

The Defense of Necessity and Powers of the Government

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If one of the lessons of the ubiquitous and highly problematic¹ “ticking bomb” scenario is that torture may be justified under certain narrowly specified situations, why would we not want it made available as a weapon in the government’s anti-terrorist activities? This is not a new question, and it has been hotly debated.² The question that this Essay addresses is related but narrower: if one starts from the proposition that the ticking bomb scenario demonstrates that a government official facing prosecution for torture may have available the necessity defense,³ can the government formulate a torture policy that permits torture whenever and wherever the necessity defense would be available?⁴

This Essay proceeds as follows. Part I introduces the problem by summarizing three different instances in which the relationship between the necessity defense and the question of torture has been articulated. Part II discusses different arguments that have been made to defend the paradoxical position that a government official may raise the defense of necessity when facing prosecution for torture but may not formulate a policy in reliance on the necessity defense’s allowance of certain types of conduct in times of emergency. Part III discusses each of the arguments presented in Part II and raises some doubts about them. Part IV argues that many, although not all, of the problems that I raise in Part III either fall away or are weakened once we understand the nature of the necessity defense as driven not only by a principle of morality but also as an allocation of power between public officials and private citizens.

I. The Torture Debate and the Necessity Defense

A. Public Committee Against Torture v. State of Israel

In a much discussed opinion, the Supreme Court of Israel considered the question whether the General Security Service could legally engage in interrogation tactics that

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¹ For a cogent criticism, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* (KAREN J. GREENBERG ED. 2006); David Luban, *Unthinking the Ticking Bomb*; see also Kremnitzer & Segev, *The Legality of Interrogational Torture*

² See, e.g., Sanford Levinson, *Torture*

³ While I assume in this Essay that in certain situations, the necessity defense may be available for someone who is facing prosecution for torture, this is by no means a foregone conclusion. First, the balance of evils analysis might always come out in the direction of prohibiting torture no matter how much evil is avoided through torture. Second, the Model Penal Code comment has stated that “[t]he harm sought to be prevented by the law defining the offense may be viewed broadly” to include the negative impact of recognizing the defense on general law enforcement interests. See Model Penal Code commentaries. Therefore, under this reading, the concern that recognizing the defense for the crime of torture would have on the rule of law generally, see, e.g., Waldron, *Jurisprudence for the Whitehouse*, can be counted as one of the “evils” in the choice of evils calculation. For a skeptical discussion of this way of counting evils, see Alan Brudner, *A Theory of Necessity*, 343.

⁴ This issue, too, has been debated. See, e.g., Mordechai Kremnitzer & Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*

involved “physical means” such as shaking, sleep deprivation, and excessive tightening of handcuffs, and forcing subjects into uncomfortable positions.⁵ The Israeli Supreme Court handed down a pair of decisions that seem both paradoxical and reasonable. On one hand, the Court decided that if a GSS investigator is facing criminal prosecution, the necessity defense would be available to him if all the requirements of the necessity defense are met. However, the Court rejected the government’s argument that the availability of the necessity defense can be used as a source of authority for the use of physical means of interrogation. In other words, it is possible for a government actor to avoid prosecution for torturing someone because of his successful invocation of the necessity defense, but generalizations about when the necessity defense may be available for the crime of torture may not be used as a way of authorizing government officials to torture in such situations.

B. The “Torture Memo”

In the notorious “Torture Memo,”⁶ the Office of Legal Counsel of the U.S. Department of Justice addressed the questions as to the definition of “torture” under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and what kinds of defenses would be available should a governmental official be found to have violated the convention, which is implemented in the U.S. as federal criminal provisions.⁷ The Bush administration relied on this memorandum when it devised interrogation practices used by the C.I.A.⁸

The memo stated, among other things, that even if an interrogation method turns out to meet the definition of torture, the defense of necessity might be available to a government official facing prosecution for torture. The Torture Memo has a lot of problems as a matter of legal analysis, and it has been heavily criticized for its various faults.⁹ However, its argument based on the necessity defense does raise a troubling question. If one could in fact raise a successful necessity defense facing prosecution given certain assumptions, is there anything in fact wrong with a government attorney advising the executive branch accordingly and the executive branch relying on that advice to design a program of interrogation in such a way that every governmental official facing a potential prosecution would have the necessity defense available to him or her?

