, normative social values generally dominate[74] in determining whether the defendant acted improperly by violating the law, erasing any consideration of the exigencies of the moment.

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[63] *See infra* notes 113-16 and accompanying text.

[64] Indeed, it is the primary and practically sole requirement under the Model Penal Code, which justifies an otherwise criminal act if

> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

The Model Penal Code also negates the defense if the defendant was "reckless or negligent in bringing about the situation." MODEL PENAL CODE § 3.02 (1962).

[65] LAFAVE, *supra* note 26, § 5.4(a), at 483.

[66] *See id.* at 477.

[67] Parry, *supra* note 40, at 415.

[68] *Id.*

[69] *See id.* at 416.

[70] *Id.* at 415-16.

[71] *Id.* at 415.

[72] *Id.* at 416.

[73] *See* LAFAVE, *supra* note 26, § 5.4(c), at 479-480, for examples of such clear winners (sailors refusing to obey a captain at sea so that the captain will return the unseaworthy vessel to port for repairs, a parent violating mandatory school attendance laws due to a child's feeble health, an ambulance driver violating speeding laws to race a patient to the hospital, a police officer violating gambling laws in order to arrest a gambler, among others).

[74] *See* Parry, *supra* note 40, at 420.

The classic example of this moral debate can be found in two shipwreck cases,[75] one arising in England[76] and the other adjudicated by the American courts.[77] In both cases, the survivors of tragic shipwrecks were floating at sea, uncertain of rescue, and eventually sacrificed some survivors to save the remainder.[78] The American case involved throwing fourteen passengers overboard in order to keep the lifeboat from sinking,[79] while the English case involved killing one survivor in order to feed the other three.[80] After being rescued, the American officer was charged with manslaughter[81] and two Englishmen were charged with murder.[82] The defendants in both cases attempted to justify the killings by invoking the necessity defense, arguing that the circumstances allowed them no alternative to killing the victims in order to save themselves.[83] While public sentiment was highly in their favor,[84] all defendants were convicted.[85]

These cases illustrate the high premium society places on human life, and imply that one life cannot be sacrificed to save another, even in the direst of circumstances.[86] The English court did leave open the possibility that the killing may have been justified if the survivors drew lots to determine who would be killed, rather than killing the youngest, weakest, and sickest member of the crew.[87] Indeed, the American case, which had been decided over forty years earlier, declared that if "all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot."[88] While there may rarely be a circumstance requiring one person's life to be sacrificed for another,[89] it seems clear that in choosing the person to sacrifice,

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[75] For a fascinating, colorful, and detailed account of both cases, see Joseph J. Simeone, *"Survivors" of the Eternal Sea: A Short True Story*, 45 ST. LOUIS U. L.J. 1123 (2001).

[76] Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884).

[77] United States v. Holmes, 26 F. Cas. 360 (C.C. E.D. Penn. 1842) (No. 15,383).

[78] *Id.* at 361; *Dudley & Stephens*, 14 Q.B.D. at 274.

[79] *Holmes*, 26 F. Cas. at 361. Two women were also killed, though it is unclear whether they threw themselves overboard voluntarily after seeing their brother tossed out, or if they were thrown overboard after requesting that they "die the death of their brother." Their deaths brought the total death toll to 16. *Id.* at n.5.

[80] *Dudley & Stephens*, 14 Q.B.D. at 274.

[81] *Holmes*, 26 F. Cas. at 362-363.

[82] *Dudley & Stephens*, 14 Q.B.D. at 275.

[83] *Id.* at 277; *Holmes*, 26 F. Cas. at 364.

[84] Public sentiment was so strong in England that a number of fundraising efforts took place to help the defendants pay for their legal fees. English townspeople arranged a benefit night to raise money for the accused, yacht clubs raised money, and ballads were written and sold to contribute to the cause. Simeone, *supra* note 75, at 1131.

[85] *Holmes,* 26 F. Cas. at 368; *Dudley & Stephens*, 14 Q.B.D. at 288.

[86] The *Dudley & Stephens* court asked the resounding questions, "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?" 14 Q.B.D. at 287.

[87] *See* Simeone, *supra* note 75, at 1137.

[88] *Holmes*, 26 F. Cas. at 367.

[89] Given that the law considers all lives equal so that one is not better than another, it is argued that if two men stranded at sea simultaneously reach a plank that will hold only one of them, neither is justified in killing the other. This seems to mean certain death to both. However, if one man reaches the plank before the other, commentators argue that he would be justified in keeping the other man off the plank in order to preserve his own life. Such

the selection must place all persons eligible for sacrifice on a level playing field.[90]

Fortunately, most cases invoking the necessity defense do not involve the taking of a life,[91] so such ethical debates over the greater and lesser harm are more simplified. However, examining cases such as the shipwreck cases above demonstrate the extraordinary difficulty in determining which of two harms should be deemed to be the greater harm. Such inquiries involve not only questions of law, but usually questions of morality as well,[92] creating an unusually difficult job for the trier of fact who must stand in judgment of another.

5. The Threatened Harm Was Imminent

The imminence requirement is closely connected to the requirement that no legal alternatives were available to the actor in order to avoid the potential harm.[93] Generally, if the threatened harm is not imminent, it is said that the actor had sufficient time to consider legal alternatives to the criminal act.[94] Consequently, failure of this element will usually negate a finding of the "lack of legal alternatives" requirement as well.[95]

Application of the imminence requirement is problematic, because if the harm to be avoided is not imminent *per se*, but merely *likely* to happen in the near future before alternate help can be obtained, the defense is barred.[96] Some courts have determined that a sufficient showing of imminence requires that the defendant was forced to make a "split-second decision,"[97] implying there was no time to consider all available alternatives. Others refer to imminence in terms of whether a sudden, unforeseen emergency arose.[98] In either case, the

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valuations of life based on fortuity of timing are much debated. LAFAVE, *supra* note 26, § 5.4(d), at 483, 484 & n.54.

[90] *See id.* at 484.

[91] Self-defense and defense of others are in the same family as the necessity defense, and are more typically used in cases to justify harming a person to save another. *Id.* § 5.4(b), at 479.

[92] The English judge, in deciding the fate of Dudley and Stephens, stated that "the absolute divorce of law from morality would be of fatal consequence." *Dudley & Stephens*, 14 Q.B.D. at 287.

[93] *See* Martin, *supra* note 31, at 1568.

[94] *See id.*; LAFAVE, *supra* note 26, § 5.4(d), at 485.

[95] *See, e.g.*, State v. W.M.S., 465 S.E.2d 580, 583 (S.C. Ct. App. 1995) (where the court denied the necessity defense to a woman who violated a custody order to keep her child away from an alleged sexual predator and stated in practically the same breath, "[f]irst, appellant failed to show an imminency of sexual attack or bodily injury against the child. Second, there was time for appellant to complain to authorities about her concerns before she acted on her own."); State v. Warshow, 410 A.2d 1000, 1002 (Vt. 1979) ("Where the hazards are long term, the danger is not imminent, because the defendants have time to exercise options other than breaking the law.").

[96] *See* Martin, *supra* note 31, at 1572.

[97] *See* State v. Hudgins, 606 S.E.2d 443, 448 (N.C. Ct. App. 2005) ("It was up to the jury to decide whether the situation involved a split-second decision in an emergency situation that rendered defendant's actions reasonable and necessary."); Smith v. State, 874 S.W.2d 269, 273 (Tex. App. 1994) ("An 'imminent harm' occurs when there is an emergency situation, and it is 'immediately necessary' to avoid that harm when a split-second decision is required without time to consider the law.").

[98] People v. Brandyberry, 812 P.2d 674, 678 (Colo. Ct. App. 1990).

clear directive is that without an immediately arising emergency requiring a split-second decision, the necessity doctrine cannot be invoked.

