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Necessity as a Justification: A Critique of Perka

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In his characteristically trenchant and influential investigation, "A Plea for Excuses",[1] J. L. Austin reminded us that we can and do use different strategies of defending a person when it is claimed that he has done wrong. He drew attention to two distinct tactics:

> One way of going about this (defending a person) is to admit that he, X, did that very thing, A, but to argue that it was a good thing, or the right or sensible thing, or a permissible thing to do . . . To take this line is to *justify* the action, to give reasons for doing it: not to say, to brazen it out, to glory in it or the like.
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> A different way of going about it is to admit that it wasn't a good thing to have done but to argue that it is not quite fair or correct to say badly "X did A" . . . (W)e admit that it was bad but don't accept full or even any responsibility.[2]

While admitting that the concepts of *justification* and *excuse* may meld together on occasion and that other concepts live out a shady existence somewhere between the two, (he offers "extenuation", "palliation" and "mitigation" as examples), Austin nevertheless urges that the basic dichotomy be embraced because it does reflect two separate facets of our moral life.

Austin's exhortation has met with mixed reaction in the legal community. George Fletcher has been a noted proponent of the distinction, using it to exemplify the wider and more basic dichotomy between the concepts of wrongdoing and attribution.[3] Fletcher's contributions are now being considered and relied on by the judiciary. Most recently, in *Perka* v. *The Queen,* [4] the Supreme Court of Canada, through the voice of Dickson J., for the majority and that of Wilson J., in a minority opinion, has adopted some aspects of Fletcher's theory of criminal liability including his classification of criminal defences as justifications or excuses. However, in both majority and minority opinions, the conclusions concerning the status of the defence of

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1. J.L. Austin, "A Plea for Excuses", reprinted as Chapter Eight of *Philosophical Papers* (2nd ed., 1970) at 175.
2. *Id.* at 176.
3. G.P. Fletcher, *Rethinking Criminal Law* (1978).
4. *Perka* v. *The Queen* (1984), 14 C.C.C. (3d) 385. (Henceforth cited as *Perka.*)

necessity, while properly founded on this mode of classifying defences, are also premised on other, less attractive claims, made in the process of unpacking the dichotomy. It is worthwhile to inspect the merits of some of these claims and to pinpoint their shortcomings, for it would be unfortunate if the general conclusion of the majority in *Perka,* that the defence of necessity operates only as an excuse and not as a justification, gained unqualified acceptance. In my opinion, this would lead to the proliferation of argument based on fiction and casuistry. In the pages that follow, I identify the source of the Court's error to lie in the crudeness of the distinction drawn between the two concepts, in its failure to recognize the supple nature of a justification and its willingness to extend the notion of an excuse beyond its natural limits. Before expanding on these criticisms, I shall lay out briefly the central tenets in the majority argument.

Dickson J. introduces his analysis of the defence of necessity by noting that its status as a legally recognized defence has until now been questionable. While pointing out that debate continues on this issue in England, his first move is to settle the question of its availability for Canada. His earlier remarks on the defence in *R.* v. *Morgentaler*[5] were premised on a conditional clause, ("If it does exist . . ."). In *Perka,* Dickson J. removes the condition and diverts his attention to the problem of identifying the proper ambit of the defence.

The ensuing argument can be summed up in the following point form:

i) Necessity could be either a justification or an excuse. The Criminal Law recognizes both.

ii) If a justification, it would be founded on the Utilitarian principle which requires an actor to engage in a "balancing of the benefits of obeying the law as opposed to disobeying it".[6] This is referred to as the "greater good" formulation of the defence.

iii) If an excuse, the wrongfulness of the act would have to be conceded.

iv) Necessity ought not to be regarded as a justification because a) the Legislature has not recognized it as such, and it would be inappropriate for the courts to "second-guess the Legislature and to assess the relative merits of social policies underlying criminal prohibitions"[7]; and b) by conceiving of the defence in this way one would "import an undue subjectivity into the criminal law"[8],

5. *R.* v. *Morgentaler* (1975), 20 C.C.C. (2d) 449.
6. *Perka* at 397.
7. *Id.* at 398.
8. Quoted from *R.* v. *Morgentaler* (1975), 20 C.C.C. (2d) 449 at 497.

because "(n)o system of positive law can recognize any principle which would entitle a person to violate the law because in his view the law conflicted with some higher social value."[9] The objectivity of the Criminal Law would be threatened if courts started recognizing standards of right conduct which contradict and would overwhelm the application of the standards created by the legislature. Implicit in this view is the notion that the assessment of social values is inherently subjective.