⁵ Supreme Court of Israel, *Judgment Concerning the Legality of the General Security Service’s Interrogation Methods (September 6, 1999)*, in TORTURE: A COLLECTION (SANFORD LEVINSON ED. 2004).

⁶ There are actually two “torture memos” from the Office of Legal Counsel, one dated August 1, 2002 and the other dated March 14, 2003. The first is entitled “Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A” and the other is entitled “Military Interrogation of Alien Unlawful Combatants Held outside the United States.” The first was addressed to the White House counsel Alberto Gonzales, and the second was addressed to the Department of Defense. In this Essay, I will be referring to the first memo, but the substance of the legal analysis relevant to the topic of this article – the relevance of the necessity defense for interrogation practices – is the same in the two memos. Both memos were eventually withdrawn. See generally Jack Goldsmith, *The Terror Presidency* 141-76.

⁷ 18 U.S.C. §§ 2340-2340A.

⁸ Goldsmith, *Terror Presidency*. The memo was later replaced by the so-called “Levin Memo,” which asserted that no interrogation practice approved under the old memo needs to change under the new memo. Levin Memo, December 30, 2004

⁹ Luban, *supra* note 1; LUBAN, LEGAL ETHICS AND HUMAN DIGNITY

C. Legalize and Regulate

Adrian Vermeule and Eric Posner give one answer to this question. They express some befuddlement over the Israeli Supreme Court's discussion of the necessity defense described above as "rather subtle,"¹⁰ and argue that once we acknowledge that the ticking bomb hypotheticals illustrate situations in which torture is permitted and that the necessity defense may be available for certain acts of torture, then there is no good reason *not* to legalize and regulate torture (or "coercive interrogation," the term that they prefer).¹¹ Posner and Vermeule analogize torture to other uses of violence by the state for law enforcement purposes, such as police use of deadly force, killings by soldiers during wartime, the death penalty, and imprisonment, and argue that torture should be regulated by limitations on when it can be used, how it can be applied, whom it can be applied to, who can apply it, and so on.¹² Posner and Vermeule argue that transparency is an important value and suggest that if torture is worth the cost sometimes, then we should torture out in the open, and that it is incoherent and unstable to maintain the absolute prohibition on torture *and* make the necessity available for torture.¹³

II. Some Arguments Against Necessity as a Justification for Torture Policy

There have been a number of attempts to resist the argument that it is incoherent to both recognize the existence of a potential necessity defense for an official who engages in torture *and* support an absolute ban on torture as a matter of policy.

A. Artificial Cases Make Bad Ethics

One way of resisting the argument from the necessity defense is to point out that the ticking bomb hypothetical, which appears to compel the view that the necessity defense would in fact be available sometimes, is misleading. Henry Shue, for instance, acknowledges that "there are imaginable cases" for which he "can see no way to deny the permissibility of torture," but at the same time argues that such a possibility is no "reason to consider relaxing the legal prohibition against it."¹⁴ His argument appears to be that we should be careful about drawing a general lesson from a highly stylized hypothetical, as "one cannot easily draw conclusions for ordinary cases from extraordinary ones."¹⁵ From this, it seems to also follow, that something like the necessity defense should not be

¹⁰ Posner & Vermeule, *Terror in the Balance*

¹¹ Posner & Vermeule, *Terror in the Balance*

¹² 211-213

¹³ For a similar proposal, see Alan Dershowitz, *Tortured Reasoning* (proposing torture warrants).

¹⁴ Henry Shue, *Torture*; see also Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1715 (2005). Shue recently recanted his position, and his current position is: "Never again. Never, ever." See Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE WESTERN RESERVE J. OF INT'L L. 231 (2006) ("You cannot be a little bit pregnant, you cannot -- if you are an alcoholic -- have a drink only on special occasions, and you cannot -- if your politicians are not angels -- employ torture only on special occasions.).