This requirement also played a role in the shipwreck cases discussed above. In the American case, defense counsel pointed out that under the prosecution's theory, the crew members were not entitled to act until the ship had actually sunk, thereby creating the "imminent" need for action.[99] The English court, despite a jury finding that at the time of the killing the survivors had no reasonable prospects for survival unless they fed on the victim and that they quite probably would have died before a rescue ship found them,[100] nonetheless pointed out that there *might* have been a rescue ship about to appear.[101] The high standard of imminence precludes the defense in cases like these where sudden, unforeseen circumstances are not present, but life-threatening situations still exist.[102]

6. *The Defendant Was Not Responsible for Causing the Situation*

This final element is sometimes added to the necessity defense to prevent one from claiming the defense if the defendant was at fault for creating the situation.[103] Some jurisdictions bar the defense if the defendant's intentional, reckless, or negligent state of mind establishes culpability for the crime.[104] Other jurisdictions bar the defense if the actor was responsible for creating the situation requiring a choice of evils decision, regardless of whether the fault was intentional, negligent, or reckless.[105] This requirement ensures that the defense is reserved only for those who are considered blameless in the eyes of the law, and were simply in the wrong place at the wrong time.

B. *Application of the Necessity Defense*

The rationale behind the necessity defense is that in some cases, society should tolerate a violation of the criminal law when doing so achieves a greater

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[99] Counsel argued that the prosecution

> ask[s] us to wait until the boat has sunk. We may, then, make an effort to prevent her from sinking. They tell us to wait till all are drowned. We may, then, make endeavours to save a part. They command us to stand still till we are all lost past possibility of redemption, and then we may rescue as many as can be saved.

United States v. Holmes, 26 F. Cas. 360, 364 (C.C. E.D. Penn. 1842) (No. 15,383).

[100] Regina v. Dudley & Stephens, 14 Q.B.D. 273, 275 (1884).

[101] *Id.* at 279.

[102] In fact, in such situations, it might be the proper course for all of the men to die rather than sacrifice another. The *Dudley & Stephens* court explained that although "[t]o preserve one's life is generally speaking a duty . . . it may be the plainest and the highest duty to sacrifice it." *Id.* at 287. Because some "duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others . . . [i]t is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life." *Id.*

[103] LAFAVE, *supra* note 26, § 5.4(d), at 486.

[104] *Id.* Many jurisdictions that take this approach focus only on the recklessness or negligence of the defendant, without explicitly referencing intentional acts of the defendant. This creates a loophole where a defendant who acts intentionally in bringing about the situation would technically be entitled to the defense. *See* MODEL PENAL CODE § 3.02(2) (1962) (barring the defense only for negligent or reckless behavior).

[105] LAFAVE , *supra* note 26, § 5.4(d), at 486.

good.[106] As one court stated, "[i]n some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances."[107] While a noble and valid recognition, this philosophy creates some worry among members of society because it allows predetermined laws to be disregarded by one who deems it necessary under the circumstances.[108]

Consequently, the necessity defense is one of limited application.[109] The prospect of evaluating the subjective nature of the defendant's proffered choice of evils dilemma creates judicial anxiety about applying it.[110] Additionally, the need for predictability and certainty in the law is eroded when the necessity defense allows one to violate the law without punishment.[111] The danger of allowing citizens to violate laws based on the claim that it was "necessary" for their particular cause also raises obvious fears, which have been partially allayed by the strict elements the necessity defense requires.[112]

To limit an individual's ability to invoke the necessity defense as a justification for violating the law in pursuit of his own causes, the defense has been disallowed in virtually all civil disobedience cases.[113] The Ninth Circuit went so far as to declare that the necessity defense is *never* available in cases involving indirect civil disobedience.[114] Other courts, while not barring the defense entirely in such cases, frequently rely on the availability of legal alternatives and the absence of imminent harm when reaching decisions excluding necessity as a defense to the crimes committed.[115] The Tenth Circuit summed up the rationale behind disallowing the defense to protestors by declaring that "[t]o allow the personal, ethical, moral, or religious beliefs of a person . . . as a

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[106] *Id.*, § 5.4(a), at 477.

[107] United States v. Schoon, 971 F.2d 193, 196-97 (9th Cir. 1992).

[108] *See* V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1712-1713 (2003).

[109] 21 AM. JUR. 2D *Criminal Law* § 159, *supra* note 30.

[110] *See* Nourse, *supra* note 108, at 1714.

[111] *See* Parry, *supra* note 40, at 452.

[112] *See* Nourse, *supra* note 108, at 1712-13.

[113] *See, e.g.*, United States v. Turner, 44 F.3d 900 (10th Cir. 1995), *cert. denied,* 515 U.S. 1104 (1995) (abortion clinic protest); United States v. Schoon, 971 F.2d 193 (9th Cir. 1992) (protest related to government actions in El Salvador); State v. LeVasseur, 613 P.2d 1328 (Haw. Ct. App. 1980), *cert. denied*, 449 U.S. 1018 (1980) (animal liberation); Commonwealth v. Leno, 616 N.E.2d 453 (Mass. 1993) (distribution of hypodermic needles to prevent the spread of AIDS); People v. Craig, 585 N.E.2d 783 (N.Y. 1991) (protest related to American embargo on Nicaragua); State v. Warshow, 410 A.2d 1000 (Vt. 1979) (nuclear power plant protest).

[114] *Schoon,* 971 F.2d at 199-200. Indirect civil disobedience indicates the defendant has violated a law which is not in itself the object of the protest, but rather, the defendant is merely attempting to draw attention to his cause. On the other hand, direct civil disobedience involves the violation of a law to protest the existence of the law. *Id.* at 196.

[115] *See* Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1179, 1182 (1987); William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 49, 51 (2003).

justification for criminal activity . . . would not only lead to chaos but would be tantamount to sanctioning anarchy."[116]

Despite the development of the necessity defense, it has never been applied to a criminal looting charge. Before analyzing the application of the necessity defense to a looting charge, an examination of current looting statutes is first in order.

III. An Examination of Looting Law and Enforcement

A. *State Looting Laws*

In contrast to the development of the necessity defense in case law and statute, the crime of looting scarcely appears. In fact, only California,[117] Illinois,[118] Louisiana,[119] Mississippi,[120] North Carolina,[121] and South Carolina[122] have current looting statutes. Tennessee's looting statute[123] was repealed in 1989.[124]

While the contours of the looting statutes differ slightly, they each apply only when there is an absence of normal security of property due to a variety of calamities,[125] or during a proclaimed state of emergency[126] or local emergency.[127] Illinois, Mississippi, North Carolina, South Carolina, and Tennessee enacted specific looting laws in the late 1960s in reaction to widespread race riots.[128] California enacted its looting statute in response to the 1989 San Francisco earthquake.[129] Louisiana followed with the creation of its looting statute in 1993.[130] The enactment of these laws during volatile times indicates that looting statutes were meant to provide additional punishments for criminals taking advantage of natural disasters and emergency situations.

Since six states have had active looting statutes since as early as 1967,[131] one might expect a breadth of case law applying the statutes to crimes commit-

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[116] *Turner*, 44 F.3d at 903.

[117] Cal. Penal Code § 463 (West 1999).

[118] 720 Ill. Comp. Stat. 5/42-1 (2003).

[119] La. Rev. Stat. Ann. § 14:62.5 (Supp. 2006).

[120] Miss. Code Ann. § 97-17-65 (West 1999).

[121] N.C. Gen. Stat. § 14-288.6 (2003).

[122] S.C. Code Ann. § 16-7-10 (Supp. 2005).

[123] Tenn. Code Ann. § 39-6-324 (repealed 1989).

[124] 1989 Tenn. Pub. Acts, ch. 591 § 1.

[125] 720 Ill. Comp. Stat. 5/42-1 ("hurricane, fire, or vis major of any kind or by virtue of a riot, mob, or other human agency"); La. Rev. Stat. Ann. § 14:62.5(A) ("hurricane, flood, fire, act of God, or force majeure of any kind, or by virtue of a riot, mob, or other human agency"); Miss. Code Ann. § 97-17-65(1) ("hurricane, fire, or vis major of any kind or by virtue of a riot, mob, or other human agency"); N.C. Gen. Stat. § 14-288.6(a) ("riot, insurrection, invasion, storm, fire, explosion, flood, collapse, or other disaster or calamity").

[126] Cal. Penal Code § 463(a) (a state of emergency arises from "an earthquake, fire, flood, riot, or other natural or manmade disaster"); S.C. Code Ann. § 16-70-10(A).

[127] Cal. Penal Code § 463(a) (a local emergency arises from "an earthquake, fire, flood, riot, or other natural or manmade disaster").

[128] *See* Roger D. Scott, *Looting: A Proposal to Enhance the Sanction for Aggravated Property Crime*, 11 J.L. & Pol. 129, 153 (1995).