N.B. There is an apparent contradiction in Dickson J.'s judgement. Although he argues at length towards the conclusion that the Criminal Law ought not to recognize the defence of necessity as a justification, he nevertheless seems to suggest that the good Samaritan who breaks the speeding laws to rush an accident victim to hospital, is justified in doing so. Since this conclusion is incompatible with his general conclusion, I shall ignore it in the remainder of the paper, although I do so with great hesitation.

v) These difficulties are bypassed when necessity is conceptualized as an excuse. As such, it will operate when the evidence reveals that the accused's conduct, while voluntary in a strict sense, was "remorselessly compelled by normal human instincts".[10]

vi) Conditions must be placed on the availability of the defence of necessity. a) It is restricted to situations of "clear and imminent peril when compliance with the law is demonstrably impossible";[11] b) Since "(n)o rational criminal justice system . . . could excuse the infliction of a greater harm to allow the actor to avert a lesser evil", the defence is restricted to cases where the harm inflicted is proportionally less than the harm that is to be avoided.[12]

Hence, a future advocate who wished to remain constant to the central tenets of the judgement when arguing about the applicability of the defence of necessity will be forced to veer away from stressing the merits of the accused's conduct, at least, as the main thrust of its pitch. He will be prevented from brazening it out, to use Austin's phrase. Instead he will be constrained to characterize the accused's conduct as instinctive, to characterize the instinct as normal, to characterize alternative action as demonstrably impossible, and finally to characterize the conduct as a lesser evil than that averted. My earlier suggestion that such argument will be based on fiction and casuistry, can be substantiated by pointing

9. *Perka* at 397.
10. *Id.* at 398.
11. *Id.* at 400.
12. *Id.*

out the problems with these characterizations. I shall proceed, first, by identifying what I regard to be the central defects, and subsequently, shall attempt to resurrect the notion of necessity as a justification.

The idea of an instinct does much of the work in Dickson J.'s analysis. Reference to it is made first in the context of developing a particular example of conduct which would doubtlessly be covered by the defence of necessity:

> The lost Alpinist who, on the point of freezing to death breaks open an isolated mountain cabin is not literally behaving in an involuntary fashion. He has control over his actions to the extent of being physically capable of abstaining from the act. Realistically, however, his act is not a "voluntary" one. His "choice" to break the law is not true choice at all: it is remorselessly compelled by normal human instincts . . . (T)he act was wrong but it is excused because it was realistically unavoidable.[13]

The use of quotation marks to express the central concepts in this passage should put the reader on notice that we are on shaky ground. Another such index is the use of descriptive terminology to express what is admitted to be a normative judgement. The question, how should this person have acted? is shelved while attention is paid to the more general query, how do people behave? The designation of a reaction as instinctive and the instinct as natural or normal, shortcircuits the inquiry into blame. After all, a person cannot be faulted merely for expressing his humanity.

However, contrary to Dickson J.'s implication, we are not faced with a question to be answered by biologists or behavioural scientists. One distinguishing feature of humankind is the advanced capacity of its members to transcend the instinctive; to repress drives and restrain urges. If we conceive of ourselves as having this capacity we should not be satisfied with a rejoinder to an accusation of fault that the act was instinctive. Likewise "normalcy" by itself does not respond to the normative issue. It is not the operation of normal human instincts, per se, which lead us to acquit the Alpinist. The self-preserving act, instinctive or not, is not only normal but also regarded as worth fostering. Or, more precisely, not worth repressing. It is because we do not expect or demand the Alpinist to exercise "counter-instinctive capacities" that we regard his conduct differently from that of the person who breaks into the cabin as an act of revenge.

The focus on instinctive compulsion can be seen more clearly to be unfortunate if the conduct of an altruist is considered. There is no doubt that Dickson J. considers that an altruist's generous act may fall within the defence of necessity. Where the Alpinist himself is in no danger, but where he breaks into the cabin to get aid for a third party, the judgment

13. *Id.* at 398.

condemns us to recognizing an excuse only if we are satisfied that his conduct *was* remorselessly compelled. If it *was* compelled, then it would be singularly inappropriate to *praise* the Alpinist for saving the party, for praise should be reserved for those who, realistically could have done otherwise. I would contend that it is because we regard an altruistic disposition to be worth developing that we are unwilling to condemn the second Alpinist who violates the legal rule. He need not persuade us that his choice was not "true" for us to accept his claim. Our future advocate will be on stronger ground if he presents the Alpinist, not as a victim of circumstances, but as a person whose actions have expressed a character trait which we positively value. Unless we are to regard the altruist as driven in his acts of benevolence, or unless we are willing to deprive him of the defence, we should reject Dickson J.'s analysis as being the whole story.

