

Chapter 2

When a Crime is not a Crime

Abstract Necessity would appear to be an unambiguous concept. Yet in criminal law, where it serves as a justification for otherwise criminal acts if they bring high societal benefit, necessity only rarely brings acquittal. Historically there might be a good justification for this, but in evolved societies it would appear that necessity could be given a broader ambit, and thus enable a greater harvesting of societal benefits. The chapter argues that an expanded and well-balanced application of the necessity concept could bring not only more individual justice, but also be a catalyst of societal action to remedy systemic imperfections. The concern that wider application of the necessity defence would lead to anarchy is countered by the argument that post factum judicial control would be the ever-present corrective to over-enthusiastic resort to crime in the face of imagined injustice.

Keywords Necessity • Justification • Exculpation • Legal defence • Anarchy • Sanctity of property • Self-responsibility • Beyond good and evil • Proportionality • Compensation • *Nullum crime sine lege*

Positivism is a bulwark against anarchy. Every time positivism is sacrificed on the altar of naturalism the price is a degree of anarchy, as so tragically illustrated on the international scene a few years ago when a superpower opted for its perception of justice against clear, positive norms of international law.

Naturalism is thus not a viable option for maintaining societal order. Naturalism is the fuel of revolution. This notwithstanding, a question exists whether the principle of proportionality offers a hitherto under-appreciated dimension of positivism, allowing for predictable justice even when otherwise correctly promulgated norms would lead to demonstrable injustice. A permutation of sorts of naturalism.

The analytical starting point is the theory of self-defence, which is a well-tuned example of proportionality. Self-defence operates on the principle that an imminent illegal attack can be repelled by an equally illegal act, as long as the latter is not clearly disproportional to the original attack.

The pure example of proportionality in this respect is, however, the legal concept of necessity. Necessity is accepted as exculpation or justification for an illegal

act undertaken in order to avert loss of a good of higher value than the one sacrificed by the illegal act. Necessity requires an imminent threat and an absence of other, better options to avert the loss.

On the face of it necessity is thus a most powerful tool to implement proportionality in value preservation across all societal domains. The values protected could be both tangible and intangible, could be goods, persons, intellectual property—even honour is alluded to in a related German statute. The illegal acts seeking to avert the damage could equally be of all kinds, could be the sacrifice of material or immaterial goods; or the causing of personal injury or death. The principle could even be a justification of torture.

Not surprisingly, legal systems around the world have not embraced the principle in this all-encompassing fashion, although it would be a strong remedy to the inevitable imperfections of the normative system. In desperate circumstances, the pure principle would possibly make it legal to rob a bank in order to buy medical treatment for a relative who would otherwise die.

The reason that legal systems have been more than reluctant to give necessity its full due is, of course, that the societal endeavour so far has been to get the inherently anarchic Man to follow the rules. Every let-out, self-defence, insanity, has been seen as a necessary evil. Individual judgment of whether a crime would be proportionally justified would further undercut the eminently positivistic alter ego of *nullum crime sine lege*, namely that law and law alone determines crime and punishment. As mentioned, this positivistic credo has already been somewhat undermined by the exculpation sanctioned by self-defence and, more problematically because of its entirely subjective nature, by the insanity defence. Yet, in terms of subjectivity the acceptance of the proportionality of crime in its pure form as invited by the necessity concept obviously introduces an exponential degree of complexity.

Common law and complexity go hand in hand, and lawyers from common law jurisdictions should thus be less aghast than civil law lawyers when considering the proportionality of crime. Common law lawyers might point out that where common law principles still permeate non-criminal law the province of common law in the criminal domain is waning, since most offences now are defined in statutes *inter alia* in order to decrease indeterminism. This distinction is, in itself, a questionable proposition since the indeterminism of common law in civil affairs might cause as much damage as in criminal law. Surely, many businessmen would prefer to go to jail innocent than to lose their businesses because of common law indeterminism in civil cases. But this is not really the point. The point is that the proportionality of crime introduces uncertainty about whether somebody undoubtedly guilty of a crime will actually be condemned. It does not alter *nullum crime sine lege*, and hence does not increase the risk of being criminally condemned. The uncertainty introduced is an uncertainty about whether society will punish the sacrifice of a good, even if the sacrifice leads to an overall societal gain.