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used as a foundation for imagining and implementing broad policies designed to deal with extraordinary situations.¹⁶

B. Acoustic Separation; Slippery Slope

Another reason to resist the application of the necessity defense to articulate situations in which torture may be permitted may be rooted in the idea of “acoustic separation” between the audience of “conduct rules” and the audience of “decision rules.”¹⁷ The necessity defense tells the judicial branch which violations of the rule against torture are justified, but there may be good reasons not to transmit the same message to the public as a guide to behavior. In this context, the necessity defense should not be used as a guidance rule because confines of the necessity defense may not be respected by government officials and the scope of permissible torture could consequently enlarge. Shue has noted that there is “considerable evidence of all torture’s metastatic tendency.”¹⁸ Richard Posner, too, has argued that “[i]f legal rules are promulgated permitting torture in defined circumstances, officials are bound to want to explore the outer bounds of the rules; and the practice, once it were thus regularized, would be likely to become regular.”¹⁹

C. Against Legitimization

A closely related position is the one that Alan Dershowitz has criticized as the “off-the books” approach.²⁰ The basic idea is to acknowledge, grudgingly, that there may be a situation in which torture is morally permissible but to simultaneously urge that an absolute prohibition on torture be maintained – even if we would allow something like the necessity defense to individual officials. Jean Bethke Elshtain writes that “there are moments” when the prohibition “may be overridden” but that it is “vitally important” to “refus[e] to legalize and sanction something as extreme as torture.”²¹ The reason for this is because the “tabooed and forbidden, the extreme, nature of his mode of physical

¹⁶ For similar criticisms, see Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, 284; Luban, *supra* (“[T]he ticking-bomb scenario is an intellectual fraud.”); Waldron, (“[T]orture is seldom used in the real world to elicit startling facts about particular ticking bombs; it is used by American interrogators and others to accumulate lots of small pieces of relatively insignificant information which may become important only when accumulated with other pieces of similar information elicited by this or other means.”).

¹⁷ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

¹⁸ See also Waldron; Oren Gross, *The Prohibition of Torture and the Limits of the Law*

¹⁹ Richard A. Posner, *Torture, Terrorism, and Interrogation*; see also Mordechai Kremnitzer & Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509, 537 (2000) (“[T]here are even justified acts that we would not want to empower a governmental authority to carry out, on a regular basis, because of the danger that such power bestowed on a powerful organization would be improperly applied and abused, thus leading to the performance of unjustified acts.”).

²⁰ Dershowitz, *Tortured Reasoning*

²¹ Jean Bethke Elshtain, *Reflection on the Problem of “Dirty Hands”*

coercion must be preserved so that it never becomes routinized as just the way we do things around here.”²²

But why should we maintain this taboo? Various arguments have been made. Michael Ignatieff argues that “torture . . . should never be regulated, countenanced, or covertly accepted” because “torture . . . expresses the state’s ultimate view that human beings are expendable,” which is “antithetical to the spirit of any constitutional society whose *raison d’être* is the control of violence and coercion in the name of human dignity and freedom.”²³ Jeremy Waldron has similarly argued that the rule against torture is a “legal archetype” on the integrity of which the rule of law depends, and that if we legalize torture, “the character of our legal system would be corrupted” because we “would have given up the linchpin of the modern doctrine that law will not operate savagely or countenance brutality.”²⁴

D. Nature of Necessity Defenses

The Israeli Supreme Court’s argument to prevent a necessity defense from serving as a general basis to “infer authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of ‘necessity’” relied on the general nature of the necessity defense.²⁵ The Court stated that the defense “is an ad hoc endeavor, in reaction to a event” and “a result of an improvisation given the unpredictable character events.”²⁶ The Court concluded, “Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power.”²⁷ Alan Dershowitz, too, has written that the “necessity defense is by its very nature an *emergency measure*” and that “it is not suited to situations which recur over long periods of time.”²⁸ Mordechai Kremnitzer and Re’em Segev have similarly argued that “the basic behind the concept of the lesser evil, embodied in the necessity defense, is that it is hard (perhaps impossible) to determine in advance all types of actions that are justified under extraordinary circumstances” and that it is thus inappropriate to apply it to “the powers of governmental authorities with respect to repeated situations which can be predicted in advance.”²⁹

E. Defenses versus Authorizations

The Israeli Supreme Court also stated that we must distinguish between empowering a public official and making a criminal law defense available. The Court noted that the “necessity” defense “has the effect of allowing one who acts under the circumstances of ‘necessity’ to escape criminal liability” but does not “possess any additional normative value” and “can not authorize the use of physical means to allow

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²³ MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 143 (2004).

