

## Choice of Evils: In Search of a Viable Rationale

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**Abstract** The defense of necessity, also known as the “choice of evils,” reflects popular moral intuitions and common sense: sometimes, breaking the rules is the right—indeed, the only—thing to do in order to avoid a greater evil. Citing a classic example, mountain climbers may break into a cabin to wait out a deadly snow storm and appropriate the owner’s provisions because their property violations are a lesser evil compared to the loss of life. At the same time, this defense contradicts the fundamental principles of criminal responsibility in that it authorizes violation of rights of innocent bystanders. By allowing the mountain climbers to override the property rights of the cabin owner, the defense effectively forbids the cabin owner to use force in response—a different rule would perpetuate violence. This outcome is at odds with the basic criminal law doctrines. There is no general duty to rescue in Anglo-American law. Yet, by forbidding the cabin owner to use force, the defense of necessity essentially imposes on him the duty to forego his interests in favor of those of the mountain climbers. The paper explores the origins and boundaries of the defense of necessity. It argues that the existing public and private theories of necessity are unsatisfactory and concludes that a viable theory of necessity should be able to explain *why* it is sometimes permissible to override individual rights of citizens without their consent or fault.

**Keywords** Necessity · Choice-of-evils · Justification · Harm · Wrongdoing · Duty-to-rescue

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