[129] *Id.*

[130] *Id.*

[131] Illinois was the first state to enact a looting statute through 1967 Ill. Laws 2598.

ted during various emergency situations. However, reported cases of defendants prosecuted under looting statutes are incredibly sparse. In fact, there is only one reported case of a looting acquittal,[132] one reported case of a mistrial on looting charges,[133] and one reported case where a person was convicted of violating a looting statute.[134] None invoked the necessity defense.

The one conviction occurred in *People v. Flores,* affirmed by an Illinois appellate court.[135] Flores entered a fire-damaged apartment, where the victim caught him inside holding a saw, a drill, and a woman's purse and later discovered that Flores was also wearing his watch.[136] Flores was charged with looting and burglary, and after a jury convicted Flores on both counts,[137] he appealed. Flores argued that the looting conviction should be vacated since it was based on the same unlawful act as the burglary conviction, therefore the state could not charge him with both crimes.[138] However, the appellate court affirmed the conviction, declaring that the act of burglary took place when Flores entered the apartment, but the act of looting did not take place until Flores exerted control over the victim's property.[139] Since the charges were based on two separate acts, Flores could be properly convicted of both crimes.[140]

B. Substitute Charges for Looting

While *Flores* showcased that a suspect can be successfully prosecuted on charges of both burglary and looting based on acts stemming from the same incident, often suspects caught in situations that resemble looting are charged only with burglary.[141] This is understandable in states without looting laws, where burglary and other standard criminal charges are the only ones available against those engaged in traditional looting.[142] However, the lack of prosecution under looting laws is mysterious in states where the charge is available.

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[132] Shillington v. K-Mart Corp., 402 S.E.2d 155 (N.C. Ct. App. 1991).
[133] State v. Short, 769 So. 2d 823 (La. Ct. App. 2000).
[134] People v. Flores, 645 N.E.2d 1050 (Ill. App. Ct. 1995).
[135] *Id.*
[136] *Id.* at 1052, 1053.
[137] *Id.*
[138] *Id.* at 1054.
[139] *Id.* at 1059.
[140] *Id.*
[141] *See* People v. Thompson, 268 N.E.2d 369, 370 (Ill. 1971) (defendant found holding a bag inside ransacked drugstore); People v. Parks, 273 N.E.2d 162, 163 (Ill. App. Ct. 1971) (defendant found pulling clothes off racks inside a ransacked clothing store during riots); People v. Mitchell, 268 N.E.2d 232, 232 (Ill. App. Ct. 1971) (abstract opinion only) (defendant found walking away with stolen property from a store during riots); People v. Glasgow, 261 N.E.2d 424, 425 (Ill. App. Ct. 1970) (defendant found inside a shoe store that had been broken into during riots, wearing a new pair of shoes from the store).
[142] *See* United States v. Jeffries, 45 F.R.D. 119, 120 (D.D.C. 1968) ("The defendants indicted for Burglary II . . . are accused of looting the same store at about the same time."); Virgin Islands v. Bryan, 731 F. Supp. 720, 723 (V.I. 1990) (defendant charged with grand larceny and possession of stolen property after being investigated for "looting"); State v. Scott, 641 So. 2d 517, 520 (Fla. Dist. Ct. App. 1994) (defendant charged with burglary after being caught with "several items of electronic equipment . . . in an area of homes reportedly being looted"); Commonwealth v. Cooper, 407 A.2d 456, 457 (Pa. Super. Ct. 1979) (defendant charged with burglary, theft, and receiving stolen property "after the Johnstown flood of July, 1976, [which] could be described as looting").

The lack of case law is itself a possible reason for the failure of law enforcement to utilize the looting statutes.[143] Prosecutors are generally faced with no precedent in their own state and are uncertain how and whether other states' minimal efforts to convict under looting laws will be considered by their own courts.[144] Because of scarce case law, looting charges are quite susceptible to failure should clever defense counsel raise novel points of law.[145] In a field with so little development, the risks of a failed prosecution could be great.

Burglary charges, on the other hand, are quite common and regularly applied.[146] Prosecutors as well as courts are more familiar with the elements of burglary and are probably more comfortable dealing with criminal acts under a burglary, larceny, or other common charge that has a developed common law history.[147] Burglary charges are also presumably easier to prove, since burglary requires only the unauthorized entering of an occupied structure or building with the intent to commit a crime therein,[148] regardless of whether a crime is actually committed. Looting, on the other hand, usually requires that the offender actually damage, remove, or otherwise exert control over the victim's property.[149] The additional work placed on prosecutors to obtain sufficient evidence to prove a looting charge may act as a further incentive to rely solely on a burglary charge.[150]

Some defendants attempt to secure prosecution of a looting charge instead of a burglary charge given the lighter sentences that looting charges sometimes carry.[151] This phenomenon is particularly prevalent in Illinois, the only state with any limited case law regarding looting charges. Four[152] of Illinois' five[153] looting cases arose out of riots that occurred in Chicago during early April of

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[143] Scott, *supra* note 128, at 157.

[144] *See id.*

[145] *Id.*

[146] *See id.* at 156.

[147] *Id.* at 156-57.

[148] MODEL PENAL CODE § 221.1 (1962). The common law definition of burglary consisted of "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." LAFAVE, *supra* note 26, § 8.13. However, states have crafted unique definitions of burglary which have strayed from the original common law meaning, and now the crime "contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598 (1990).

[149] *See supra* notes 118-20, 122-23. California and North Carolina do not require that the offender obtain control over any property to be guilty of looting; however, the classification of the crime and the accompanying punishments are increased if the offender does in fact obtain control over property. *See supra* notes 117, 121.

[150] Scott, *supra* note 128, at 156.

[151] For instance, Illinois classifies burglary as a class 2 felony, 720 ILL. COMP. STAT. ANN. 5/19-1(b) (West 2002), carrying a sentence of 3-7 years, 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(5) (West 2005). However, a looting conviction in Illinois is a class 4 felony, requiring the offender to perform community service, pay restitution, 720 ILL. COMP. STAT. ANN. 5/42-2 (West 2005), and receive a sentence of 1-3 years, 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(7) (West 2005). *But see* LA. REV. STAT. ANN. 14:62.2 (1997) (punishing simple burglary of an inhabited dwelling with 1-12 years of hard labor); LA. REV. STAT. ANN. 14:62.5 (Supp. 2006) (punishing looters with up to fifteen years of hard labor and/or a $10,000 fine).

[152] *See* People v. Parks, 273 N.E.2d 162 (Ill. App. Ct. 1971); People v. Mitchell, 268 N.E.2d 232 (Ill. App. Ct. 1971) (abstract opinion only); People v. Long, 261 N.E.2d 437 (Ill. App. Ct. 1970); People v. Glasgow, 261 N.E.2d 424 (Ill. App. Ct. 1970).

1968 in response to the assassination of Dr. Martin Luther King.[154] All of the defendants appealed burglary convictions, arguing that they should have been prosecuted only under the looting statute, which carried a lighter penalty.[155] While one court declined to consider the question since the defendant did not raise the objection with the trial court,[156] the remaining three courts affirmed the convictions, holding that burglary is an appropriate charge even if the circumstances in which the burglary takes place could also qualify the defendants for looting charges.[157] Judicial approval of prosecutions under burglary charges instead of looting charges may bolster prosecutors' decisions to proceed solely on burglary charges even further.

C. *Police and Prosecutorial Discretion as Deterrents to Looting Charges*

Another explanation for the lack of prosecution under looting laws is the fact that the law enforcement system is vested with considerable discretion to arrest and charge suspected criminals as officials see fit.[158] When police and prosecutors choose not to utilize looting laws, the natural consequence is that criminal looting cases will not appear before judges or juries and case law will not develop.

Since police officers are the first line of defense against criminals, their decisions profoundly affect whether or not a suspected criminal will be prosecuted.[159] While police officers may not have a significant amount of discretion to arrest,[160] they still have limited options to not arrest a suspect. A police

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[153] The only Illinois case addressing looting crimes that did not arise from the 1968 riots is People v. Flores, 645 N.E.2d 1050 (Ill. App. Ct. 1995).

