

**“Necessity Knows No Law”**  
**On Extreme Cases and Uncodifiable Necessities**

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*I Introduction*

In a recent decision, the German Federal Constitutional Court declared a prominent provision of a new German anti-terrorism law unconstitutional and void. The so called Air-transport Security Act (& 14) enacted in the Bundestag in June 2004 authorized the Minister of Defense to order that a passenger airplane may be shot down, if it could be assumed that the aircraft would be used against the life of others and if downing it is the only means of preventing this present danger. This section was explicitly drafted with the attacks of 9/11 in mind.<sup>1</sup> The German Constitutional Court declared the provision unconstitutional on the grounds that it violates the constitutional right to dignity (Article 1 of the German Constitution) and the constitutional right to life (Article 2 of the German Constitution). In particular the Court emphasized that the provision treated the innocent passengers in such a plane as objects without providing them legal protection.<sup>2</sup> Indeed something seems amiss in permitting the intentional execution of innocent civilians. Yet the idea that no action ought to be taken to protect the lives of others –most likely, many more in number – seems equally disturbing.

This is but one of a large class of policies and measures that have been vigorously debated anew in the wake of the attacks of September 11<sup>th</sup> 2001. Does the threat of mass suffering and death justify torture, preemptive strikes, invading privacy, rendition and other violations of fundamental rights? How are we to adjudicate such questions from a theoretical moral perspective? Specifically, does the recognition of the imminence of such threats and the urgency of averting them, even at significant moral costs, entail that our reasoning in such issues ought to be based solely on questions of consequence? Or

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<sup>1</sup> For a useful summary of the case, see Oliver Lespius, “Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act 7”, *German Law Journal* No. 9 (1 September 2006).

<sup>2</sup> Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 59 Neue Juristische Wochenschrift (NJW) 751 (2006).

can the conception of fundamental rights and liberties as exceeding the calculations of consequence be retained in light of such convictions?

These doubts are new expressions of old disputes relating to a familiar problem. The problem, although probably of a more general scope, is often treated in relation to a family of legal and moral phenomena we shall call *extreme cases*. These are cases characterized by radically irregular circumstances, typically involving catastrophic consequences and requiring (or at least seeming to require) severe measures. The leading examples all involve situations in which actions that are normally regarded illegal and immoral are necessary to prevent great harm, usually the death of many people. Extreme cases evoke a familiar dilemma. On the one hand, there are strong deontological sentiments – sentiments which suggest that we ought not to torture or kill innocent individuals even if this is likely to save lives.<sup>3</sup> The prohibitions on killing and torturing are grounded, in some sense, in the sacredness of life (or life's intrinsic value) which entails that the life of a person ought not to be sacrificed even for the sake of saving the lives of others. On the other hand, there is an equally powerful conviction that when the threat is grave, when consequences might be catastrophic, lives may have to be sacrificed and rights may have to be infringed upon. This intuition is often stimulated by invoking extreme scenarios involving dirty bombs in urban centers and uncooperative terrorist prisoners. The case of the rogue plane brought before the German court raises the same dilemma. Killing innocent civilians by the state seems morally and constitutionally intolerable. Yet, at the same time, allowing a plane to crash into a densely populated area is clearly an unacceptable alternative.

Two positions reject the dilemma thereby indicating the outer limits of the debate. The first rejects the deontological intuition and claims that consequences and consequences alone are to determine what ought to be done in all cases, extreme cases included. The other extreme is occupied by the position often called absolutist deontology. This position rejects the intuition that deontological rules must sometimes be violated to prevent catastrophic outcomes. According to the absolutist deontologist one is never allowed to kill the innocent or to violate rights *come what may*. Neither of these

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<sup>3</sup> The deontological intuition can also be phrased in terms of rights – agents ought not violate rights even if doing so is likely to lead to more rights being respected. See, e.g., Nozick *Anarchy, State and Utopia*, Harvard, 1974. For a general analysis of this feature of rights, see Alon Harel, ???

positions recognizes the dilemma of extreme cases for the genuine dilemma that it is. In this article we propose to take the dilemma of extreme cases seriously, giving due weight to each of its horns. The article is an exercise in philosophical reflection on one of the options within the theoretical space that lies between the two denying positions we have just sketched. Our aim is to address the dilemma of extreme cases not by denying it, but rather by articulating a position that recognizes its moral force while providing the tools for its practical resolution.

After presenting (in section II) the dilemma and the two prominent deontological positions with regard to it, we present a third alternative and its advantages. Our proposal turns on the idea that, correctly understood, what is most pernicious for deontology is not merely the violation of moral rules as such, but their *principled* or *rule-governed* violation. After we unearth some traces of this distinction in the history of political thought (in section III), we analyze it and explicate a conception of deontology to which it gives rise (section IV). Deontology, under this interpretation, is based on the idea not of absolute (or even particularly powerful moral rules), but rather of unconditional duties and prohibitions. Maintaining a normative distinction between acts performed under the direction of principles or rules and unprincipled, context-generated acts, acts performed under the force not of principles, but of circumstances, allows for accommodating the necessity of infringements in extreme cases within a deontological framework. The actions required in extreme cases are, we argue, permissible only when necessary. Moreover, their permissibility is grounded in the necessity of the circumstances. Thus they ought to be performed strictly as acts of necessity, not as acts governed by principles. We apply these ideas to the case of rogue planes and the German Court's decision (in section V) and draw some further consequences and conclusions (section VI).

## *II Deontology: Categorical and Absolute Impermissibility*

What shall we do when the only way to prevent calamity involves doing what is otherwise clearly and quintessentially wrong? Are we permitted, or even required, for example, to shoot down a civilian plane threatening to crash into an urban center? Within a deontological framework, the answer, it seems, is simple. If the prohibition on killing

the innocent is a deontological prohibition, it must always be wrong to shoot down a plane containing innocent civilians. In its ruling on legislation authorizing such action, the German constitutional court seems to express this thought:

Under the aviation Security Act they [the claimants' rights] become the mere objects of governmental actions. The value of their lives is judged on a quantity basis and according to how long they can still be expected to live with regards to the circumstances of the particular case....