²⁴ Waldron, *Jurisprudence for the White House*; see also Sanford H. Kadish, *Torture, the State and the Individual*, 23 *ISR. L. REV.* 345, 352-56 (1989).

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²⁸ Dershowitz, *Is It Necessary*, at 197

²⁹ Kremnitzer & Segev

investigators to execute their duties in circumstances of necessity.”³⁰ The Court further added that “the fact that a particular act does not constitute a criminal act – due to the ‘necessity defense’ – does not in itself authorize the act.”³¹

Similarly, Miriam Gur-Arye has explained, “Justifications provide reasons for doing what would otherwise have been breaking the law,” whereas official empowerment redefines what the “law” is.³² There is no reason to assume, she appears to be arguing, that recognition of a defense necessarily requires us to redefine the scope of public officials’ power. Mordechai Kremnitzer has similarly argued that a distinction must be drawn between “power granted . . . to governmental authorities” and “defence from criminal liability.”³³

III. Unanswered Questions

As one might surmise from this discussion, there is no shortage of arguments for the position of maintaining the absolute ban on torture while acknowledging that there may be a situation in which it is permissible.³⁴ Numerous questions are raised by these arguments, however.

A. Artificial Cases Make Bad Ethics

At the outset, it must be noted that this argument is a bit odd coming from those accustomed to moral philosophy, the home of the Trolley Problem and, in the philosophy of punishment context, the punishing the innocent hypothetical. We can argue over ways in which a hypothetical does or does not demonstrate the point it purports to make, but complaining about the fantastic nature of a hypothetical in itself makes philosophically-minded opponents of the ticking bomb hypothetical look intellectually opportunistic. (Or is it the case that academics have a special duty not to seriously and openly discuss hypotheticals that can capture the public’s imagination in ways that are especially harmful? Perhaps that is the difference between the ticking bomb hypothetical and the Trolley Problem. I myself don’t know any instance of anyone changing their mind on any moral issue after studying the Trolley Problem, whereas the ticking bomb hypothetical appears to have a scary amount of power in shaping people’s views.)

Setting that aside, there are two issues here. First, how “artificial” or “extraordinary” is the ticking bomb hypothetical really? Second, how likely is it that the ticking bomb argument -- that under certain conditions torture is morally permissible and

³⁰ Alan M. Dershowitz, *Is It Necessary to Apply “Physical Pressure” to Terrorists – And to Lie About It?* 23 ISR. L. REV. 192 (1989); see also Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?* 23 ISR. L. REV. 216, 237 (1989).

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³² Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogation?: Reflections in the Light of the Israeli Experience*

³³ Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?* 23 ISR. L. REV. 216, 237 (1989).

³⁴ Of course, not every scholar discussed in Part II thinks that it is desirable to have this particular combination of the positions. Dershowitz, for instance, thinks that it would be better to legalize and regulate torture, see Dershowitz, *Tortured Reasoning*, whereas Kremnitzer and Segev have argued that it would be better to simply declare torture to be wrong and illegal.

perhaps even morally mandatory – will be extended and abused to justify practices that are outside the scope of the argument? There is some debate on the first argument.³⁵ The second argument is a reprisal of the slippery slope argument.