From this point of view, it is easy to conclude that the proportionalisation of crime would lead to an even greater degree of anarchy than natural law. Law-abiding citizens may see themselves as robbed of the protection that criminal law normally

affords to both person and property. Society may descend into a primitive state of “everybody for himself” because arbitrariness rules. Arbitrariness only rules, however, if we believe that it is an inherent feature of the proportionality of crime that every actor is the ultimate judge of the legality of his actions. Evidently this is not necessarily so. Courts would, of course, remain the arbiter of legality, and the individual would still have to predict the reaction of the courts when pondering the legality of his or her action. In this there is no difference between the situation in relation to self-defence, or to common law at large. The issue is whether we want a more bespoke system of justice, informed by the principle of proportionality. The price we would pay for a bespoke system is clearly a higher degree of uncertainty; the benefit we would gain is not only better justice, but also a corrective system that would allow blatant injustices to be identified, corrected and ultimately systemically addressed. If proportionality of crime would have been applied in the US, many criminal acts would have taken place in order to overcome the obvious injustice of the lack of comprehensive health care. The ultimate result would have been that the US in this field would have found a path to decency before the ascent of President Obama.

The degree of uncertainty to be paid for greater justice is, in fact, directly correlated to the degree of bespoke justice desired. If it is required that the benefit to be reaped far outweighs the crime, then the degree of uncertainty introduced is small; but if it is required only that the “cost” of the crime should be clearly less than the benefit, then the degree of uncertainty will be much higher.

The recognised principle of extenuating circumstances targets the same topology of reactions as proportionality of crime, but does so ineffectively and incompletely. Where proportionality of crime, and its sister principle self-defence, legitimate an avoidance action, extenuating circumstances signal societal disapproval—the signal being “Don’t do it”! This might be sensible if society indeed wants to have the most minimalist avoidance system, with the resultant maximum of certainty and predictability. However, if society wants more bespoke justice, then the signal cannot be that you should not do something even if it is in the interest of cumulative happiness maximization, but if you do it nevertheless we might forgive you. If it is to work, bespoke justice requires a clear signal, and that signal must be “Do it if the benefit outweighs the societal cost to some established degree”!

2.1 Lord Denning and the Current Limits on the Necessity Defence

The famous English Master of the Rolls, Lord Denning, had a knack for putting things very succinctly even when it demonstrated how wrong he was. This ability he deployed well in a 1971 case, *Buckoke v. Greater London Council*, where in an *obiter dictum* he wrote:

A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds

or more for the lights to turn green? If the driver waits for that time the man's life will be lost.... The circumstances go to mitigation and do not take away his guilt.

The reason a clever judge like Lord Denning can go so wrong is, of course, the fear of anarchy, if one starts to weaken the normativity of criminal offences. So, even if Lord Denning also stated that the driver should be commended, the overriding concern of Lord Denning was systemic integrity, and hence the conclusion that the driver was guilty. Yet, Lord Denning makes it too easy for himself, because he assumes that the driver would still do the right thing. But what if he did not? What if the driver waited for green and let the imperilled man die? In Lord Denning's logic he had the perfect defence: I acted in accordance with the law. By any normal logic the driver would have to be indicted for manslaughter, at least—and that is by no means by virtue of an extreme interpretation of the proportionality of crime principle.

What really disturbed Lord Denning he showed even clearer in another 1971 case, *Southwark London Borough Council v. Williams*, where the question was whether necessity made squatting legal. Lord Denning stated:

If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine they were in need or would invent a need, so as to gain entry. The plea would be an excuse for all sorts of wrongdoing. So the courts must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and good.

Of course, exactly this sort of reasoning could have prevented self-defence as exculpatory, as well, but did not because of the a posteriori judicial control.

Still, one can see where Lord Denning and many other judges are coming from when they hold that:

If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognised, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale.¹

A society striving for compliance will not let illegality be accepted easily.

The upshot is that necessity as a defence is highly constrained. Breaking the window and entering a property in order to put out a fire is OK, driving under the influence in order to escape from a kidnap is OK, and the deeply tragic choice to let one Siamese twin live, when both cannot, is accepted. This is the kind of envelope within which the defence of necessity is currently operating, so, indeed, its application is scrupulously limited.