The State may not protect a majority of its citizens by intentionally killing a minority, in this case the flight crew and the passengers on the airplane. Balancing life against life on the basis of how many people might possibly die on the one side and how many on the other, is inadmissible. The state may not kill human beings based on the assumption that it will save more lives than it will destroy by killing these people.<sup>4</sup>

One natural way of reading this paragraph is as affirming an absolute deontological prohibition forbidding the downing of a plane under any circumstances.

Is it, however, impermissible to down a plane under circumstances in which it threatens the lives of innocent victims? Similar questions have of course been debated by contemporary moral theorists, particularly in the context of the debates concerning deontology.<sup>5</sup> It seems that consequentialists would be more favorably disposed towards the view that it is permissible to take such action under extreme circumstances while deontologists may be committed to the position that it is never permissible to do so. Yet, this initial impression is too simplistic; most committed deontologists would oppose the view that it is *never* permissible to take actions of this sort.

Even orthodox advocates of deontological prohibitions concede that certain significant risks warrant the infringement of rights including the right to life.<sup>6</sup> But if the life of one person cannot be sacrificed for the sake of saving one other person or two or even a hundred, why can it be sacrificed to save a thousand, or ten thousand or a million?

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<sup>4</sup> See *supra* note 1, section 15.

<sup>5</sup> See, e.g., Samuel Scheffler, Introduction, *Consequentialism and Its Critics* (ed. Samuel Scheffler); Shelly Kagan, *Normative Ethics ???*

<sup>6</sup> The most well known example of a deontologist who makes this concession to consequences is Robert Nozick in his famous footnote. See Robert Nozick, *Anarchy, State and Utopia*, p. 30 n. \* (1974).

There seems to be a persistent tension between deontological commitments and the values underlying these commitments on the one hand and the willingness to compromise the absolute force of these commitments on the other.

A leading strategy for dealing with the dilemma of extreme cases is what has come to be known as *threshold deontology*. Most contemporary deontologists agree that deontological injunctions can be overridden under certain circumstances. Even if one concedes that shooting down a plane carrying 50 passengers in order to save 50 victims is not justified, the numbers can surely be fiddled with until an acceptable ratio is achieved. What about shooting down 50 passengers to save a 1000? What about a 10,000? And what about shooting down 2 to save 50? The issue surely must not hinge on playing with the numbers. As a matter of principle, there must be some ratio of victims to potential victims that would indeed justify the downing of the plane.<sup>7</sup> This is not merely an abstract observation of moral philosophers. The duties to protect are an established component of many constitutions, including the German Federal Constitution. The duty to protect includes a duty to protect the potential victims of a terrorist attack and such a duty, enshrined in the Constitution, may require, under certain circumstances, infringing some people's rights.<sup>8</sup>

The difficulties faced by threshold deontology are familiar and need not be rehearsed here. Let us just note the ad hoc nature of the very idea of a threshold within a deontological framework. If an injunction is deontological, namely it is not determined on the basis of consequences, how can the consequences reverse the injunction, be their severity as it may? Allowing consequences to determine the case seems inconsistent with deontology's underlying rationale – not treating individuals as means to ends and respecting human dignity. If consequences do not determine what is to be done, how can

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<sup>7</sup> The literature concerning threshold deontology is vast. For a useful review of the literature, see Eyal Zamir & Barak Medina, *Incorporating Moral Constraints into Economic Analysis* (forthcoming in *California L. Rev.*).

<sup>8</sup> It is perhaps worth emphasizing that the Court's assertion that by shooting the plane the crew and the passengers are used as a means for the saving of other lives is, at least under the view of many theorists, flawed. The death of the passengers is a *foreseen* consequence of shooting the plane; their death is not a means to save the potential victims of the terrorist activity. In fact, their death is not even necessary to achieve the desired end since even if none of the innocent passengers were present in the plane, shooting the plane would have achieved the same end. Some (although not all deontologists) believe that it is permissible in such cases to engage in consequentialist reasoning (in contrast to cases in which the death of some is strictly necessary to save a greater number of lives). See, e.g., ???

adding more of them change what ought to be done? But if setting a threshold to deontological considerations is implausible, how else can deontology accommodate legitimate violations?

### *III Weapons of Defense: Historical & Theoretical Observations*

In the history of political thought a different tradition of dealing with the problem of extreme cases can be discerned. This train of thought is usually linked with a deontological morality that subscribes neither to absolutist nor to threshold deontology. Instead, the leading idea within this tradition is that in extreme circumstances rules may be inept to guide action. Coupled with a fundamental distinction between rule-governed and circumstance-necessitated action, this deontological conception can accommodate necessary violations of moral constraints while preserving their deontological nature.

The conception according to which extreme cases are essentially rule-transcendent is not foreign to jurisprudence. In the Jewish Talmudic tradition, for example, there is a class of acts that are conceived as necessary violations of the law. A notable example relates to the very act of writing of the oral corpus of Jewish law, which was explicitly strictly prohibited. In face of imminent threat that the corpus might be forgotten, writing it became an urgent necessity. To justify doing what is strictly prohibited, the Talmud reads a verse from the Psalms as saying: “When it is time to act for the Lord, you violate the law”, and concludes “it is preferable that a letter of the law be uprooted than that the whole law should be forgotten.”<sup>9</sup>

The Talmudic rendering of the Psalms verse is explicitly non-literal. The verse: “Time to act for the Lord, they have broken your law” (*Psalms*, 119, 126), clearly calls upon those faithful to God to act in the face of violations of his laws. The Talmud, however, reverses the order of reasoning in the verse – instead of the violations necessitating action, the necessity of action requires violation. As the great medieval interpreter of the Talmud, Shlomo Yitzhaki, had put it “there are times you must violate the words of the law to do for God”.<sup>10</sup> This is the Talmud’s way of anchoring the notion of necessary violations in scripture.

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<sup>9</sup> Babylonian Talmud, Tractate Temurah, 14b.

<sup>10</sup> Babylonian Talmud, Tractate B’rachot 54a.