B. Acoustic Separation; Slippery Slope

There are two questions that have to do with the slippery slope argument. First, is it really the case that once the absolute prohibition is lifted, the scope of permissible torture will have a tendency to grow beyond situations of true necessity? Let's grant that this is the case, as there are persuasive arguments to suppose that this is so.³⁶

The flipside of this question is the second question. If necessity is a justification in the sense that at least some normally wrongful acts are not only morally permissible but in fact morally desirable and even perhaps morally mandatory,³⁷ is it not possible that an absolute prohibition would have the effect of overdetering torture? Richard Posner says that “if the stakes are high enough torture is permissible” *and* that “[n]o one who doubts that should be in a position of responsibility,”³⁸ and this is presumably the case because we *want* people in positions of responsibility to do what is necessary when it is necessary and not shrink from their responsibility. Eric Posner and Adrian Vermeule warn along these lines that “[e]xcessive caution is the most likely result” of maintaining an absolute prohibition.³⁹

So we have one side of the debate arguing that excessive torture is the most likely result and the other side arguing that excessive caution is the most likely result. If there is such thing as an optimal level of torture, no matter how small that is (it could of course be zero), the question is which policy is most likely to get us to that point.

C. Against Legitimization

If we acknowledge that the ticking bomb hypotheticals illustrate situations in which torture is permitted (or even required) and that the necessity defense may be available for certain acts of torture, then the problem is that it may be difficult to avoid legitimizing them. Some argue that there is no way to avoid giving some legitimacy to torture if one accepts the possibility of acquittal, suspension of sentence, or pardons.⁴⁰ Even if we maintain the prohibition, once we allow defenses, the argument goes, torture will inevitably end up with the government's approval stamp. In other words, either torture is outlawed with no pardons or defenses or it is normalized and legitimized, and there is no space in between. These arguments, especially by Posner and Vermeule (who argue that the public cares only about “outcomes” (such as whether one ends up in prison) and pays no attention to “legal rules”) sometimes move too quickly and too far. However, they do raise a genuine puzzle as to whether the idea of keeping torture illegitimate can be sustained while permitting the necessity defense.

³⁵ Gross; Dershowitz

³⁶ Waldron; Luban; for a differing perspective, see Posner & Vermeule, 197-203

³⁷ Krauthammer

³⁸ Posner

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⁴⁰ Levinson, at 36

D. Nature of Necessity Defenses

The logic of the argument -- that necessity defense is available for an emergency, ad hoc, improvisatory measure only and that it would not make much sense to turn it into a source of prospective rulemaking – is not crystal clear.

There are emergencies that are unforeseeable and the necessity defense may be well-suited for such situations, but there also are emergencies that are foreseeable and there are even emergencies that we can predict would recur over long periods of time. Every example of necessity given in textbook formulations deals with situations that can recur over time, such as “property may be destroyed to prevent the spread of fire,” “[a] speed limit may be violated in pursuing a suspected criminal,” “an ambulance may pass a traffic light,” and so on.⁴¹ What is wrong or incoherent about devising general formulations that identify situations in which the necessity defense would be available?

In fact, it seems unavoidable for a court that allows a necessity defense to simultaneously articulate a rule of law giving guidance to citizens about situations in which the necessity defense is allowed.⁴² For instance, if a court determines that the necessity defense is available to a defendant facing conviction for prison escape and identifies factors that make this particular escape “necessary” as defined by the jurisdiction’s defense of necessity, then prisoners whose situations resemble the situation of the acquitted defendant can now be guided by that ruling when deciding whether escaping from prison is a viable option for them as well. Every time a court applies the necessity defense, it cannot help but give guidance to individuals about how they might behave in similar situations.

And this conclusion is not entirely dependent on the assumption that necessity is a justification, not excuse, defense, although it is somewhat dependent on it.⁴³ If necessity is a defense of justification, then, according to the standard account, it can provide a reason for action for citizens.⁴⁴ In other words, if the necessity defense (as justification) were made available to an official facing conviction for torture, then the implication of that ruling would be that officials in similar situations can be guided accordingly.

On the other hand, even if necessity is a defense of excuse, that does not deprive the application of the defense of its guidance aspects. Of course, if the reason for applying the necessity defense to someone who tortures is that an official, in a situation of emergency, temporarily lost his capacity to reason (scary thought), then a ruling of necessity does not articulate any reason for action for other officials although we probably would be very stringent about making this particular defense available.⁴⁵ However, if the reason for applying the necessity defense in that kind of situation is to acknowledge that we as a society understand why he might have acted in the way he did and to express the judgment that it would be inappropriate to blame him for acting in the way he did even if what he did was wrong, then there is a guidance aspect to the ruling.