Further difficulties are raised by the conditions placed on the availability of the defence. It seems bizarre to stipulate that conduct be both the lesser of two evils and also the only option which is realistically possible. The two limitations on the defence seem to contradict each other. According to the judgement, compliance with the law must be shown to be an unavailable option *and* the less preferable option. How this can be achieved without sleight of hand is hard to fathom.

The need for a limiting device is recognized by Dickson J. because he has in mind an example of Fletcher's, that of a person who is threatened with a broken finger if he does not blow up a city. Dickson J. holds that such a person should not be allowed to take advantage of the defence of necessity, because compliance with the threat, while involuntary in the required sense is not the lesser option. The incapacity of this person and of the Alpinist are regarded as similar; the social worth of this act is different.

Consistent with what was said above, we can question the characterization of the conduct as involuntary. I suggest that we condemn the conduct because we expect the victim of the threat to have developed the capacity to resist such minor threats especially when so much is at stake. The difference between the Alpinist and this individual is that the former reveals himself as a wise decision-maker while the latter reveals himself as an abject coward, who has placed insufficient weight on the vital interests of others. Further, the reliance on the idea of proportionality, that is, the demand that the harm avoided should always be greater than the harm caused, is based on an additional flaw. While we accept that there are some things in this world that are more important than a single human life, or his desire to avoid pain — the continued existence of a whole population being one — we also know

that at some point a person's tolerance to pain can be reached and he will seek alternatives, no matter how much is at stake. The person who is threatened with a broken finger should be contrasted with the individual who is subjected to excruciating pain which will be relieved when he destroys the city. Dickson J.'s approach condemns us to weighing up the value of the city and the pain, only allowing a defence if we determine that the continued existence of the city was of lesser value. The proportionality demand is not sensitive to the fact that people can reach the end of their tether, and that in such cases we may sympathize with their predicament to the extent of holding them blameless. Likewise, the person who is threatened with the broken finger unless he blows up a city should be distinguished from the person who is threatened with the same harm unless he hurts others in a minor way, (say, by slapping them) but not on the ground that instinct compelled the latter choice but not the former. Assuming the threat of harm to be real and immediate, in both cases, we can differentiate between the two on the ground that we see *nothing wrong* with succumbing to the threat in the latter case. Such conduct reveals not weakness of character, but balanced judgment. The victim properly pays regard to his own interests. He need not convince us that he could not help his conduct. Of course, recognizing that nothing wrong was done, gets us tangled in the language of justification. To continue with this line of thought, it is necessary to develop a present conception of justification which differs radically from that adopted in *Perka,* and to argue for its superiority by exposing the weaknesses in Dickson J.'s exposition. To this I now turn my attention.

Dickson J. presents justifications as being Utilitarian in nature, involving a "balancing of the benefits of obeying the law as opposed to disobeying it". However, contrary to this assumption, it is difficult to fit into Utilitiarian theory the notion of a justification as a factor which overwhelms the normal application of a rule. The principal of Utility stipulates that one has a moral duty to maximize good where goodness is identified with human happiness, or the satisfaction of preferences or some other standard. The theory has difficulty dealing with rules, since rule-following can be valued only instrumentally, insofar as it promotes Utility. The Utilitarian is pushed in one of two directions. Either he will be committed to treating rules as absolutes, having determined that following the rule will, in general, or in the long run, promote Utility. This commitment will not permit him to have truck with justifications. Alternatively, he will be committed to inspecting every act which would be in accordance with the rule to decide if *it,* as a particular act would promote Utility. In this case, if he is deciding each case on its merits, it can scarcely be said that he is following the rule. Both these alternatives

can be contrasted with the usual approach to justifications adopted in Criminal Law theory. In most cases, justifications are thought to be limited in application to extraordinary cases, and prohibitory rules are applied without concern being given to the utility of doing so in the particular case. So, it is unacceptable to dismiss justifications as the crude tools of Utilitarian theory. It is, of course, notoriously difficult to give an adequate explanation of their role. However, this I shall try to do by building upon examples which are, I hope, reasonably uncontroversial.