[154] The Chicago riots resulted in approximately $10 million in property damage, 162 businesses destroyed, and eleven African-American men killed. Residents fled the Westhaven neighborhood, which is just now beginning to redevelop after the devastation. Andrew Herrmann, *Near West Side Will Get First New Grocery Since 1968 Riots*, CHICAGO SUN TIMES, Nov. 17, 2004, at 12.

[155] *Parks*, 273 N.E.2d at 163; *Mitchell*, 268 N.E.2d at 233 (abstract opinion only); *Long*, 261 N.E.2d at 440; *Glasgow*, 261 N.E.2d at 426.

[156] *Glasgow*, 261 N.E.2d at 427.

[157] *Parks*, 273 N.E.2d at 164 ("[T]he coincidental presence of the riots in adjacent areas cannot militate against strong and unrefuted evidence of burglary."); *Mitchell*, 268 N.E.2d at 233 (abstract opinion only); *Long*, 261 N.E.2d at 440 ("[W]e do not believe that it was the intent of the legislature to frustrate and impede prosecutions for burglaries perpetrated during periods of civil disturbance and treat burglars differently simply because lack of security made their job easier.").

[158] *See* Allee v. Medrano, 416 U.S. 802, 837 (1974) (Burger, C.J. concurring) (both prosecutors and police have "broad discretion in enforcing the criminal laws").

[159] *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 13.2(b) (3d ed. 2000).

[160] Many criminal statutes contain mandatory arrest terms, requiring officers to arrest suspects without regard to discretionary considerations. *Id.* Indeed, the Police Chief of Kenner, Louisiana stated when asked whether his department had been bringing to the prosecutor cases of people who stole food during the aftermath of Hurricane Katrina,

> Yes, we do. It's up to the district attorney to prosecute and prefer charges. We have a very specific mission in the criminal justice system where we arrest people and make reports to the district attorney based on our observations. The district attorney then makes a decision whether he prosecutes or not.

The Abrams Report (MSNBC television broadcast Sept. 16, 2005), *available at* 2005 WLNR 14637439.

officer may choose not to arrest a suspect if insufficient evidence exists to support the arrest, or if the officer does not believe the arrest would be in the best interest of the suspect or society at large.[161] Offenders who are likely to garner jury sympathy are unlikely candidates for arrest.[162] The sheer volume of wrongdoers may also serve as a deterrent to individual arrests, particularly during mass rioting or looting where enacting a curfew may be the most efficient way to handle violators.[163] In states of emergency, the police force may not have the capacity to handle a large number of wrongdoers.[164] Whatever the reason, the decision not to arrest virtually guarantees that the suspect will escape prosecution since most of the cases brought before the prosecutor are provided courtesy of police arrests.[165]

Once an arrest is made and the case is turned over to the prosecutor, a number of ensuing decisions determine whether the case is ultimately brought before a judge or jury.[166] Prosecutors must first decide whether there is sufficient, admissible evidence to support a conviction.[167] Even when such evidence does exist, the prosecutor may choose not to charge the suspect for any number of reasons.[168] The most common reasons not to prosecute include the victim's request not to pursue the charge, excessive costs of prosecution, undue harm to the suspect, utilizing the suspect as an informant in other matters, and the opportunity for the suspect to make full reparations without prosecution.[169] Discretion extends not only to decisions whether to prosecute, but also which charges to file.[170]

The extraordinary amount of discretion vested in prosecutors is deeply entrenched and accepted within the American justice system.[171] Given the

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[161] LAFAVE, ISRAEL & KING, *supra* note 159, § 13.1(a). *See also* Trymaine Lee, *8th District: Videotaped Beating in the Quarter Batters 8th District's Image*, THE TIMES-PICAYUNE (New Orleans), Dec. 18, 2005, at 1 (where a police commander stated that "[w]hen I see a mother with her kids, under those circumstances [referring to the aftermath of Hurricane Katrina], I have to do what is morally correct . . . I'm not going to snatch crackers and water out of a mother's hands.") (internal quotation marks omitted).

[162] *See* Purpura, *supra* note 23 (where a New Orleans sheriff instructed deputies not to arrest people taking food and survival goods after Hurricane Katrina, noting that "[i]f we went to trial, the jury would probably find them not guilty.") (internal quotation marks omitted).

[163] Scott, *supra* note 128, at 156.

[164] *See* Lee, *supra* note 161 (where a police commander stated that, in regard to New Orleans looting after Hurricane Katrina, "[w]e didn't have a jail, there was nothing in place for us in terms of holding people . . . if people were trying to loot for profit, we'd make them put the stuff down, and we'd send them away. We had no other option.") (internal quotation marks omitted).

[165] LAFAVE, ISRAEL & KING, *supra* note 159, § 13.1(a).

[166] *Id.*

[167] *Id.* § 13.1(b).

[168] *Id.* § 13.1(c).

[169] *Id.* § 13.2(a).

[170] *Id.* § 13.1(e).

[171] *Id.* § 13.2(a). *See also* Wayte v. United States, 470 U.S. 598, 607 (1985) ("[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)); Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana,*

wide latitude of discretion prosecutors possess, conditions that might give rise to a criminal necessity defense inevitably factor into a prosecutor's decision whether and whom to prosecute.[172] Therefore, crimes that might meet with great public sentiment or compassion for the accused are likely candidates for nonprosecution.[173]

The level of discretion vested in prosecutors and its effect on criminal charges is best illustrated in *Virgin Islands v. Bryan*,[174] where the defendant sought to have charges of grand larceny and possession of stolen property[175] dismissed, alleging selective prosecution.[176] Bryan was charged with the crimes after allegedly taking over $1000 worth of items from a local home improvement store in the period immediately following Hurricane Hugo.[177] Bryan, a captain of the Virgin Islands Police Department, former two-term senator, and recent gubernatorial candidate, argued that prosecutors targeted him for prosecution because of his prominence in the community, whereas others who "looted" the same store were not prosecuted.[178] He presented two witnesses who admitted to taking items from the same store, but who were not charged with any crimes.[179] One witness took "'a handful' of nails" worth about one dollar, while the other witness took "two sheets of plywood and three pieces of lumber" with an uncertain value.[180] The court recognized that hundreds, perhaps thousands of people had engaged in looting in the days following the hurricane,[181] but also reiterated that "the government is granted broad discretion in deciding whom to prosecute."[182] The court denied Bryan's motion to dismiss, pointing to the great disparity in value of the items allegedly taken by Bryan compared to his witnesses and also the fact that the prosecutor had initiated several other cases based on similar looting incidents.[183] Based on these facts, the court concluded that the prosecutor had validly exercised discretion in filing charges.[184]

Prosecutorial Discretion and the Medical Necessity Defense, 41 B.C. L. REV. 699, 736 (2000).

[172] *See* Martin, *supra* note 31, at 1539; LeVay, *supra* note 171, at 736.

[173] *See* Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 810 (2002) ("[P]rosecutors usually will not charge sympathetic defendants . . . .").

[174] 731 F. Supp. 720 (V.I. 1990).

[175] These are the standard charges brought against looters in St. Croix in the absence of formal looting laws. *See* William Branigin, *A Slow Recovery From '12 Hours of Terror'; Six Weeks After Striking, Hurricane Hugo Still Haunts Virgin Islands*, WASH. POST, Oct. 31, 1989, at A1.

[176] *Bryan*, 731 F. Supp. at 720-721. A selective prosecution claim requires the defendant to prove "(1) that other violators similarly situated are generally not prosecuted; (2) that the selection of the claimant was 'intentional and purposeful'; and (3) that the selection was pursuant to an 'arbitrary classification.'" LAFAVE, ISRAEL & KING, *supra* note 159, § 13.4(a).

[177] *Bryan*, 731 F. Supp. at 721.

[178] *Id.* at 720-21.

[179] *Id.* at 722.

[180] *Id.*

[181] *Id.* at 724.

[182] *Id.* at 723.

[183] *Id.* at 724.