Still, as societies develop, what might have once been right and appropriate might not be ideal for the future—and societies must at least ask themselves whether their evolution would not allow more responsibility to be allocated to citizens and courts in terms of protecting higher goods even at the cost of permitting otherwise illegal acts in the pursuit of this objective.

¹ *Perka v The Queen* (1984) 2 SCR 232, Courts of Canada.

2.2 The Provenance of Crime as an Absolute

Early society was full of ambiguity in terms of crime. Councils of elders would hear complaints and provide radically bespoke justice. The penal “code” was the perception of justice as crystallized through the elders. Civilisation took a great step forward when the arbitrariness of this system was replaced by *nullum crime sine lege*. No longer would the legality of actions have to be gauged against the societal mood, but societal sanctions could be predicted by measuring them against positive norms.

As mentioned, there could be a fear that proportionality of crime would be a throw-back to these earlier, non-positivist days. This fear overlooks, however, that one part of the problem of that time was that crimes were defined “on-the-go”. In contradistinction, proportionality of crime would not introduce uncertainty regarding *nullum crime sine lege*, it would only introduce uncertainty as to whether a crime has been committed, even *cum lege*. The principle is exculpatory. Furthermore, proportionality is not arbitrary. Proportionality requires good judgment, but it is not an empty norm without guidance, and the fact that good judgment is required for the operation of the proportionality principle does not set it apart from many other principles of criminal law, notably *in dubio pro reo* and the concept of negligence.

One of the reasons why proportionality of crime appears repugnant is that it collides with our intuitive understanding of equality. We believe that individual action and societal sanction must be balanced—that the same action must give rise to the same sanction. Insanity, for example, removes such equality, and hence the consequent exculpation does not threaten our view of equality as being mechanistic and eminently positivistic. Self-defence, again, does not threaten our perception of equality because the original illegal attack cancels out the illegality of the response. Only *necessity* seems to question our notion of the same action having to give rise to the same societal reaction.

Lord Denning was concerned with the risk of anarchy, but as the Southwark London Borough Council case shows, also with the sanctity of property. Where are we going to be if you were allowed to find shelter in my derelict building? Of course, expropriation operates on value proportionality, but then expropriation is controlled by the courts or some other official authority prior to the sacrifice of the demanded good. A priori control is the comfort normally offered to the possessed.

2.3 Parasitic Paternalism

There is an inherent comfort in knowing one’s place. The insecure will flock to fatalism in order to remove the burden of self-responsibility. Absolutism was attractive because a cruel father figure would remove the cross of choice. Democracy has lightened the weight of this cross by making self-responsibility a shared responsibility. Schubert’s rendition of Psalm 23, *The Lord is my Shepherd* stirs, on many levels, the wonderful feeling of being protected, even against our own folly.

Yet, in much religious thought there is not only the idea of the Lord's protection, but also the highly disconcerting threat of damnation unless you exercise your free will in the "right" way. Existentialism puts us at the eternal crossroads of choice, telling us that the individual must plot his own course. And modern society has so much choice and so much mutually exclusive advice that everyone can become his own subculture.

The cross-currents of submission and empowerment are the backdrop against which the concept of proportionality of crime must be judged. This is particularly so because, in a sense, proportionality of crime not only makes it legal to break the law, but also makes it a moral *obligation* to do so in certain circumstances, like that of Lord Denning's fire engine driver. Societies that have spent centuries moulding inherently anarchistic Man into a social animal will inevitably have difficulties with any proposition that loosens central control, especially because so much unintended loss of central control has been experienced as a result of the social experimentation that began in the 1960s. Drive-by shootings are a tragic consequence of "make love, not war". The anti-establishment movement of the 1960 and 1970s revolted against the parasitic paternalism of rigid hierarchical structures—and rightly so—yet replaced these structures with a culture largely premised on irresponsibility rather than self-responsibility. Sadly, it can be argued that the anti-establishment movement tried to move towards the communist ideal state of affairs long before the individual was ready for it, and long before the individual, in Marxist orthodoxy, had been returned to his original state of being inherently good. Ironically, Marxist and conservative thought is not so different in premising societal advancement upon rigid hierarchical structures, and the unfortunate legacy of not moving towards self-responsibility in a structured fashion is that a benevolent society has lost some of its ability to implement commonly agreed measures for individual betterment.