A preliminary point that should be made is that it is not merely consequences which justify conduct that violates a prohibitory norm. One need not demonstrate that one actually succeeded in promoting consequences that were more valuable in order to rely on a justification. One can separate conduct from consequences, focus solely on the former, and claim that, in the circumstances, the attempt to bring about the consequences was justified. However, good intentions alone will not serve to justify the violation of a norm. In order for an attempt to amount to a justification, not only must the end be worthy of pursuit, it also must be appropriate in the circumstances. Unsuccessful attempts are only accepted as justifications if success was in the cards. We will only admit a justification if we see the beneficial or permitted consequences as, *ex ante*, a realistic possibility.

One can hammer another nail in the Utilitarian's coffin by noting that in our moral life, we *permit* individuals to engage in action when they will not promote the greatest happiness of the greatest number. The language of rights, in the sense of permissions is the language that is appropriate in these cases. The language of duty is avoided because rights-talk (he has the right to kill him) makes the point that it is the actor's independence to choose what to do that is being respected. Respect for a person's independence is inconsistent with Utilitarianism. As Samuel Scheffler has recently noted,[14] Utilitarianism is not responsive to such deeply imbedded, non-consequentialist intuitions as the value of personal independence. In particular, Utilitarianism demands that a person is required to devote attention to his own projects "*in strict proportion* to the value from an impersonal standpoint of their doing so".[15] Such a demand does not jibe with the intuition that individuals should within certain limits be allowed to devote "energy and attention to their projects and commitments even if their doing so would not on balance promote the best outcomes overall".[16] Transferring this analysis into a Criminal Law context, the claim that one was justified in

14. Samuel Scheffler, *The Rejection of Consequentialism* (1982).
15. *Id.* at 9.
16. *Id.* at 17.

contravening a legal rule would have nothing to do with the promotion of greater good nor the avoidance of the greater evil. Instead, it would amount to the claim that in the circumstances, respect for a person's independence or autonomy requires that one allow him to choose whether or not he is going to violate the rule. Scheffler's point is that respecting a persons's integrity involves regarding him as a being who may place more weight on his own projects than they objectively merit. The question that a court of law might have to address is whether demanding adherence to the legal rule would require an agent to devote more attention to and place more value on the interests of others than is proper for someone who has his own life to lead.

One can find within the Criminal Law recognition and acceptance of this idea of a right to place more weight on one's own interests than those of others. The defence of self-defence provides a good example. It is problematic and ultimately unacceptable to analyse the defence in terms of the accused doing the right thing, or bringing about the better result when he kills an aggressor. This would require one to place less value on the life of the aggressor. While one may be willing to make such a judgement when the attack is murderous, it is less convincing to explain the defence in this way when the aggressor is an "innocent", such as a child or an insane person. Fletcher has delineated an alternative theory of self-defence, which does not depend on characterizing the life of the accused as more valuable than that of the aggressor. Instead, he poses the autonomy of the accused as the value to be protected.

> If a person's autonomy is compromised by the intrusion then the defender has the right to expel the intruder and restore the integrity of his domain.[17]

Fletcher couches his idea in right-talk, endorsing the idea that the defender has the option of exercising the right, and engaging in the defensive conduct. Neither is the conduct mandatory, nor is it necessarily the right thing to do. The law has granted the actor the discretion to choose how to act, thereby recognizing him as the ultimate guardian of his own independence.

This analysis can be transposed to the defence of necessity. However, in doing so, one confronts some difficult issues. Our intuitions are not so clear in that context. While we have little difficulty in recognizing the right of a person to neutralize the attack of an aggressor, even that of a child or insane person, situations of necessity are more difficult to resolve because the ultimate victim is not the aggressor.

The following variation on a familiar problem developed by Philippa

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17. Fletcher, *supra,* note 3 at 860.

Foot[18] and Judith Jarvis Thomson[19] brings the issue into clear light. Suppose you are working on a trolley track. A trolley careers down the track out of control, its braking system having failed. The conditions of work are such that you are unable to remove yourself from the path of the runaway trolley. However, you are in control of a switch which, if pressed, will divert the trolley onto a spur of the track before it reaches you. A fellow worker is located on the spur, himself in a position where he will be unable to avoid the trolley. Do you have the right to divert the trolley?