[184] *Id.*

Bryan demonstrates not only prosecutors' discretion to prosecute only the most severe cases, but also the practical limitations prosecutors face when faced with mass criminal incidents.[185] The reality of limited manpower and limited financial resources to prosecute all wrongdoers understandably results in the nonprosecution of "minor" looters, such as those who take just a few items. When the few items taken are small and of little consequence, such as a handful of nails, the inclination to prosecute subsides even further.[186]

These inherent limitations on prosecutions may explain a great deal of the lack of case law on looting charges during disasters, riots, and states of emergency. When the items taken can be reasonably identified as "necessities," prosecutorial discretion not to bring charges may result in the virtual nullity of the necessity defense.[187] In this way, it can be said that prosecutorial discretion is a tool to prosecute only those crimes that would fall outside of the generally accepted levels of societal behavior.[188] This, however, presupposes that prosecutors validly exercise their discretionary powers in line with the will of the people.[189]

What happens in those rare cases where prosecutorial discretion does not weed out those "minor" crimes? Given the virtually unlimited amount of discretion vested in prosecutors,[190] the potential for abuse of that power is significant.[191] While we, as a community, might hope and assume that a prosecutor would elect not to pursue charges against someone like Monica Laguard who was "looting" to care for her children,[192] what might she say to a judge if she found herself charged with looting? Would the necessity defense be available to explain her actions, releasing her of criminal culpability?

IV. A Proposal to Make the Necessity Defense Available to Individuals Charged with Looting

Currently, under Louisiana law, the necessity defense would not operate to protect Ms. Laguard and others like her who found themselves in need of basic items for survival after Hurricane Katrina.[193] Given the harsh penalties of a looting conviction,[194] the defense of necessity ought to expand to apply to simi-

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[185] Law enforcement officials elected to focus the charges on "major" looters, since "[t]here was no way we could identify and prosecute thousands." As a result, roughly fifteen cases were filed as a result of the St. Croix looting. Branigin, *supra* note 175 (internal quotation marks omitted).

[186] *See id.*

[187] Martin, *supra* note 31, at 1539.

[188] *See* LeVay, *supra* note 171, at 740.

[189] *See* Martin, *supra* note 31, at 1539.

[190] *See supra* notes 171-173 and accompanying text.

[191] LeVay, *supra* note 171, at 740.

[192] Prosecutors do appear to be dropping charges against such sympathetic looters from Hurricane Katrina, since those found with food and other necessary items "were just trying to survive" and, therefore, the District Attorney feels they should not be charged with a crime. Purpura, *supra* note 23 (internal quotation marks omitted).

[193] *See infra* section IV.A.

[194] "Whoever commits the crime of looting during the existence of a state of emergency . . . may be fined not less than five thousand dollars nor more than ten thousand dollars and shall be imprisoned at hard labor for not less than three years nor more than fifteen years without

larly situated persons who might find themselves subject to criminal prosecution.

A. *Current Application of the Necessity Defense to Looting Charges*[195]

Louisiana's codified necessity defense explicitly identifies seven circumstances that allow a defendant to invoke the defense.[196] The necessity defense only applies to: (1) public officers fulfilling their duties, (2) reasonable efforts to make an arrest, (3) conduct that is authorized by law, (4) conduct that equates to the reasonable discipline of a child, (5) failure to perform an affirmative duty that is physically impossible, (6) crimes committed because of another's threats of death or great bodily harm, and (7) conduct in defense of persons or property.[197] The seventh circumstance, while potentially applicable to a mother violating the law to defend her children's health, actually only applies to circumstances where force or violence is used against another.[198]

While Ms. Laguard's actions do not fall into any of these enumerated categories, there is still some hope. Louisiana courts have interpreted the justification categories as non-exclusive, allowing a court to apply the necessity defense to any crime where it is not expressly prohibited.[199] Despite this extension of the necessity defense, thus far, it has only been applied in two very limited circumstances. First, necessity is a defense to the crime of "felon in possession of a firearm" when temporary possession of a firearm is necessary to defend oneself against an imminent attack.[200] Second, a prison escapee can claim necessity if he escapes to avoid imminent harm, has no time to seek help, does not injure any innocent persons in the process of escaping, and turns himself over to authorities once safe.[201]

In both of the limited jurisprudential necessity applications, the defendant must prove that there were no reasonable alternatives to violating the law in

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benefit of probation, parole, or suspension of sentence." LA. REV. STAT. ANN. § 14:62.5(C) (Supp. 2006).

[195] The analysis will focus on the application of the necessity defense to looting laws in Louisiana and Mississippi, since the issue is most critical in those states in the aftermath of Hurricane Katrina. However, the recommendations are certainly applicable to the remaining four states with looting laws since the necessity defense is of such limited application and likely would not apply to defendants charged with looting in those states.

[196] LA. REV. STAT. ANN. § 14:18 (1997).

[197] *Id.*

[198] The subsection authorizes the necessity defense "[w]hen the offender's conduct is in defense of persons or of property under any of the circumstances described in Articles 19 through 22." *Id.* Those sections authorize the use of force against another to prevent harm to oneself or one's property, *id.* § 14:19; authorize justifiable homicide, *id.* § 14:20; revoke the defense where the offender is the aggressor, *id.* at § 14:21; and authorize the use of force against another when defending third persons, *id.* § 14:22.

[199] State v. Blache, 480 So. 2d 304, 308 (La. 1985) (finding that because the justification statute applies to "any crime" based on illegal conduct, the defense could be extended to a felon in possession of a firearm under limited circumstances); *see also* State v. Smith, 777 So. 2d 584, 587 (La. Ct. App. 2000) (the necessity defense "provid[es] a defense in any case in which it is not expressly prohibited").

[200] *Blache*, 480 So. 2d at 308.

[201] State v. Boleyn, 328 So. 2d 95, 97 (La. 1976) (quoting and adopting the doctrine from People v. Lovercamp, 118 Cal. Rptr. 110, 115 (Ct. App. 1974)).

order to avoid the harm[202] and that the threat of harm was imminent.[203] Therefore, it is reasonable to assume that if a court were inclined to extend the necessity defense to one charged with looting, these same two elements would be introduced.

These elements will prove to be a substantial barrier to Ms. Laguard's defense, given the historical difficulty in proving them as detailed in Section II. First, a court may assume that she had reasonable alternatives available in the form of rescue workers and agencies assisting in providing food and shelter.[204] The threat of harm will probably not rise to the strict "imminent" threshold, given the general reluctance of courts to consider theft of food as necessary except where a person is literally starving to death.[205] Additionally, should a court try to impose the requirement that she was not at fault for being in the situation, a court could point to her failure to evacuate despite mandatory evacuation orders as proof that she was responsible for putting herself in the situation.[206] In all probability, her common law defense of necessity would be just as inapplicable as the statutory defense.[207]

If Ms. Laguard were arrested, charged, and convicted of the crime of looting, a recent addition to Louisiana's looting law would *require* a judge to sentence her to hard labor for at least three years without possibility of probation,

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[202] State v. Recard, 704 So. 2d 324, 328 (La. Ct. App. 1997) (prison escape defendant must show that there is no time or opportunity to report the threat to the authorities or that such attempts have been futile in the past, and felon in possession of a firearm must show that he had "*no reasonable alternative* but to possess the firearm").

[203] *Id.* (prison escape defendant must show that there was a "specific threat of death, forcible sexual attack or substantial bodily injury in the *immediate* future," and felon in possession of a firearm must show that "the threat of force by another is *imminent*") (first emphasis added).

[204] For instance, a 73-year-old woman was arrested on looting charges when she was seen outside a deli with some sausages. The city's police chief explained that the police department was nearby, and if she was hungry, all she had to do was go to the police department for help rather than stealing. *The Abrams Report*, *supra* note 160. Criminal charges against her were filed and subsequently dropped. Paul Purpura, *Sausage-Looting Case Doesn't Pan Out*, THE TIMES-PICAYUNE (New Orleans), Jan. 13, 2006, at Metro 1.

[205] *See* LaFave, *supra* note 26, § 5.4(c), at 480.

[206] Many people stubbornly stayed behind to endure the hurricane, failing to heed mandatory evacuation orders. *See A City Weeps*, *supra* note 5. One woman justified her refusal to evacuate by declaring, "[h]eck, if we can put up with Mardi Gras, we can put up with a hurricane." Christopher Lee & Peter Whoriskey, *Hurricane Bears Down on Gulf Coast*, WASH. POST, Aug. 29, 2005, at A1. However, many had nowhere to go and no means to leave. *See* Peter Whoriskey & Sam Coates, *Amid the Devastation, Some Feel Relief*, WASH. POST, Aug. 30, 2005, at A1 (highlighting the nine-hour commute to reach safety and elderly seniors afraid to make such a journey); *'God Bless Us,'* CHI. TRIB., Aug. 29, 2005, at Redeye 3 (interviewing residents without cars and unable to get on an Amtrak train); Joseph B. Treaster & Abby Goodnough, *Powerful Storm Threatens Havoc Along Gulf Coast*, N.Y. TIMES, Aug. 29, 2005, at A1 (officials declared that at one point during the evacuation, "more than 18,000 cars an hour were leaving the city").