It is notable that the Talmud characterizes the required act as a violation of the law, albeit a necessary violation. Unlike numerous other instances, where discrepancies between what the law seems to say and what appears to be circumstantially required are explained simply as cases not falling under the jurisdiction of the law or as cases which require an emendation of a law, in the cases where this principle is employed, the actions performed are described as *violations*. They are contrary to existing norms and are not justified by some competing norm or principle other than the recognition of the necessity of violations in extreme circumstances. So the point is that there can be breakings of the law that are necessary to uphold the spirit of the law or its underlying purpose. In such cases a violation is called for, rather than conformity with the law – a violation which cannot be incorporated into the legal corpus. Such an act, it follows, is – given the circumstances – the “right thing to do”; and yet it is not governed by law, and hence cannot be incorporated into the legal corpus.

In the *Summa Theologica* Aquinas addresses the case of necessity by focusing on the limits of legislation. Aquinas asserts that:

The lawgiver cannot have in view every single case, he shapes the law according to what happens more frequently by directing his attention to the common good. Wherefore, if a case arises wherein the observance of that law would be hurtful to the general welfare, it should not be observed.<sup>11</sup>

Furthermore, Aquinas recognizes that cases falling into this category are not “legislable” and adds that:

He who in a case of necessity acts besides the letter of the law does not judge of the law but of a particular case in which he sees that the letter of the law is not to be observed.

Last, Aquinas stresses that agents operating under these exceptional circumstances are not accountable to the law as in ordinary cases. In his view: “The mere necessity brings with it a dispensation, since necessity knows no law.”

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<sup>11</sup> St. Thomas Aquinas, *Summa Theologica*, Part II, 1<sup>st</sup> part, que. 96, art 6. See also II, II, que. 110 art.1.

The explanation provided by Aquinas is apparently founded on the inherent limits of law. Since law is not an end itself, it is a means to realize the common good, the normative power of law applies only when the law is conducive to the realization of the common good. Law governs “what happens more frequently.” The statistical rarity of the circumstances of necessity and the difficulty or even impossibility of designing a law that takes account of these rare circumstances gives rise to the need to deviate from the law in states of necessity. It is significant however that, unlike the Talmud, Aquinas does not describe these cases as violations of the law.

Aquinas provides two reasons why rules cannot govern cases of necessity. One is that the lawgiver cannot design the law in a way which can accommodate these cases and the second is that the person who acts in these cases does not “judge of the law but of a particular case...”<sup>12</sup> The first reason may be read as reflecting Aquinas’s consequentialist sentiments, and does not contribute to the present discussion. The second claim, however, connects with Aquinas’s recognition of the category of necessity as exceeding the realm of law.<sup>13</sup> This seems to be the basis for the claim that violating a law out of necessity is not to “judge of the law.” One way to understand this is that the person who acts in these cases in discordance with the law does not convey in his action a rejection of the law as such in the same way as a person who violates the law under normal circumstances. This thought is echoed, we believe, in some arguments advanced by Kant.

A great deal of intellectual as well as exegetical attention has been given to Kant’s late polemical article “On the Supposed Right to Lie from Philanthropy.”<sup>14</sup> Disputing Benjamin Constant’s claim that lying is sometimes justifiable, Kant appears to claim in the essay that one may never lie; even to a murderer under circumstances in which the lie is necessary to save a friend’s life. This conclusion seems to take deontological reasoning to an unacceptable extreme. Although a systematic interpretation of Kant is not our aim

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<sup>12</sup> See also *Summa Theologica* II, II, que. 110 art.1

<sup>13</sup> Aquinas stresses that this only applies when there is “sudden risk needing instant remedy” (*Summa Theologica*, II, 1, que. 96, art 6).

<sup>14</sup> Immanuel Kant, *On a Supposed Right to Lie from Philanthropy* in Immanuel Kant, *Practical Philosophy* (Cambridge University Press, translated and edited by Mary J. Gregor) 611-615 (1996) (8:423-430)

here,<sup>15</sup> we nevertheless would like to note some aspects of his treatment of necessary violations that bear on our discussion.

In Kantian terms, the question raised by the case of the plane is that of “rights of necessity.” Kant considers this issue in the introduction to *the Doctrine of Right* (MM 6:235), where he defines the question as “a matter of violence being permitted against someone who has used no violence against me.” Situations of this type are contrasted with situations concerning “a wrongful assailant upon my life whom I forestall by depriving him of his life.” In cases of the latter type it is clear that one has a right to defend oneself. The question is whether there is a right to do so by endangering the life of innocent others. Kant’s position is, clearly, that such taking of lives may not be punishable by law. At the same time, Kant believes that there is no moral right to take lives under these circumstances.<sup>16</sup>

A seemingly inconsistent result is implied by Kant’s position on lying in his *Lectures on Ethics*. After saying that “every lie is objectionable and deserving of contempt” (27:448), Kant considers the notion of “necessary lie”. Kant recognizes that “if in all cases we were to remain faithful to every detail of the truth, we might often expose ourselves to the wickedness of others, who want to abuse our truthfulness.” The possibility of such abuse is the basis for the concept of “necessary lies” which Kant considers “a very critical point to the moral philosopher.” His reasons for taking it so seriously as well as his treatment of this notion are worth quoting in full:

For seeing that one may steal, kill or cheat from necessity, the case of emergency subverts the whole of morality, since if that is the plea, it rests upon everyone to judge whether he deems it an emergency or not; and since the ground here is not determined, as to where emergency arises, the moral rules are not certain. For example, somebody, who knows that I have money, asks me: Do you have money at home? If I keep silent, the other concludes that I do. If I say yes, he takes it away from me; if I say no, I tell a lie, so what am I to do? So far as I am constrained, by force used against me, to make an admission, and a wrongful use is made of my statement, and I am unable to save myself

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<sup>15</sup> Surely we take our interpretation of the arguments below to be accurate, but to provide a complete recounting of Kant’s position on lying the strand in his thought picked up here has to be accommodated with other claims of his. We make no such attempt here. For a recent detailed discussion see ch. 14 of Allen Wood’s *Kantian Ethics*, Cambridge, 2007.