Again I pause to emphasize that the issue focuses on the existence of a right, rather than on the existence of a duty, or the question what is the right thing to do. In removing the notion of a justification from the context of questions of right and wrong I am stressing the point that it belongs equally in the context of rights, authorizations and permissions.

I believe that it is proper to recognize a right to divert the trolley in the hypothetical example, on the ground that the worker's protection of his autonomy may be given more weight by him than it may merit objectively. The argument is similar to that relied on by the person who kills the innocent aggressor. Permitting such conduct is consistent with Scheffler's point that one can identify within our own ethical system limited prerogatives to be selfish. The delineation of the limits will, of course, be a difficult task; should the right be recognized when five workers will be killed by the trolley? The responsibility for engaging in such delineations should not be shirked by courts and theorists. A large step will have been taken when the question is framed in terms of how much selfishness is our society willing to tolerate?, rather than asking what the right thing to do was, or what acts would normal instincts have compelled.

One issue to which criminal lawyers will be particularly sensitive will be whether recognition of a right in the above hypothetical will commit us to recognition of a defence in such cases as *R.* v. *Dudley and Stephens,*[20] where shipwrecked sailors killed and ate an unconsenting cabin boy. I believe it does not. However, in order to address fully the differences between the two, I would like to advert to another type of situation where limited prerogatives should be recognized, namely, where the conduct is other-regarding or altruistic. Again the trolley example is helpful. Suppose that the choice to be made by the person at the switch is not between his own life and that of another, but rather that it is

18. See P. Foot, "The Problem of Abortion and the Doctrine of Double Effect" in *Virtues and Vices and Other Essays* (1978).
19. See J.J. Thomson, *The Trolley Problem* (1985), 94 Yale L.J. 1395.
20. *R.* v. *Dudley and Stephen* (1884), 14 Q.B.D. 273.

between the lives of five workmen on the track or one workman on the spur. Does the person at the switch have the right to divert the trolley away from the five towards the one? This is the very problem that Thomson untangles in her latest article. From the Criminal Law point of view, inaction would not be criminal but the act of diversion, involving as it does an act rather than an omission would *prima facie* fall under homicide provisions.

Once again, I believe that a widely shared moral intuition would suggest that the actor should be permitted to intervene. In this instance the reason for recognizing the right to intervene, (to "take charge" as Thomson puts it) does relate to the consequence of one person dying being adjudged from an impersonal point of view to be a lesser evil than five dying, other things being equal. But this does not commit us to grounding justifications on Utilitarian premises. Thomson's article is an attempt to explain why this is so. She distinguishes the case of the bystander at the switch from one of a doctor who sacrifices a healthy person in order to obtain five of his organs each of which is needed by one of five other people. Utilitarians cannot distinguish between the two cases. In each, the life of one is being sacrificed for the lives of five. Compare these situations with a scenario based on *Dudley and Stephens,* where an observer in another lifeboat decides to shoot the cabin boy in order to allow the others to survive by eating the boy, although he himself will not benefit. In this case, as in the actual case of *Dudley and Stephens,* there would be much more hesitancy in recognizing a justification than in the case of the bystander at the switch. Thomson suggests that her two examples can be distinguished on two grounds. First, the bystander does not create a new threat. "He makes be a threat to fewer what is already a threat to more . . . We might speak here of a "distributive exemption" which permits arranging that something that will do harm anyway shall be better distributed than it otherwise would."[21] While the bystander has not, so to speak, brought evil into the world, but has merely channeled it, the doctor has introduced evil by creating a new threat to the healthy patient. I believe that Thomson has correctly identified an important feature of our ethical thought. While it may be objected by the sceptic that the ground for distinguishing between a "creative" act and a "channeling" act is somewhat arbitrary, I think it is nevertheless recognizable as a commonly used device to interpret action, one which informs our practice and intuitions. Second, the means selected by the bystander is not *in itself* an infringement of a person's right, while the doctor can only save his patients by an act which itself interferes with the

21. Thomson, *supra,* note 18 at 1408.

rights of the victim. Similarly, with *Dudley and Stephens* and the hypothetical based on it. In the case of the bystander we separate the conduct from the result and while we may have to admit that the victim ultimately suffered a right infringement, the act of diverting the train, *in itself* did not amount to this.[22]

These two points may be the reflection of each other, relying as they both do on the interpretive constructs on which our ethical thought is based.[23] That one does not instigate a new threat in the world but merely channel it suggests that the act of channeling is not in itself an infringement of a right. A new threat to an individual as opposed to the diversion of an existing threat may by definition entail the infringement of that individual's rights.