[207] One Louisiana state police officer declared in an interview that "[t]here actually is a provision that looting is acceptable only if it's for things that are necessary to sustain life, such as food and water." *America's Challenge* (FOX television broadcast Sept. 1, 2005) *available at* 2005 WLNR 13792594. However, this exception is not included in Louisiana's statutory defense, *supra* notes 196-198, and a search of Louisiana caselaw does not reveal any such provision. In all likelihood, this approach is probably used as part of the police discretion to determine which offenders should be arrested on charges and which to set free.

parole, or a suspended sentence, as well as impose a possible fine ranging between $5,000 and $10,000.[208] A judge could impose a maximum penalty of fifteen years in prison without possibility of probation, parole, or a suspended sentence, along with the same monetary fine.[209] While the punishment may seem excessive, Louisiana's judges do not seem to have any qualms imposing the new maximum sentences on convicted looters, even those with no history of criminal activity.[210] Although residents may consider the punishment draconian and unreasonable,[211] one judge feels such a punishment is warranted to send a clear message that looting will not be tolerated.[212]

Ms. Laguard would not fare any better if her crime had been committed in the hurricane-ravaged state of Mississippi. Mississippi uses a common law necessity defense, which contains three basic elements: (1) the act was done to prevent a significant harm; (2) there were no adequate alternatives; and (3) the harm created was not disproportionate to the harm avoided.[213] Mississippi also adds the extra judicial gloss that the threatened harm was specific and imminent.[214] Recently, the state contemplated adding the requirement that the defendant was not at fault in bringing about the harm, but declined to rule on the matter.[215] Again, Ms. Laguard will have extraordinary difficulty proving the lack of alternatives and the imminence of harm, with the potential added stumbling block of the "no fault" requirement should the state entertain the idea again. At least in Mississippi, her punishment will be slightly milder, since the judge has discretion to sentence her to imprisonment of up to fifteen years and/or a fine up to $10,000, without mandatory minimums.[216]

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[208] Almost as a premonition regarding the travesty about to befall the state of Louisiana, the governor signed into law this provision on June 29, 2005, which mandates certain punishments for those who commit looting during a declared state of emergency. The provision became effective August 15, 2005 – exactly two weeks before Hurricane Katrina hit. The new subsection of the looting statute reads:

> Whoever commits the crime of looting during the existence of a state of emergency, which has been declared pursuant to law by the governor or the chief executive officer of any parish, when the defendant knew or should have known that a declaration of emergency existed may be fined not less than five thousand dollars nor more than ten thousand dollars and shall be imprisoned at hard labor for not less than three years nor more than fifteen years without benefit of probation, parole, or suspension of sentence.

LA. REV. STAT. ANN. § 14:62.5(C) (Supp. 2006).

[209] *Id.*

[210] Three individuals, one with a clean criminal history, received the maximum sentence from Judge Liljeberg after attempting to take twenty-seven bottles of liquor and wine, six cases of beer, and a case of wine coolers from a local store. Paul Purpura, *Looters Given 15-Year Terms*, THE TIMES-PICAYUNE (New Orleans), June 29, 2006, at Metro 1 [hereinafter Purpura, *Looters Given 15-Year Sentences*]. In another court, Judge Guidry threatened to sentence defendants accused of looting a clothing store to fourteen years in prison, one year less than the maximum, if they pled guilty to the charge. He also threatened to increase a $50,000 bond for a single mother accused of looting when asked to reduce it. Paul Purpura, *Judge Testifies on His Looting Rulings*, THE TIMES-PICAYUNE (New Orleans), Apr. 29, 2006, at Metro 1.

[211] Editorial, *Be Judicious*, THE TIMES-PICAYUNE (New Orleans), July 3, 2006, at Metro 6.

[212] Purpura, *Looters Given 15-Year Sentences*, *supra* note 210.

[213] McMillan v. City of Jackson, 701 So. 2d 1105, 1107 (Miss. 1997).

[214] *Id.*

[215] Stodghill v. State, 892 So. 2d 236, 239 (Miss. 2005).

[216] MISS. CODE ANN. § 97-17-65 (West 1999).

B. Should the Necessity Defense Be Explicitly Available to Defendants Accused of Looting?

In the wake of the mass looting following Hurricane Katrina, the ethics of looting has been hotly debated.[217] Yet no one can seem to agree whether looting can ever be justified, and if so, where to draw the line regarding acceptable versus unacceptable looting.[218]

Instances of looting seem never-ending in the aftermath of Hurricane Katrina. There were reports of people breaking into pharmacies with a forklift to get food and water.[219] Some took microwaves, coolers, knife sets, and football jerseys.[220] Others ransacked stores and took guns.[221] Residents returned home to find their televisions, stereos, and tools gone.[222] Others found their homes missing jewelry, computers, clothing, and bedding.[223] One man was accused of taking an intriguing combination of boat batteries, a drill, antifreeze, coffee, and 53 bottles of alcohol.[224] A New Orleans sergeant was shocked to discover his own wedding video in a home along with other looted items.[225] Police cars were taken.[226] Police officers found themselves at the other end of the spectrum when they took items from local pharmacies, auto stores, and hardware stores.[227] Police officers also commandeered roughly 200 cars from a dealership, including 41 Cadillacs.[228]

These situations raise the question of where the fine line lies regarding when people are willing to classify looting as acceptable or not. Most would probably agree that taking tens of thousands of pills from a pharmacy[229] is unacceptable because it goes beyond the realm of what can reasonably be deemed a basic necessity of life. But what if a diabetic needed insulin during the crisis? Would that person be justified in taking one day's supply? One week's? One month's? Where is the line?

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[217] *See infra* notes 229-241 and accompanying text.

[218] *See infra* notes 229-241 and accompanying text.

[219] Campos & Cook, *supra* note 19.

[220] McClam, *supra* note 6.

[221] Roughly 1000 guns were stolen during the looting spree – 400 in Mississippi and Alabama, and more than 600 in Louisiana. Michelle Hunter, *600 Firearms Looted in LA During Hurricane Chaos*, THE TIMES-PICAYUNE (New Orleans), Dec. 15, 2005, at Metro 1.

[222] Hamilton, *supra* note 23.

[223] Trymaine Lee, *Ghost Patrol*, THE TIMES-PICAYUNE (New Orleans), Nov. 8, 2005, at 1.

[224] Christopher Drew, *Courts' Slow Recovery Begins at Train Station*, N.Y. TIMES, Oct. 14, 2005, at A22.

[225] Michael Perlstein & Trymaine Lee, *Looters Continue to Prey on Storm Victims Even as Flooded Homes are Being Rebuilt*, THE TIMES-PICAYUNE (New Orleans), Jan. 22, 2006, at 1.

[226] Hamilton, *supra* note 23.

[227] William Hermann, *Sheriff's Officers Lament New Orleans Police Actions*, ARIZ. REPUBLIC (Phoenix), Sept. 7, 2005, at A5.

[228] Trymaine Lee, *Pair Charged With Looting Car Dealer*, THE TIMES-PICAYUNE (New Orleans), Oct. 26, 2005, at Metro 1. Many police officers are still under investigation for taking cars from the dealership, but neither the attorney general nor the district attorney have taken action against any of the officers. The police department asserts that the vehicles were used to replace their own flooded vehicles, and that the dealership's cars were returned, kept "in top-notch shape," and "used with the greatest intent." Bruce Eggler & Michael Perlstein, *A Vested Interest In NOPD*, THE TIMES-PICAYUNE (New Orleans), July 8, 2006, at Metro 1 (internal quotation marks omitted).

[229] *See* Hunter, *supra* note 11.