The starting point of societal engineering must, however, be the conditions prevailing at a given time. In terms of the proportionality of crime, the question is whether, in a societal state of irresponsibility, an expansion of this individualistic principle would lead to more self-responsibility or whether, it would become a shortcut to even more irresponsibility. Although, the proportionality of crime is, of course, but a small piece of the societal puzzle, the question is similar to the one which the anti-establishment movement neglected to ask itself: can individuals generally shoulder the burden of self-responsibility?

The answer might depend on an assessment of the state of justice. If the assumption is that bespoke justice is much needed in order to remedy systemic imbalances, the answer might be that the individual *must* shoulder the burden of self-responsibility, and that the societal gain from the exercise of self-responsibility must not necessarily wildly outweigh the societal price associated with allowing an otherwise illegal act. But then "must" is different from "can", and the question was whether the individual *can* shoulder the burden. The answer might then be one straight out of the proportionality book, namely that many might not be able to shoulder the burden, but that this is a price society must pay in order to realize the much more important benefit of bespoke and corrective justice. A very uncomfortable

conclusion indeed! The answer should probably be the opposite, however; namely, that if a society is in dire need of systemic improvement in order to cater for proper justice, then the remedy is not for everybody to reach for their own gun in order to provide for individual justice. If the problem is despotism, the collective means of revolution might be the right medicine, and if the problem is a lack of proper institutions, then obviously the remedy is not to erode the nascent institutions by asking for a much higher degree of sophistication through the medium of proportionality of crime. Do not give someone a trawler if he cannot yet use a fishing rod!

In fact, proportionality of crime presupposes a society already fine-tuned in terms of justice. Only then will the exercise of this principle be an exception, and only then is it responsible policy vis-à-vis individuals who, due to social conditioning, should abhor breaking the law even when it is done for the noblest of reasons! The foundation of the human being as a social animal is, as mentioned, fragile. Still, it is clearly also correct to note that, in many other respects, society now demands much more mature and personal decision-making, even by society's weakest. The Clintonian welfare model of providing for the stricken only if they themselves are ready to contribute to society, places existential decisions in the hands of every individual, irrespective of capability. New sexual mores, and attendant deadly diseases, mean that individuals, even at an early age, might have to grapple with sexual identity and learn to balance pleasure against serious risk. Religious doctrine has become amazingly optional. With such a state of affairs, it is presumably not too much to ask that individuals, in rather rare cases, might have to resist *prima facie* societal instruction in order to realize a higher goal of justice!

Anarchy is not going to be the consequence, even if it is true that proportionality of crime represents a further small step towards the anarchical ideal of a society that operates mostly on individualized social contracts. But then, of course, the anarchical dream is nothing but idealized humanism or, if you wish, completely bespoke justice. The premise, a complete realization of the inherently good in Man, has been far from realized by any societal model, but proportionality of crime allows for finer justice, and for a slightly more discerning, slightly more mature and caring human being. Gradualism as a means of human betterment is not a bad idea!

2.4 Typology

Self-interest has an unfortunate tendency to mess up concepts that are otherwise good. The Marxist road to a self-interest-free society leads into the wilderness, because tyranny of the proletariat is no probative step to rein in self-interest.

Conceptually, proportionality of crime would, no doubt, raise far fewer hackles if only disinterested parties could be players, and self-interest could thus be eliminated. A situation in which an individual commits a crime in order to assist a third party, with the result that a net societal gain is realized, is much easier to accept than a situation in which an individual commits a crime for his own benefit, even if a net societal gain is equally the result.

Yet, it is neither appropriate nor possible to draw a line of legality between the two situations, and hence to declare as legal only the situation involving disinterested parties. It is not possible to draw a line because it would be an invitation to circumvention: getting your cousin to hold the gun, rather than holding it yourself! It is not appropriate to draw a line, because often the friendless will be the one most in need.