Until this point, I have attempted to show that Dickson J.'s analysis of justifications as Utilitarian devices is unsatisfactory. I have done so by drawing attention to three situations where justifications play a role in our ethical thought that Utilitarians cannot handle. — a) where purposes rather than results justify; b) where permisible self interest justifies, and c) where redistribution of harm justifies. I also think it is important to emphasize a fourth situation, where one grounds the justification on the premise that the right that is infringed is unimportant in comparison with the end that is achieved. Again, Thomson offers useful examples.[24] The intuition that the bystander be permitted to divert the train is unchanged by the fact that he has to trespass in order to get to the switch. It would also be unchanged if he had to steal a device to operate the switch. But it may be changed if he gave the victim a guarantee that he was in no danger, and it was only because of that guarantee that the victim had ventured on to the tracks. The case of the Alpinist is relevant in this context. The Alpinist, whether in charge of boy scouts or on his own sacrifies rights for more important concerns. Thomson reminds us that some rights are "minor, trivial, non-stringent" and concludes that "We shall therefore have to recognize that what is at work here is a matter of degree".[25] It is important to remember that even Dworkin, who was the first to characterize rights as trumps over utility,[26] never promoted a theory of rights at all costs, but recognized that some policy reasons could overwhelm rights. His point was that *not just any* policy reasons could do so. It is the conclusion that some difficult matters of degree are at issue, which Dickson J. wants to bypass. But his two reasons for refusing to

22. *Id.* at 1409-1410.
23. See, generally, M. Kelman, *Interpretive Construction in the Substantive Criminal Law* (1981), 33 Stan. L.R. 591.
24. *Id.* at 1411-1413.
25. *Id.* at 1411.
26. R. Dworkin, *Taking Rights Seriously* (1977).

recognize necessity as a justification are unsatisfactory. His first is that undue subjectivity would be imported into the law. His second that it is beyond the limits of judicial decision-making to assess the policies behind the Criminal Law. I shall now examine each of these in turn.

I. *The Importation of Undue Subjectivity.*

Dickson J. is reluctant to recognize and develop common law justifications on the ground that he believes that this would entail that it "would entitle a person to violate the law because on his view the law conflicted with some higher social value".[27] It is difficult to figure out why he believes in this entailment. Nowhere else in the Criminal Law do we acquit an individual just because he believes that he was not responsible for what he did, or because he believes that what he did was not illegal. The beliefs of the accused in this regard are generally held to be irrelevant, and rightly so.[28] It is not the beliefs of the accused but the beliefs of the judiciary on the justifiability of the conduct that matter. The idea that we should rely on just anybody's ideas about whether conduct is considered justifiable should not be given the time of day.

Perhaps the thrust of Dickson J.'s concern about undue subjectivity is that the judiciary will be unable to formulate standards by which to assess justifiability, to determine that theft, for example, was justifiable because so much was at stake. Judges will introduce their own standards, which may differ greatly from those of their colleagues on the question how much has to be at stake before the theft can be justified. The conclusion seems to be that because differences in degree are so slippery, courts should not even try to distinguish between the person who steals a fire extinguisher because stealing gives him pleasure, and the person who steals it in order to put out a blaze. But what is forgotten is that if we have to concoct a defence for the latter, on the ground that "normal instincts compelled" his conduct, the judiciary is going to reach widely disparate conclusions about whether the conduct was instinctive, whether it was normal, etc. It is less likely that there will be giant gulfs in opinion if the question is framed in a non-fictional albeit evaluative way. In other areas of law, the courts have coped with general principles without quavering about disparaties in application. The principle, no person shall profit from his own wrong, is a good example in this regard. The principle itself does not contain criteria about what sort of profits it applies to, or what types of wrong. These are questions which courts have to work out and about which there can be great disagreement. The possibility of

27. *Perka* at 397.
28. See, for example, *Roberge* v. *R.* (1983), 33 C.R. 289 at 302.

disagreement is not regarded as a bar to application of the principle, neither should it be with justifications.