Public officials have made it clear they abhor looting, no matter the circumstances surrounding the crime. President Bush set the tone early on, declaring a "zero tolerance" policy for all crimes committed related to the aftermath of the hurricane.[230] He felt there should be "zero tolerance [for] people breaking the law during an emergency such as this, whether it be looting or price gouging."[231] The White House Press Secretary defended President Bush's position, even as it related to those taking necessities, pointing out that supplies were being sent to the region; therefore, looting was not an acceptable way to obtain them.[232] Mississippi's governor echoed the President's stance when she declared that "looting will not be tolerated, period. And the rules of engagement will be as aggressive as the law allows."[233]

Public sentiment seems a bit softer, though the feelings towards looters vary depending on the items taken.[234] Purdue University ethics professor Mark Bernstein reflected the general feeling that looting can be justified when it involves survival items, because in those circumstances, the obligations to care for oneself and one's family take precedence over respect for another's property rights.[235] However, he echoed public opinion when he stated that looting television sets and beer is "completely illegitimate."[236] This seems to be the moral line taken by many in evaluating which instances of looting were acceptable,[237] though it does not quantify the level of looting that would be acceptable, or how to determine what items qualify as "survival items."

A simple debate that seems to encapsulate the argument for and against looting was illustrated during a news broadcast weeks after the hurricane. A viewer chastised the news anchor for condemning those who were looting shoes, and pointed out that their behavior was justified based on the unsanitary water that people had to walk in without knowing whether dangerous glass, nails, metal, other hazardous items might be lurking beneath.[238] In such a circumstance, the viewer felt that regardless of whether it might be wrong to loot, people had to do what was necessary to protect themselves.[239] The anchor responded that it was absurd to think that anyone would need "eleven pairs of Nike Cross Trainers to survive the hurricane."[240] To him, such excess seemed

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230 Roger Cohen, *Prerogative of the Poor or a Sign of the Times?*, INT'L HERALD TRIBUNE (N.Y.), Sept. 10, 2005, at 2.

231 *Id.*

232 Geoffrey Nunberg, *After Katrina, Language is Adrift, Too*, SAN JOSE MERCURY NEWS, Sept. 11, 2005, at 3.

233 Cohen, *supra* note 230 (quoting Mississippi governor Haley Barbour).

234 *See* Mindy Fetterman, *Shopping for Christmas Spirit in New Orleans*, USA TODAY, Dec. 23, 2005, at Money 1B ("When you see people looting from Saks or Brooks Bros., as opposed to breaking in to get food or water from a hotel, it's just incredible.").

235 Cohen, *supra* note 230.

236 *Id.*

237 *See* Nunberg, *supra* note 232 (the term "looters" refers to those "who were taking what they wanted and not simply what they needed").

238 *The Situation* (MSNBC television broadcast Sept. 19, 2005), *available at* 2005 WLNR 14780611.

239 *Id.*

240 *Id.* (statement of Tucker Carlson).

to imply sheer greed and demonstrated that people were taking advantage of the situation.[241]

This exchange illuminates a valid concern regarding those who seemed to loot excessively by taking large quantities of items that appeared unnecessary for one person's survival. As the anchor indicated, when one person is seen taking vast quantities of something, society considers that unjustifiable looting because the act stems from greed, not survival needs.[242]

But consider a group of ten neighbors trying to survive in their small apartment complex, who banded together to help provide for the entire group.[243] They shared supplies they had taken from stores, including food, water, clothes, and shoes.[244] Not only did their "leader," Marty Montgomery, gather supplies[245] for the group, he also kept watch over the neighborhood with his shotgun, assisted local business owners in chasing away looters, and helped board up shops that had been broken into.[246]

But again, according to the law, Mr. Montgomery is just as guilty of looting as the men he chases away from unsecured liquor stores. And if he were seen carting away eleven pairs of Nikes, he would likely be described as one of the "greedy" looters, despite the fact he was taking them to provide for his small community of survivors. Facial "greediness" would probably lead to his arrest should a police officer witness the incident. An ambitious prosecutor might not be willing to drop charges, electing instead to pursue a criminal conviction carrying mandatory prison time. In that case, the proper thing for society to do is to provide a legal defense to Mr. Montgomery, as well as Ms. Laguard, and the others like them, who have valid explanations for their "looting." After all, harsh prison sentences and steep fines hardly seem like appropriate consequences for good Samaritans doing what is necessary for their own survival and the survival of those close to them.

C. A Proposed Statutory Defense of Necessity as Applied to the Crime of Looting

Given the broad discretion police officers and prosecutors have in charging suspected looters,[247] someone like Ms. Laguard could easily find herself facing criminal charges for taking children's clothes and food. The unclear and unlikely application of a jurisprudential necessity defense in such situations[248] probably would offer no viable defense for her, and the harsh sentencing requirements that a looting conviction carries[249] would surely seem unjust. To remedy this possible situation, looting statutes should contain explicit provi-

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[241] *Id.*

[242] *See id.*

[243] James Dao, *French Quarter Becomes an Oasis of Wary Calm for Some Amid the Chaos Nearby*, N.Y. TIMES, Sept. 4, 2005, at 32.

[244] *Id.*

[245] Another New Orleans resident, in defending his actions in taking food and other necessities for himself and his neighbors, said "[c]all it 'gathering supplies' . . . [j]ust don't call it looting." *Id.*

[246] *Id.*

[247] *See supra* section III.C.

[248] *See supra* section IV.A.

[249] *See supra* notes 208-09 and accompanying text.

sions allowing the necessity defense to looters under narrowly drawn circumstances.

A viable statutory necessity defense may provide as follows:

Justifiable Looting: One shall be justified in committing the crime of looting if the accused demonstrates the following:

1. The items looted are for basic survival needs for the duration of the emergency. Basic survival needs include:
   a. Essential food items;
   b. Essential medical supplies;
   c. Essential household items;
   d. Essential clothing; and
   e. Anything reasonably necessary for survival under the circumstances of the emergency.
2. The items looted are taken to support oneself, one's family, and those one has assumed some consensual responsibility for during the emergency.
3. The violator had no reasonable, legal alternatives available to obtain necessary supplies.

A person who commits justifiable looting shall be ordered to compensate the injured party for the items taken during the emergency.

This statutory proposal includes a number of components to ensure that the defense is reserved for only those who are forced to loot out of pure necessity, rather than those who take advantage of an opportunistic situation in the wake of a natural disaster.

First, looting will only be justified for items that are necessary for the *duration of the emergency*. This requirement recognizes that there must be an end to the need to loot once the emergency situation has stabilized and other resources are available. One who takes pharmacy supplies to get medicine for an ailing family member would be justified;[250] however, one who takes thousands of pills from a pharmacy cannot reasonably be said to be stocking up on medical supplies for the duration of the emergency.[251] The durational requirement allows for daily "shopping trips" that some looters engage in to stock up on necessities for the day,[252] but not the stockpiling of pills that Mr. Dantoni and Ms. Lee took part in.[253]

Second, the items looted must be for *basic survival needs*, such as clothing, food, household needs, and medical supplies.[254] While the model statute

[250] *See* McClam, *supra* note 6 ("If the only pharmacy nearby were closed, and it had a drug your mother needed to stay alive, breaking into the pharmacy would be the right thing to do.").

[251] As of Nov. 4, 2005, New Orleans police officers arrested fourteen people for looting pharmacies and recovered over 58,000 pills from the offenders. Officers suspect that most were drug dealers, and some of those arrested were also charged with drug possession with the intent to distribute. As one official stated, "[t]here was just too much for personal consumption." Hunter, *supra* note 11.

[252] *See* Dao, *supra* note 243.

[253] *Supra* notes 11-12 and accompanying text.

[254] The distinction between taking survival supplies instead of frivolous items seems to explain why several New Orleans police officers were cleared of looting charges after being discovered taking underwear, socks, and shoes from a local Wal-Mart. A later investigation revealed that they had received permission from their commanders to obtain the needed items for fellow officers, and, therefore, "[t]hey did not steal anything." However, they were suspended nonetheless because "there were citizens in the store taking nonessential items

includes a list of what would qualify as a basic survival need, it also contains an open-ended subsection to include any item *reasonably necessary* under the circumstances. The law must recognize that it cannot predict one's needs during an emergency, given the wide variety of natural disasters and states of emergency that may arise without warning.[255] To restrict the defense to an exclusive list of food, water, clothing, household supplies, and medical supplies would be to turn a blind eye to unpredictable needs that cannot be anticipated and are situation-dependent. Although the reasonableness standard introduces some uncertainty into the application of the defense, the law must recognize that the necessity defense in general is designed to tolerate violation of the criminal law if the offender does so to achieve a greater good, whatever that may be.[256] Allowing room for flexibility facilitates the underlying purpose of the necessity defense by not excluding those with needs we cannot predict.