It might be advisable, however, to establish a different threshold of net societal gain in the two situations. The person who acts out of self-interest should perhaps be required to show that the crime he committed brought a more obvious net societal benefit than the person who tried to help somebody else. In a sense, this would be an inversion of the situation prevailing with self-defence. The doctrine of self-defence dictates that the force used to repel the illegal attack shall not be clearly disproportionate to the threat, but it is accepted that when one protects oneself one might go a bit overboard. The reason why the doctrine of self-defence is more indulgent of the interests of the attacked person is, of course, that he is subjected to an illegal attack, and hence it is found just that the attacker might suffer a somewhat disproportionate loss, merely because "he asked for it". In proportionality of crime, the victim of the loss off-setting crime is entirely innocent, and a difference in the threshold of net societal gain between self-interested and disinterested actors might be justified by the societal interest in avoiding that self-interest gets the better of the ideal.

However, it is crucial to note that the concern that self-interest might mess up an otherwise good concept has not stopped those defining legal doctrine from accepting self-defence as exculpatory. The person defending himself against an illegal attack is himself under the threat of criminal sanction, if the force used to repel the attack significantly exceeds the reasonability standard. Conceptually, there is no difference between this penal threat and the penal threat that would be associated with crimes committed by self-interested parties, if the crimes bring no clear net gain to society.

A central feature of many implementations of necessity, which by definition involves only innocent parties, is that the beneficiary of the exercise has to compensate the possible loss to those whose goods have been sacrificed. Compensation might not always be feasible in practice, however. This notwithstanding, a poor person must also be able to invoke proportionality of crime. If a wealthy person can break someone's arm in order to save his own life, and then be obliged to pay monetary compensation for the injury and pain suffered by the victim, then so can a poor person, even if he cannot pay the compensation. Here, too, the decisive element is whether there is a net societal gain. In this example, the poor person may benefit at the expense of the victim, yet the only thing that ultimately matters is the net societal gain. Both injurer and victim are innocent at the outset, and whether compensation can be paid is only a question of the eventual luck or misfortune of the victim. For society, the net gain is there, irrespective of the possibility of compensation, and this is true even when the trade-off is ultimately only a financial one.

When a concert pianist who is excusably late for a concert steals a bike in order to still make it, the monetary value of the bike and the sacrifice of societal value

in allowing a theft are potentially dwarfed by the value of having the concert take place. In this situation proportionality of crime would exculpate as long as the concert pianist gave back the bike and paid for the bus ticket of the stranded bike owner. On the other hand, when a millionaire steals a Ferrari in order not to be late for a golf game, proportionality of crime does not exculpate, even if the millionaire pays generous compensation, simply because no net societal gain has been achieved.

Proportionality of crime is wonderfully democratic!

2.5 Beyond Good and Evil

The norm-relativity of Nietzsche might be said to chime well with proportionality of crime. Proportionality of crime might be thought to introduce exactly the kind of normative fluidity that is the central theme of *Beyond Good and Evil*. Outside of metaphysics it is, however, a fundamental mistake to believe that relativity contrasts the absolute. Relativity primarily concerns itself with the relationship between absolutes, and introduces predictive fluidity when one analyzes how two absolutes interact. Relativity does not bring lawlessness, neither in physics nor in law. Gravity and mass may interact, but each nevertheless has inherent properties, as illustrated by the fact that a given mass, when exposed to a given degree of gravity will always “weigh” the same. Relativity is only meaningful if the interacting elements have some inherent properties and, even in quantum mechanics, the problem is not an absence of inherent properties, but the mystery of (the absence of) the relativity.

Proportionality of crime has everything to do with rule-bound relativity and nothing to do with normative fluidity. Proportionality of crime puts a criminal norm, with inherent features, into a relationship with a protectable good, also with its own inherent features. As a result, the validity of the inherent features of the criminal norm is confirmed. To the extent that the exercise of a norm invigorates it, proportionality of crime also does exactly that. And to the extent that the degree of justice in a system determines its strength, proportionality of crime can be a positive contributor. But, as with strong medicine, it should only be given to a strong patient!

“Render unto Caesar the things which are Caesar’s, and unto God the things that are God’s” was the way of Jesus to avoid confronting the tension between morals and law, which in the centuries before and after has been a crucible for endless bloodshed. Natural law was a way of seeking to fuse morals and law, but is, in the final analysis, purely a pretext for the imposition of subjective views. Yet, as counterintuitive as it may sound, in its own limited domain proportionality of crime aligns moral exigencies with law, without succumbing to pure naturalism.



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