At this point it is worthwhile to turn to the minority opinion of Wilson J. in *Perka,* who seems to share this concern about the scope for disagreement. While less extreme than that of Dickson J., Wilson J.'s analysis is qualified by questionable limitations. She points to the fact that on occasion the law places positive duties on a person and that these positive duties may conflict with other negative duties. For example, a parent may have a duty to rescue her child yet the only means of doing so may be to steal a life jacket. In such situations where legal duties conflict, *and only is such situations,* would Wilson J. allow the defence of necessity to operate as a justification. Where the drowning person was a stranger, rather than one's own child, the theft would not be justified. Wilson J. states, "Such an act of rescue may be one deserving of no punishment and indeed deserving of praise, but it is nevertheless a culpable act if the law is violated in the process of rescue".[29]

In essence, the point that is being made is that only one type of reason ought to be regarded as justificatory, namely, that the act was required to prevent the violation of another legal rule. Implicit in this conclusion is a differentiation between moral justifiations and legal justifications. To justify morally, one may rely on a well-equipped arsenal of strategies; but to justify legally one would have to rely on only one type of claim. Behind this distinction may lie the conviction that one ought not to look beyond the perimeters of legal texts to find justificatory reasons; that a divide exists between law and life which ought to be respected. The view that the former should be the sole source of justifications can be criticized on three grounds.

First, it would commit us to a mode of expression that is unfamiliar if not bizarre. Should a person push another away from the path of a runaway trolley, without having gained consent he would not be able to "glory in his act" in a court of law. It seems outlandish to conclude, as Wilson J. does, that a praiseworthy act may nevertheless be culpable.

Second, the notion that only the law can provide justificatory reasons misconceives what the law maker has done. Take the example of rescuing a stranger. The absence of a prohibition against ignoring strangers in distress may be accounted for by reference to the view that the state ought not to impose on individuals burdens which may unduly prevent them from following their own projects. The absence of a provision demanding rescue does not entail the conclusion that "the law" does not recognize the value of the act of rescue. It may entail only the narrower view that

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29. *Perka* at 419.

"the law" recognizes ulterior reasons for not demanding it. Silence on the issue of what conduct should be enforced need not relate to the issue of what can count as a justification.

Third, the separation of moral and legal justification depends on the notion that the law can, by itself, provide criteria by which to determine whether an act is justified. But this it cannot do. Legal texts can never reveal which of two duties should be fulfilled when they conflict, which of the two is more important. The determination of importance will be based on a number of "extra-legal" factors, of a moral nature — how serious the violation, how severe the harm suffered, how serious the potential ramifications. Wilson J. seems to suggest that the proportionality judgement is one that can be made without looking beyond the text of the law. If this is not the case, and if one must introduce moral criteria to determine what one has reason to do, then it is hard to fathom why one ought not to look beyond the law at an earlier stage in the search for justifying reasons.

II. *Judicial Decision-making and Its Limits*

The point that judges ought to steer clear of importing common law justifications into the law because this would involve meddling with the legislature's business is related to the one just discussed, especially if the latter point is grounded on the idea that the judiciary is ill-equipped to formulate standards by which to assess justifiability. The connection is that if the judiciary is ill-equipped, another branch of government should be granted the authority to engage in the task. Dickson J.'s point is that it is politically inappropriate for a court to make an evaluation of the purposes embedded in legislation with a view of balancing these against moral concerns which do not have legislative recognition.

What Dickson J. fails to recognize is that the practice of interpretation *demands* that judges engage in just such activity *whenever* they are confronted with a legal text. The activities of each participant in the legal process are guided by his conception of the background of common understanding and conventions against which he acts, and the assumptions which, in the circumstances, are reasonable to make. Again, the development of the principle no person shall profit from his own wrong provides a clear example of judicial interpretation of legal texts *in the light of* principles that are viewed as a basic aspect of the morality into which the legal rules fit.

The co-operative relationship between court and legislature is not, on this count, different from that between master and servant, where for example, the former has told the latter not to disturb him but the latter has discovered that the house is on fire. The implementation of normative

directions will always involve some sort of second guessing when unusual situations arise.

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It is my contention that Dickson J.'s "institutional" arguments against recognizing common law justifications are unpersuasive. I have tried to show that non-utilitarian justifiations pervade our ethical thinking. If there is to be a disjunction between ethical thought and criminal law theory, as Dickson J. wants there to be, it must rest upon institutional features peculiar to the latter — for example, that it is inappropriate for an organ of state, because of its limited authority, or some such reason, to follow the prescriptions of ordinary life. The Supreme Court has failed to provide adequate grounds for the distinction. By separating the criminal law from the structures of moral thought, the Court has risked incoherence for no good reason.