<sup>16</sup> Kant, *Metaphysics of Morals* 6:235.

by silence, the lie is a weapon of defence; the declaration extorted, that is then misused, permits me to defend myself, for whether my admission or my money is extracted, is all the same. Hence there is no case in which a necessary lie is to occur save where the declaration is wrung from me, and I am also convinced that the other means to make wrongful use of it.<sup>17</sup>

Lying seems to be allowed when it is “a weapon of defence” (“one may...”). The problem Kant appears to be concerned with is not the existence of circumstances under which it is legitimate to act in a way that departs from the dictates of moral laws. It is also not the fact that it remains to each individual’s own judgment to determine whether a given situation constitutes an emergency or not. The problem seems to be rather, that as long as there are no clear grounds for determining which circumstances constitute an emergency the rules of morality are not fully determined. This, we suppose, is why this issue is “very critical” to the moral philosopher – since it is the philosopher’s job to determine the moral rules, it is indispensable for the philosopher to determine what constitutes an emergency. It seems that this is the objective of the robber-at-the-door example. Reflecting on this example Kant extracts two criteria for determining whether lying is prohibited: i) the agent cannot avoid doing the action (in this case making a declaration about his money); ii) one knows that a rightful action will be abused (the money will be robbed). If these two conditions are satisfied the departure from the principle of truthfulness is allowed.

On its face the position advanced in the Lectures appears hard to reconcile with the one in Kant’s polemical article on lying from philanthropy.<sup>18</sup> Without intending to provide a defense of Kant’s position, we do, however, wish to point out a specific

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<sup>17</sup> Kant, *Lectures on Ethics* 27:448.

<sup>18</sup> For a different reconciliation of these sources see Allen Wood, *Kantian Ethics*, Cambridge, 2007, ch. 14. Although we believe the line of thought suggested here can be helpful in explaining Kant’s position in the essay, as we are not engaged in a systematic interpretation of Kant here we will not take issue with the numerous interpretations, attacks and defenses of Kant’s claims there. For helpful references and analysis see Tamar Schapiro, “Kantian Rigorism and Mitigating Circumstances”, *Ethics*, 117 (2006) note 3. Let us merely note that most accounts that try to make sense of Kant’s position in the article restrict his position to cases in which the potential victims of one’s actions contribute to the threat against one’s well-being. See, e.g., This leaves out the important type of cases in which the potential victims are not part of the threat or when it is not one’s own well-being that is threatened but other people’s (e.g. rouge planes and ticking bombs). It is cases the latter type that pose the deontological dilemma in all its severity and is therefore the focus of our attention here.

concern which seems to be driving Kant's argument in the essay, namely the concern that the principle of truthfulness be an "unconditional duty."

Kant's main objective in the essay is to rebuff Constant's claim that right precedes duty. Constant's position is that one has a duty of truthfulness only to those who have a right to be told the truth. The duty not to lie is therefore *conditional* on the existence of a right not to be lied to, in Constant's view. Thus, there is no duty of truthfulness to someone who has forfeited this right (by threatening to kill someone, for instance). Kant insists that this view must be false since: "the duty of truthfulness ... makes no distinction between persons to whom one has this duty and those to whom one can exempt oneself from it, since it is, instead, an unconditional duty, which holds in all relations" (8:429). What Kant is concerned to stress is "not the danger of *harming* (contingently) but of *doing wrong* generally, as would happen if I make the duty of truthfulness, which is altogether unconditional ... into a conditional duty subordinate to other considerations."<sup>19</sup>

What does the notion of general wrong mean in this context? The answer, it seems, is that the general wrong consists in acting in a way that fails to affirm the unconditional nature of the principle of truthfulness. In considering the possibility of lying, even if only in extreme circumstances, an unconditional duty is turned into a conditional one. In this sense – and this is the crucial point – lying under some directive or principle justifying it "is much worse than committing an injustice to someone or other, since such a deed *does not always presuppose in the subject a principle of doing so*" (ibid, our italics).

It is important to note Kant's reasoning here – the stress is not on the fact that lying to someone is hurting them or wronging them in some way. Kant recognizes that this may not always be the case and, we would add, even when it is the case, it may be (morally) unavoidable. Kant's concern is rather with the idea that lying can be adopted *as a principle*; that actions which depart from the moral dictate be performed under a principle permitting them.<sup>20</sup> Thus Kant goes on to say that "one who asks permission to think about possible exceptions [to the duty not to lie] is already a liar (*in potentia*); for he shows that

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<sup>19</sup> For Kant a categorical imperative is always "unconditional", see e.g. *Metaphysics of Morals*, 6:221.

<sup>20</sup> For a thorough discussion of the reasons provided by Kant as to why lying is a general wrong: "a wrong inflicted upon humanity generally", see Jacob Weinrib, *The Juridical Significance of Kant's 'Supposed Right to Lie'* (unpublished manuscript)

he does not recognize truthfulness as a duty in itself but reserves for himself exceptions to a rule that by its essence does not admit of exceptions” (8:430). By incorporating exceptions to moral laws one undermines their status as moral laws, i.e. as duties in themselves. As Kant states it, “exceptions would nullify the universality on account of which alone they are called principles.”<sup>21</sup>

Since the duty of truthfulness is an unconditional duty, no exception can be incorporated into the principle that requires individuals to tell the truth. To put it blatantly, principled lying is never justifiable because if it were, the duty of truthfulness would be a conditional duty.<sup>22</sup> If however this is the primary concern, it leaves open the possibility that unprincipled lying – lying that is not based on principle (but rather, as we will soon suggest, is dictated by necessity) – may be permissible.