⁴¹ Model Penal Code comment 3.02, p. 9-10.

⁴² Cf. George Fletcher, *The Individualization of Excusing Conditions*, at 1275-76

⁴³ Cf. Kremnitzer & Segev (discussing the significance of justification-excuse distinction in this debate)

⁴⁴ George Fletcher, *Rethinking Criminal Law*, 810; Paul Robinson, *Criminal Law* at 54; Peter Westen, *Duress is a Justification*, at 864

⁴⁵ Cf. John Gardner, *Gist of Excuse*, 584-85

As Antony Duff has put it, we may not be “permitting” what he did by applying the defense but we would be expressing the judgment that the society does not “demand” more of him as a citizen.⁴⁶ And it is this element of what the society demands of us that constitutes the guidance aspect of the necessity defense, if it is understood to be an excuse defense.

In short, the argument that the necessity defense is only an ad hoc defense, from which it is inappropriate to draw lessons for future behavior (in the form of, “In situations with factors *x*, *y*, and *z*, one may violate *p*,” or “In situations with factors *x*, *y*, and *z*, one’s violation of *p* is what is expected of even reasonable citizens”) seems wrongheaded. It is true that because of the “ad hoc” nature of the defense, the informative value of each application of the defense is limited. But it is at the same time wrong to suggest that each application of the defense carries no implication for future behavior or that something about the inherent nature of the necessity defense makes it inappropriate as a basis for generalizations about what kinds of behaviors will be permitted or forgiven in recurring situations.

E. Defenses versus Authorizations

The argument that the necessity defense is a defense and does not create any new powers for the government seems correct as a formal matter. That is, to the extent the Israeli Supreme Court was deciding a question about the source and scope of government officials, it is entirely appropriate to reject the argument that the existence of a criminal law defense can be a source of additional power for the government. This argument seems to take care of the narrow legal issue the Israeli Supreme Court faced.

But once we go beyond the formalistic distinction, questions arise. The defense-authorization distinction is straightforward when applied to, say, the insanity defense. It is clearly the case that recognizing the insanity defense for a murderer does not amount to an authorization to murder. The validity of the distinction, however, becomes fuzzier when we consider justification defenses. Take the term “authorization” for instance. One way of thinking about defenses is in terms of when people are “authorized” to act in ways that are normally prohibited. Those defending themselves from aggression are, one might say, “authorized” to kill to prevent the attack. If that is at least a plausible way of understanding the nature of defenses,⁴⁷ then a simple positing of the labels “defenses” and “authorizations” cannot do much; a further explanation is needed to give sense to the distinction.

A deeper theoretical account is needed also to address other questions raised by the “Torture Memo” and Vermeule and Posner’s “legalize and regulate” proposal. Namely, if it is the case that an official may be able to successfully raise the necessity defense to avoid prosecution for torturing a person under ticking bomb-like scenarios, what is wrong with a government official deciding how to act on the basis of the goal of

⁴⁶ Duff, *Rule Violations and Wrongoings*.

⁴⁷ See, e.g., Thornburn (“[S]ome parts of the criminal law such as justifications . . . regulate individual conduct . . . by authorizing certain individuals . . . to decide . . . when it is permissible to violate the law’s general prohibitions.”); George Fletcher, *Domination in the Theory of Justification and Excuse*, 571 (“The political issue at stake in interpreting the requirement of imminence [in self-defense] is whether the state’s authority to keep the peace should yield to the individual’s authority to use force in self-protection.”).

avoiding prosecution and breaking the law only when it is justified?⁴⁸ Furthermore, if it is the case that the necessity defense is available under certain conditions, what would be wrong with bringing that decision point *before* the fact as opposed to *after* the fact so that we permit and regulate torture using, say, torture warrants in advance, as opposed to applying the necessity defense after all is said and done? In fact, it seems unfair to withhold legal advice about what is allowed and what is not allowed from government officials when we *know* that, due to the nature of their work, they would frequently do their job in proximity to edges of law.⁴⁹

IV. A Further Inquiry into the Nature of the Defense of Necessity

My conclusions thus far are as follows. The argument based on the “ad hoc” quality of the necessity defense, it seems to me, is a bad argument. I am sympathetic to the slippery slope argument and the “artificial cases make bad ethics” arguments, although I will not attempt to defend them here. In the rest of the Essay, I will focus on the remaining questions about whether recognizing the necessity defense for torture can legitimize torture and whether we can come up with a theoretical account of the defense-authorization distinction that can meet the challenges against it I raised above.