Third, while the items looted must be for basic survival needs, they must also be *essential* under the circumstance. This requirement serves another limiting function by ensuring that something that might qualify as a survival need is not subject to justifiable looting if it will serve no purpose given the needs during the emergency. For instance, while clothing might be a basic survival need, taking a football jersey – which qualifies as a clothing item – is probably not an item that would be considered essential to survival under the circumstances.[257] Similarly, questions might arise regarding whether an extravagant item like foie gras would be an essential food item under the circumstance.[258]

Fourth, the defense applies only for items looted to *support oneself and those one has assumed consensual responsibility for* during the emergency. This is a necessary aspect when considering individuals like Terry Hayes and Marty Montgomery who have taken it upon themselves to provide for friends and neighbors suffering alongside them. However, by requiring that the support be consensual, the model statute eliminates the possibility that looters can claim false dependents; looters would have to demonstrate that their claimed dependents did in fact rely on them for assistance. This overall requirement dovetails with the first requirement that the supplies be necessary for the duration of the emergency, since one taking numerous pairs of shoes will clearly not need that many shoes for his own survival during the emergency[259] but may be gathering supplies for his community of neighbors.

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and these officers did nothing to prevent these citizens from looting." Michael Perlstein, *NOPD Clears Cops In Looting Probe*, THE TIMES-PICAYUNE (New Orleans), Mar. 18, 2006, at A1.

[255] For an extensive list of looting incidents taking place in the wake of natural disasters as well as other miscellaneous protests, grievance riots, sporting riots, and unprecipitated public gathering riots, see Scott, *supra* note 128, Appendix I.

[256] *See* LAFAVE, *supra* note 26, § 5.4(a), at 477.

[257] *See* McClam, *supra* note 6 (describing incidents of looting, including people who took "armfuls of football jerseys" from a sporting goods store).

[258] Nunberg, *supra* note 232 ("You were within your rights to walk out of a supermarket with a loaf of Wonder Bread and a jar of Skippy, but woe betide you if your bag turned out to contain Carr's Water Crackers and a tin of foie gras.").

[259] See the debate regarding excessive looting of shoes at *supra* notes 238-41 and accompanying text. *See also* Perlstein, *supra* note 18 (reporting a looting arrest of four individuals caught taking more than $15,000 worth of shoes from a Foot Locker).

Fifth, the statute retains the traditional requirement that the actor did not have legal alternatives available.[260] However, to avoid the creativity courts employ in crafting legal alternatives, the model statute adds the requirement that there were no *reasonable* legal alternatives available. Therefore, a woman who takes food from a deli right across the street from a police station could not avail herself of the defense, because she could have sought assistance from police officers who were just as accessible as the deli.[261] Similarly, one who is hungry and has access to a relief effort would not be justified in taking food from a store.[262] But to deny the defense, a court must first find that the offender could reasonably access such services; the mere existence of sources of aid would not be sufficient for a court to deny the defense to an offender.

Finally, the defense contains a provision for *compensation* to the injured party equal to the value of the items taken. This mirrors the requirement of compensation included in the private necessity defense applicable to tort actions[263] and recognizes that while the offender may have looted because of necessity, there is another injured party who must be made whole again. This concept is exemplified in some New Orleans police officers who found themselves in extraordinary need of ordinary supplies like food, flashlights, and batteries.[264] The officers took these necessary items from various stores, but wrote down the bar codes of the items they took,[265] presumably to account for the items and repay the owners later. This requirement not only preserves the moral code of society and the economic welfare of the unwitting "providers" of such goods, but also serves as a check on the other requirements that items taken be essential, necessary to survival, and in proportion to the need. After all, if a looter knows he will be responsible for repayment, he may consider more carefully the items he truly needs.

Noticeably absent from this proposed statutory necessity defense is the traditional requirement that the offender was faced with imminent harm.[266] By restricting the statutory defense to instances where the items taken were necessary for survival for the duration of the emergency, the statute employs a broader understanding of "imminence." Rather than requiring the defendant to be on the verge of death in order to claim the defense, the statutory remedy allows looters to take action necessary for their continued survival amidst the ruins of their locale. To analogize to the shipwreck cases, we do not want to allow one to act out of necessity to save the boat only after the boat has

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[260] *See supra* section II.A.3.

[261] *See The Abrams Report, supra* note 160.

[262] *See* LAFAVE, *supra* note 26, § 5.4(d), at 485.

[263] RESTATEMENT (SECOND) OF TORTS § 263(2) (1965) ("Where the act is for the benefit of the actor or a third person, he is subject to liability for any harm caused by the exercise of the privilege."). *See also id.* at cmt. e ("Since the actor thus avoids harm in no way threatened by the conduct of the other, he is not entitled to commandeer the use of the other's goods for his own protection, or that of a third person, without making good any loss thus caused.").

[264] Hermann, *supra* note 227.

[265] *Id.*; *see also* Michael Perlstein, *6th District: Uptown Cops Reclaim Tchoupitoulas Wal-Mart and Set Up Shop*, THE TIMES-PICAYUNE (New Orleans), Dec. 18, 2005, at 1 (where New Orleans sergeant instructed officers to take what they needed from a local Wal-Mart, but to "leave a note on the manager's door").

[266] *See supra* section II.A.5.

sunk.[267] Society should allow individuals struggling to cope with natural disasters to access whatever resources are necessary to prevent further harm.

Also absent from the proposed statute is the typical necessity requirement that the actor not be at fault for being in the situation leading to the choice of evils.[268] Such a requirement could potentially eliminate the defense for anyone left behind in the wake of a natural disaster, especially if officials issued a mandatory evacuation order. Experience shows that mandatory evacuation may not be possible[269] or practical.[270] To punish those left behind for their lackluster evacuation plan (or optimism)[271] would simply be inequitable.

The proposed statutory necessity defense to looting charges contains several narrow requirements, ensuring that the defense will apply to individuals like Ms. Laguard and Mr. Montgomery, and not those individuals who loot excessively and out of greed. Additionally, by including the defense within a state's looting statute, the proposed defense would carve out a strict application of the necessity defense to only the crime of looting, thus preserving the traditional elements of the necessity defense as it applies to other crimes. The defense would apply in limited situations, only to looters, and ensures that those who have already suffered through a traumatic event do not suffer more at the hands of the criminal justice system.

V. CONCLUSION

Looting is traditionally a term which conjures up pictures of people thieving unnecessary items during periods of unrest and insecurity.[272] However, after hearing the reports of people "looting" food, water, and necessary survival items during Hurricane Katrina, our perception of looters and legal justifications for their actions must be reexamined.

Currently, it appears that any allowances for looting for survival needs exist at the graces of law enforcement officials.[273] While we can hope that police officers will use their discretion not to arrest "survival" looters and that prosecutors will use their discretion not to pursue criminal charges, those arrested and charged with looting need an explicit defense that is subject to their own control.

After witnessing the wrath and aftermath of Hurricane Katrina, society has seen how looting sometimes serves the larger purpose of survival instead of the traditional purpose of greed. In these cases, looters' actions should be justified, and criminal penalties should be waived for their otherwise criminal behavior.

The proposed statutory necessity defense as applied to looting would give those accused of looting the security of a valid defense and spare them from criminal penalties after surviving a harrowing experience that most of us can

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[267] United States v. Holmes, 26 F. Cas. 360, 364 (C.C. E.D. Pa. 1842) (No. 15,383).

[268] *See supra* section II.A.6.

[269] *See 'God Bless Us,' supra* note 206.

[270] *See* Whoriskey & Coates, *supra* note 206; Treaster & Goodnough, *supra* note 206.

[271] *See* Lee & Whoriskey, *supra* note 206.

[272] *See* Scott, *supra* note 128, Appendix I.

[273] *See supra* section IV.A.

only imagine. Most importantly, the defense would allow Monica Laguard to worry about finding food and clothing for her children; not spending the next three to fifteen years in prison as penance for her "crime."