Note that Kant’s essay is ambivalent in that it sometimes stresses the *act of lying* based on the endorsement of an exception incorporated into the duty of truthfulness and sometimes it stresses the *very incorporation of an exception* into the duty of truthfulness even when the incorporated exception is never acted upon.<sup>23</sup> The former case, i.e., acting on the basis of an incorporated exception, presupposes the latter. Kant seems to hold that incorporating an exception into the duty of truthfulness even when the exception is not acted upon is wrong. By doing so one is in some sense “already a liar.” Thus, if, for instance, I incorporate an exception into the rule dictating truthfulness with the knowledge that I will never have to act on it (because, for instance, murderers know that I incorporated the exception into the rule and consequently never ask me for aid in locating their victims), I am still at fault for not recognizing truthfulness as a duty in itself. The incorporation of the exception into the duty of truthfulness is morally flawed even if it is never acted upon.

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<sup>21</sup> It seems that this interpretative claim is supported by the passage in which Kant criticizes Constant for arguing that every time “a principle proved to be true seems inapplicable; this is because we do not know the *intermediary principle* which contains the means of application.” Constant thus believes that lying could be justified on the basis of a principle which is more specific than general prohibitions – one which contains exceptions. In contrast Kant believes that no such intermediary principle can be articulated. Cf. *Metaphysics of Morals*, 6:216.

<sup>22</sup> In the *Groundwork* Kant contends that a categorical imperative is “limited by no condition” (4:416).

<sup>23</sup> Kant first says: “a lie ... makes the source of right unusable” (8:426) and then: “the law... is made uncertain and useless if even the least exception to it admitted” (8:427).

The centrality of the concern for maintaining the unconditionally of laws seems to figure into Kant's thought in other contexts. Regarding the assassination of Kings Louis XVI and Charles I Kant claims that

the assassination of a monarch is not itself the worst, for we can still think of the people as doing it from fear that if he remained alive he could marshal his forces and inflict on them the punishment they deserve, so that their killing him would not be an enactment of punitive justice but merely a dictate of self-preservation. It is the formal execution of a monarch that strikes horror in the soul filled with the idea of human rights...<sup>24</sup>

Surely Kant thought the assassination of a monarch, even an unjust one, is a crime. But this is a separate issue from the one we are concerned with. Whether it is a crime or not, Kant's point is that the moral status of the action is significantly influenced by the reasons on which it is performed. There is a significant moral difference between an assassination done for "self-preservation" and a "formal execution," done under the guise of a principle (in this case punitive justice). Kant explicates the reasoning behind this difference:

The criminal can commit his misdeed either on a maxim he has taken as an objective rule (as holding universally) or only as an exception to the rule (exempting himself from it occasionally). In the *latter* case *he only deviates* from the law (though intentionally)... In the *first* case, however, he rejects the authority of the law itself... and makes it his rule to act contrary to the law.

Deviating from the dictates of the law may be a crime, but adopting a principle or rule that is contrary to the law is far worse, in Kant's view. The reason is that by adopting a contrary rule one undermines the former rule. This of course does not mean that Kant thinks it is ever permitted to deviate from the law. But it does show that Kant has a specific and independent concern to maintain the integrity of the law. Coupled with Kant's position in the case of the robber-at-the-door, this observation seems to support the idea that if there are necessary deviations these should nevertheless not be formally codified; such deviations cannot be founded on rule-like norms.

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<sup>24</sup> The *Metaphysics of Morals*, 6:321.

Despite the varieties in the mode of reasoning, the Talmud and Aquinas (both of whom are generally favorable to the use of rules in moral reasoning) can be interpreted to suggest that sometimes a person ought to act in disaccord with rules, even divine rules. This is either because, as the Talmud suggests, one ought to violate the rules to uphold their underlying rationale, or because, as Aquinas suggests, the jurisdiction of rules is inherently limited. Both seem to recognize the unlegislatability of such exceptions – by legislating them they are no longer exceptions but are rather put on a par with the rest of the legal corpus. Kant’s contribution to this debate is crucial in that he is explicitly concerned with maintaining the nature of certain rules as unconditional. Kant resists in particular the view that the duty of truthfulness could be made conditional simply because of the dangers to society brought about by truth telling. In the next section we develop this Kantian insight and provide a more comprehensive account of reasoning in extreme cases.

#### *IV Why “Necessity Know No Law?”*

Among contemporary jurists, the idea that extreme cases should not be codified is quite common. There exists a sentiment shared by various legal theorists resisting the incorporation of exceptions into legal rules. This sentiment is often phrased metaphorically. Incorporating exceptions into the law, it is claimed, “contaminates” or “manipulates” the legal system.<sup>25</sup> Incorporating provisions designed to address exceptional situations is destructive to the very spirit of the law and its underlying values. What, for instance, seems particularly offensive to the opponents of legalizing torture is the fact that:

an effort is also being made to see whether something like torture can be accommodated *within the very legal framework that purports to prohibit it*. The American executive seems to be interested in the prospects for a regime of cruel and painful interrogation that is legally authorized or at least not categorically and unconditionally prohibited... An effort is being made to see whether the law can be stretched or deformed to actually

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<sup>25</sup> See, e.g., Oren Gross, ‘The prohibition on Torture and the Limits of Law’ in Sanford Levinson ed., *Torture: A Collection* 229, 240 (2004); Richard Posner, *Not a Suicide Pact ???*.

authorize this sort of thing. The administration does not just take the prisoners to the waterboards; it wants to drag the law—our law—along with them.<sup>26</sup>

Metaphors such as “contamination”, and “drag[ing] the law [...] to the waterboards” seem to capture an important sentiment. Yet these are metaphors and metaphors must be unpacked.

To unpack these metaphors, we suggest, it is useful to examine the issue from the perspective of the reasoning agent. We should examine how the codification of extreme cases impacts not only reasoning in extreme cases – cases which give rise to the urge to codify such exceptions – but also how it impacts reasoning in non-extreme cases. Specifically, how it relates to the principles which ought to govern agents’ reasoning in both kinds of cases.