Consider the following argument:

- 1) Torture is sometimes morally justified.
- 2) The necessity defense should be available in situations where torture is morally justified.
- 3) Government officials should (or should be permitted to) engage in torture whenever the necessity defense would be available.
- 4) The government should form policies on when torture is to be used (or permitted) by its agents at least partly on the basis of when the necessity defense would be available.

Proponents of aggressive anti-terrorist interrogation policies, of course, do not rely on this type of arguments only. Some, like Posner and Vermeule, go straight from step 1) to a set of policy proposals on legalizing and institutionalizing certain interrogation practices.⁵⁰ They discuss the necessity defense only in order to demonstrate that the compromise position of maintaining the absolute prohibition on torture while allowing such a defense is unstable and incoherent. One familiar objection to the Posner-Vermeule type thinking is that there is a difference between answering a moral question in a particular situation and designing an institution by generalizing from a particular moral dilemma.⁵¹ But there is another way of looking at this, which is to focus on the point of the necessity defense itself.

⁴⁸ Cf. Kremnitzer & Segev (“It is not always easy to accept the conclusion that a governmental authority does not have the power to perform a justified act in the absence of specific authorization. . . . It is especially hard to accept this conclusion when it concerns an authorization to carry out an exceptionally important action.”).

⁴⁹ See generally Jack Goldsmith, *The Terror Presidency*

⁵⁰ *Terror in the Balance*

⁵¹ Rawls, *Two Concepts of Rules; Act and rule utilitarianism*

A. What Does the Necessity Defense *Do*?

A typical way of thinking about criminal law defenses is to assume that the essence of the defenses mirrors moral principles.⁵² According to this view, contours of justification defenses should track morally permissible instances of violations of prohibitions. From that perspective, the progression from step 1) to step 4) seems natural. If moral and legal justifications coincide, then it follows that whatever is allowed by a (legal) justification defense is morally permissible, and the government may guide its own conduct by considering what conduct would constitute successful defenses since by doing so it would at least avoid engaging in immoral conduct. However, as several scholars have argued, criminal law defenses should be studied not only as problems of moral philosophy, implicating questions about blame, culpability, and moral rights and wrongs, but also as problems of political philosophy, spelling out terms of the proper relationship between individuals and the state.⁵³

Of course, saying just that does not tell us much about what precise role political theoretical considerations should play in understanding defenses. There are at least two ways of going about combining moral and political philosophical considerations in thinking about criminal law, and only one of them gives political theory a foreground role in understanding defenses. First, the reason it is important for criminal law doctrines to mirror morality is because the system would lose its legitimacy if criminal law punished the morally blameless and tolerated the morally blameworthy, and this, in turn, is because of the condemnatory dimension of punishment. Because criminal law speaks the language of morality, the state must earn its self-righteous posture, and it can lose its moral authority and legitimacy by getting moral questions wrong in its administration of the criminal justice system. Now, if the role of political philosophy is defined in this way only, then there would not be much need to refer to principles of political philosophy to shape criminal law doctrines; it would be sufficient to get moral principles correct and successfully translate such moral principles into legal terms.⁵⁴

A contrasting approach might go as follows. Political theoretical considerations must play a more direct role in shaping criminal law doctrines so that one can point at different kinks and bumps in the law and explain them as flowing from some features of the proper state-individual relationship. Because moral considerations would also play a role, the resulting doctrine would be some blend of moral and political considerations.