Extreme cases constitute a distinctive category,<sup>27</sup> characterized by circumstances which command actions that are normally impermissible. Two complementary observations ought to be noted here. First, if a threat arises to the lives of a great number of people, then if one has the power to prevent it, one ought to do so. This imperative is itself a deontological imperative. When catastrophe threatens it does not matter what the law dictates – whoever can prevent it ought to do so. Second, the actions characteristic of extreme cases are such that when unjustly performed, their being permissible, or even ordered, by the legal system cannot serve to exculpate the agent. Thus, if a plane does not constitute a genuine threat to many innocents, if there is no ticking bomb,<sup>28</sup> then the fact that one was ordered to down the plane or torture the prisoner does not justify one’s actions. Legislation or legal authorization of such acts plays no justifying role in extreme cases – neither in exculpation of the agent when wrongly performed, nor in justifying her inaction when action is necessary. In extreme cases, therefore, legal directives should not impact the agent’s reasoning. An agent capable of acting to prevent a calamity must do so regardless of legal direction and authorization. And when no such threat exists or cannot be reasonably avoided, the agent must refrain from the action regardless of legislation and authorization.

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<sup>26</sup> Jeremy Waldron, *Torture and Positive Law* 105 *Columbia L. Rev.* 1681, 1741 (2005)

<sup>27</sup> This of course is not to deny that there are vague cases.

<sup>28</sup> Or, more precisely, if one was not warranted in believing with overwhelming confidence that such threats exist.

Furthermore the action required in extreme cases is characterized as being permissible *only when necessary*. When the circumstances allow to torture they also inevitably dictate the act of torture as a duty. It seems awkward to say that an official is entitled but not required to torture a person, because whenever torture is merely discretionary the circumstances are not extreme enough to justify it and hence it ought not to be performed. This observation connects with the previous point – since the actions required are never merely permissible, and since their status is determined directly and solely by the circumstances, there is no room in extreme cases for directives to impact the agent’s reasoning. An agent capable of acting to prevent a calamity must do so regardless of legal direction and authorization.

In general, the law ought to guide the behavior of individuals via its role in their practical deliberations. When conducting themselves individuals ought to incorporate the law into their practical reasoning and follow the laws which apply to them. Legislation of extreme cases cannot, or ought not, to be incorporated into one’s reasoning in this way and is therefore inert. Moreover the codification of extreme cases can also infect reasoning in non-extreme cases. “Contamination” as well as “dragging the law to the waterboards” are apt metaphors for describing the effects of incorporating exceptions into the legal rules because they suggest *the spreading* of the poisonous effects from the exceptional cases to the entire array of cases. What seems to be implied by these metaphors is that the incorporation of exceptions into the rules impairs the legal system as a whole.

These sentiments and intuitions regarding legislation, we suggest, can be grounded in moral considerations. The incorporation of the exception into the law is wrong because it “normalizes” the exception. Codification of extreme cases puts them on a par with other legal directives. The law prohibiting the killing of innocents and the law permitting it are on a par, separated merely by variations of circumstance. But this undermines a crucial difference – only the prohibition on killing innocents is an acceptable principle. Such actions are in principle wrong; actions that may harm innocents may constitute unavoidable exceptions, not accepted as principles. By legislating them their status as exceptional, as cases that exceed the reach of legal directives is undermined. And the

legal system becomes one that incorporates and places on equal footing directives forbidding mistreatment of individuals and directives allowing them.

By incorporating lying as an exception to the rule which dictates truthfulness, i.e., by making the duty of truthfulness conditional, an agent who considers whether to follow the rule of truthfulness has to consider the possibility that lying is permissible. Even when lying is eventually rejected on the grounds that the circumstances do not call for it, the idea that lying is permissible has been admitted into one's system of moral laws. But under a deontological conception the moral value of (at least some of) these laws is grounded in their unconditionality. Incorporating exceptions into deontological rules, as Kant said, undermines their unconditional status. It follows then that there is something morally flawed in considering the permissibility of such violation even when one does not eventually act on it. Thus, generally, it is not merely that the agent ought not to lie, or torture, or shoot down innocent civilians, but also that he ought not admit the possibility that lying or torturing or shooting down planes are ever permissible.

It follows that there is a compelling reason not to incorporate exceptions to unconditional duties. But does it also follow therefore that it is never permissible to violate such duties? If it is impermissible to consider the possibility of killing innocents in one's deliberation, how could it ever be permissible to actually do so? How could the duty remain unconditional when it is sometimes permissible to violate it?

#### *V By Force of Circumstance*

The answer, we believe, can be found in Kant's observation that in exceptional circumstances, when "the false declaration is wrung from me", "the lie is a weapon of defence." What in non-exceptional cases is excluded even from being considered as permissible, namely lying, thrusts itself upon the agent as unavoidable in exceptional circumstances. Extreme cases, we argue, require action that is done out of necessity and not under the direction of law. Under the circumstances of the particular case, agents ought to act on the basis of the factual necessity, the condition of things, the force of circumstances, the necessity of the moment and similar situation-specific necessitating considerations. These cases resist rule-governed normativity. To put it crudely, being inherently irregular, they cannot be regulated. It is the force of the circumstances –

circumstances in light of which (some of) our principles collapse – that necessitate the action, not any mitigating principles.<sup>29</sup>

But what does it mean to act under the force of circumstance? To make sense of this idea let us recap what we have so far maintained about extreme cases. We have seen that extreme cases call for action that is permissible only when necessary. This feature of extreme cases, we argued, entails that legal directives have no bearing on what is to be done in such cases. Also, we took up the Kantian idea that incorporating exceptions into deontological rules intended to accommodate extreme cases undermines their moral status. The other side of this coin is that, from a deontological point of view, there is a distinction to be made between performing an unlawful or impermissible act and doing so under a principle permitting such acts.

On the basis of these claims it is possible to articulate a conception of action in extreme circumstances that is respectful of deontological tenets, yet attentive to the gravity of the consequences. So long as it is performed without guidance of a permitting principle, an action aimed at saving people's lives, for example, may be in violation of a valid law or moral requirement while leaving their deontological status intact. To get a clearer view of this, consider again the reasoning of the agent. When downing a rouge plane, for example, the agent may reason from the premise that there is a principle directing him to down a plane threatening many lives and the factual premise that a particular plane does threaten that number of lives, to the conclusion that he ought to shoot it down. Such reasoning clearly involves a principle according to which shooting at civilians is (under the circumstances) permissible. If such principled exceptions, however, are excluded, the agent will reason in another way. He will start with the premise that saving innocent lives is his duty (at least in so far as he is in a position to do so) and, recognizing the factual truth that the only means to achieve this is by downing

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<sup>29</sup> In his discussion of torture Christopher Kutz develops an idea which bears some similarity to this analysis and argues that: "[I]n the hypothetical, ideal case, the ticking bomb example does confront us with real necessity, not in our imaginations. Confronted by real, existential necessity, we find that our principles yield. But we must be precise what this means. The image of ourselves torturing, or authorizing torture, is not a *deduction* from ethical principles. It is rather a *recognition* that our principles could imaginably be unable to withstand the pressure from concrete opposing values." See Christopher Kutz, "Necessity, Torture and Existential Politics" ???(p. 38). Kutz concludes that necessity in such a case is not necessity as justification but necessity as fact.

the plane, conclude that this is what he ought to do. Notice that in this mode of reasoning no principle permitting harming innocents is employed.<sup>30</sup>

On the face of it this may seem like mere sophism. An empty analytic distinction carrying no genuine moral weight. But this appearance, we believe, is misleading. Within a proper deontological conception, the reasoning of the agent is a key factor in the determination of the moral status of his actions. An otherwise similar action has varying moral status if it is done as a permissible act or as an exception. Specifically, the difference between harming innocents as a principled, permissible act and doing so as an exceptional unavoidable measure in order to save lives is of moral significance. In this sense, within this framework exceptions do constitute a genuine and normatively distinct category.

This analysis, we propose, captures a key concern shaping deontology. Kant famously voices this concern in the *Groundwork of the Metaphysics of Morals* when he claims that

everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a *dignity*. (4:434)

This conception of dignity as incommensurable need not entail its absolute inviolability. A more reasonable interpretation of Kant's thought, we suggest, is that dignity is not to be considered as a currency to be traded, as a replaceable resource to be weighed against equivalents. Thus deontological morality, we urge, consists in an aversion to the treatment of human life as having a "market value", as Kant puts it, as capital to be weighed and traded. Human life and other comparably fundamental values must not be treated as an end to be maximized, as an asset that can be quantitatively measured and traded against equal or higher quantities of goods. Regarding something in these ways is regarding it as a mere means to other ends. Anything that is replaceable by something else is not valuable as an end in itself. The weighing of lives against lives is what, under this conception, the deontologist primarily aims to avoid. Fundamental values and rights

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<sup>30</sup> For Kant, this should not be described in terms of means-ends reasoning, but as rendering the action itself one of saving lives. For, as Kant says, a categorical imperative "represents an action as objectively necessary and makes it necessary not indirectly, through the representation of some *end* that can be attained by the action, but through the mere representation of this action itself (its form), and hence directly" (6:222).

must shape the way we deliberate by setting constraints on the ends we may morally endorse.<sup>31</sup> Harming the innocent can never be a legitimate end or an acceptable means to an end, although it may be an unavoidable consequence of the necessary means for achieving a worthy end.

In extreme cases the urgent need to avoid catastrophic consequences clashes with the stringency of deontological constraints. Absolute deontology sacrifices the former element to uphold the latter. Consequentialism and threshold deontology, on the other hand, both try to resolve the conflict by administering a procedure of comparison between the competing considerations in each case. But if they can be weighed against consequences, deontological constraints are no longer unconditional and the values underlying them are mere instruments, goods of “market value”, not “dignity.” Thus, by entering the weighing game, both positions, albeit in different ways, sacrifice the gist of deontology – the idea of treating human beings as ends in themselves and the constraints on deliberation and action stemming from their intrinsic value, or “dignity”, as unconditional. The alternative sketched here, on the other hand, allows for addressing the urgency of avoiding catastrophic consequences while preserving these deontological sensitivities. Extreme cases might require practical infringements of deontological norms, but do not warrant (nor require) their normative perversion. Extreme cases truly are exceptional.

## *VI Rogue Planes*

We are ready now to apply these observations to the case of the plane. Downing a passenger plane is the sort of action that is to be done only when the specific circumstances of the case are such as to make it practically necessary. Such actions may only be properly performed by an agent when he acts merely on the basis of the brute necessity of the circumstances. If it is performed based on the decision of a superior hierarchy authorized by the state, or based on the dictates of law it is no longer performed strictly on the basis of the necessity of the moment; it becomes part of regular institutional practice. The legal system recognizes necessity as a justification; it exempts individuals from legal responsibility when they act under the circumstance of necessity.

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<sup>31</sup> Similar aversion to reasoning by weighing is expressed by Nozick, *Anarchy, State and Utopia* and echoed by Rawls in *Theory of Justice*, p. 3.

But acting on the basis of necessity is dictated by circumstances not by authorization or specific directives.

Once legislation authorizing the downing of the plane is reinstated, it permeates the actions of agents acting under its direction even in cases in which these agents judge (or ought to judge) that the plane ought not to be downed. Downing the plane presents itself as a legitimate option which sometimes ought to be chosen and, at other times, rejected. Regardless of whether or not the act of shooting down a passenger plane under extreme circumstances constitutes a violation of the passengers' dignity, the endorsement of such a norm treats the duty not to hurt innocents as conditional and thereby can be said to treat potential victims as means to an end. When, on the other hand, the act of downing a plane in exceptional circumstances is understood to be dictated by the force of the circumstances rather than governed by a rule, one does not act under the directive of law or under authorization, and thus is not incorporating a principle according to which the lives of the passengers are dispensable. Clearly, downing a plane can be permitted only in circumstances of grave necessity. But, and this is the main point, it can be permitted only *as* an act of necessity, as an act performed strictly from the necessity of the circumstances, and not under the direction of any rules or authorizations.

This analysis is grounded in an understanding of deontology as consisting mainly in constraints on moral deliberation, namely, that fundamental values ought not to be weighed against each other. Specifically, there is a prohibition on weighing lives against lives. Under normal circumstances there is no weighing of lives against lives because downing the plane is not a legitimate option. The rule prohibiting the downing of a plane knows no exceptions. In extreme cases – cases that require the downing of a plane (if there are such cases) – there is also no weighing of lives against lives. One's reasoning is simply dominated by the necessity of the case. When faced with a truly extreme case the regular rules lose their purchase. Whether as a consequence of the inherent limitations of laws, as Aquinas suggests, or because upholding the spirit of the law sometimes requires violating its letter, as the Talmud maintains, laws are sometimes bankrupt. When such extreme circumstances present themselves, the laws are overshadowed by the moral necessity of the case and the agent must act directly in response to the circumstance. The circumstances are dominated by the obligation to save lives, compelling one to take the

necessary means. In performing such an action no weighing is involved, neither of consequences nor of competing values and clashing rules. Thus, downing a passenger plane, or torturing people to obtain life-saving information cannot be guided by general moral rules and for the same reasons ought not be codified in legal directives, but can only be performed as necessary response to extreme circumstances.<sup>32</sup> Such acts can only be warranted as acts of brute necessity, “weapons of defense.” They may never be done as part of a rule-governed institutional practice.

### *VII Consequences and Conclusions*

We have argued that extreme cases constitute a distinct normative category. This distinctness stemming from the exceptionality of the circumstances figures into the forms of reasoning appropriate for them and restricts the types of considerations that may enter into such reasoning. Our leading example thus far has been the case of rogue planes. But the analysis applies to numerous current debates including torture, targeted assassinations etc.

Torture is strictly forbidden. For the deontologist no principles permitting torture can be acceptable. And yet when a nuclear ticking bomb scenario is invoked, even a deontologist (at least of the brand we have been defending) will recognize that torture may be unavoidable. Extreme cases require extreme measures. Violations of our most fundamental norms may be unavoidable. But, and this is the crucial point, what allows the torture is solely the necessity of avoiding catastrophe. Other considerations ought not to be incorporated into the determination of what is to be done in such cases. In particular, long-term considerations such as deterrence and punishment, or institutional considerations such as legal authorization should carry no weight in extreme cases.<sup>33</sup> As Kant says about the assassination of kings, there is a moral distinction between the

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<sup>32</sup> For a more elaborate discussion of the bearing of these considerations on the issue of torture see our ‘What’s Really wrong with Torture?’ (forthcoming).

<sup>33</sup> Ironically, it is the leading classical theorist of English constitutional law who understood that in exceptional circumstances, no relevant distinctions between authorized and unauthorized individuals ought to be made. In his discussion of martial law Dicey argues that officials can use brutal means to protect the peace including the infliction of instant punishment and “if need be, put to death persons aiding and abetting the enemy or refusing such aid to the English army...” Dicey however continues and says: “Let it too be noted that what is true of a general holds good of every loyal subject according to his situation and the authority which he derives from it, e.g., subordinate officer, of a magistrate or even of a private citizen who is helping to resist an invader” (A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 541-542 (8<sup>th</sup> ed., 1924).

otherwise equivalent acts of killing when one is an act of punitive justice and the other an act of self-preservation. Thus, when torture, for instance, is necessitated by extreme circumstances, it is to be performed as an act of self-preservation, not as an act of punitive justice or the implementation of state policy.<sup>34</sup>

When circumstances are extreme, the gravity of the situation is such that the prohibition on the action simply has no purchase. Agents are to act in direct attendance to the circumstances in response to fundamental moral necessity that renders ordinary prohibitions inert. This however raises a major question. If no rule-like norms govern the decision, how can the decision be made and how can we know that it was the right one?

Doubtlessly, articulating rough and ready identity conditions for extreme cases is difficult, maybe even impossible. Nevertheless, although the need to determine whether a certain situation counts as extreme or not may arise (when an actor's decision is contested in court for example), and acknowledging that hard cases are unavoidable, we venture to speculate that these will be the exception, not the rule. Given the nature of extreme cases – they are after all extreme – the common cases will be clear-cut. For, if it isn't, a situation will normally not constitute an extreme case. For the most part, at least, extreme cases fit the label *you know one when you see one*. In any case, we should not let the epistemic difficulty of identification undermine the moral category of extreme cases. Clearly, no general detailed criteria can be given for what constitutes such cases, and vague and borderline cases are undoubtedly possible. But these shortcomings are unavoidable in matters such as these and need not detract from the plausibility of the present account.

One upshot of this is that extreme cases have little to teach us about the norms we should embrace and policies we should institute. Contemporary debates regarding the legal norms that are to guide the “war on terror” (most notably the question of torture) have been greatly shaped by examples falling under the category of extreme cases (ticking-bomb scenarios). The proposal on offer, however, entails that deliberations about these issues – important and pressing as they may or may not be – should not be swayed

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<sup>34</sup> For more on the irrelevance of the moral status of the potential victim of torture (particularly his or her culpability in creating the threat) and the illegitimacy of considerations of punitive justice which, we suspect, often creep into the arguments and deliberations regarding torture, see our “What’s Really Wrong with Torture?” (forthcoming).

by the intuitions invoked by extreme cases. This is not merely due to their rarity or mismatch with reality,<sup>35</sup> but because their inherent exceptionality renders them irrelevant for questions of institutional practices and general instruction.

To conclude, we have tried to reexamine the limits of rule-governed behavior and argued that recognizing these limits may help in maintaining a non-fundamentalist deontological morality attentive to the moral import of emergencies. More specifically it was argued that while traditional deontologists characterized deontology in terms of the special strength or even absoluteness of moral directives, a closer examination of the intuitions giving rise to deontological convictions suggests that what characterizes deontology is the unconditional nature of moral rules (rather than their special or absolute strength). This conception of deontology shapes a moral stance with regard to extreme cases allowing the resolution of the dilemma they trigger. Following this reasoning to its further ramification, we further explicated the sense in which extreme cases constitute a unique category.

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<sup>35</sup> David Luban makes a similar point in the case of torture based on the fact that the conditions assumed in ticking bomb scenarios are hardly, if ever, met in reality (David Luban, "Liberalism, Torture and the Ticking Bomb", 91 *Virginia L. Rev.* 1445-1452 (2005).