Under the first approach, it may be argued that we need the necessity defense because of the nature of rules. The legal system, in order to settle conflicts that arise in societies and provide guidance for behavior, are written in general *and* determinate terms. If rules are determinate but too specific, there will need to be a large number of rules, which puts stress on people's ability to follow them because they would have to understand which rules apply to them and how the rules fit together. On the other hand, if rules are general but indeterminate (such as "drive safely"), the possibility of multiple

⁵² See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 6-17 (2003) (criticizing what he calls the "Standard Account," which treats the justification and excuse distinction in criminal law to be equivalent to the justification and excuse distinction in morality).

⁵³ See, e.g., Malcolm Thornburn, *Justifications, Powers, and Authority*; V.F. Nourse, *Reconceptualizing Criminal Law Defenses*; George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996).

⁵⁴ For an example of this approach, see Kim Ferzan, *Self-Defense and the State*

interpretations of general terms can lead to uncertainties about what the rules allow and prohibit.⁵⁵

If we have rules that are both general and determinate, such rules will sometimes instruct people to behave in ways that are less than optimal, simply because the rules may be overinclusive or underinclusive. The necessity defense, understood as a general defense that potentially can be raised every time a law dictates conduct that does more harm than good or prohibits conduct that would do more good than harm, then would be designed to correct every error created by general rules. This is one way to understand the defense, and statements like the following are typical: “[T]he law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.”⁵⁶ The Model Penal Code provision of the necessity defense is written broadly enough to allow this interpretation: “Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.” If this were the correct reading of the necessity defense, then the driver who runs a stop sign in the middle of desert when there are no other cars around has a necessity defense if his violation of the traffic law was necessary for avoiding the “harm or evil” of being late to a movie.⁵⁷

But of course this is not the correct application of the necessity defense. Why not? One answer might be that being late to a movie is not the kind of “harm” recognized by the society as an evil to be avoided, but that kind of answer presupposes some conception of an “official” list of harms or evils that “count” in the balance of evils analysis.⁵⁸ Another answer might be that having this kind of exception available for every criminal law provision ends up having the effect of amending every rule to read, “X is prohibited unless it makes more sense to do X in a given situation,” which defeats the purpose of having these rules in the first place.⁵⁹ And neither response can avoid committing to some idea as to a purpose of having a legal system – that is, as a mode of conduct guidance⁶⁰ – and *that*, in turn, pushes the analysis away from an exercise in moral reasoning towards an articulation of the proper relationship between citizens and the state. That is, the kinds of questions one must answer -- in considering which kinds of interests the state should recognize as correct types of interests the protection of which may justify rule violation and in considering why having a well functioning legal system requires having rules that the state may enforce even when doing so means punishing a person who has done the right thing -- are questions of political theory.

Therefore, it seems very difficult to give an interpretation of the necessity defense that treats the question of what is “necessary” as a moral question only, and we need to give political theory a more direct role in understanding the defense of necessity. We can start by imagining another objection one might raise against my discussion thus far.

⁵⁵ Alexander & Sherwin, Rule of Rules

⁵⁶ LaFave, vol. 2, section 10.1

⁵⁷ Cf. KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 293 (observing that the Model Penal Code necessary defense “contains no express restrictions in terms of evils avoided and crimes committed” and that it “does not require that the harm avoided be very serious”).

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⁵⁹ Alan Brudner, *A Theory of Necessity*

⁶⁰ Raz, Rule of Law and Its Virtue, in *Authority of Law*

Perhaps the necessity defense should be thought of as a moral provision for *mala in se* offenses at least. *Mala in se* offenses generally protect against harms to others, and to the extent that the necessity defense defines situations in which one may harm others, the argument would go, the shape of the defense should track our moral judgments about when it is morally permissible for a person to harm others.

The problem with this argument is that the necessity defense is not available “if the issue of competing values has been previously foreclosed by a deliberate legislative choice, as when some provision of the law deals explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the claimed justification otherwise appears.”⁶¹ That is, the defense does not contemplate principles of morality trumping legislative judgments in certain situations;⁶² it contemplates in fact the principle of legislative supremacy. Even if the optimal outcome in a given situation is to violate a given prohibition, if the legislature has chosen to mandate the suboptimal outcome in that situation, then the violation is not justified. The legislative will takes priority over dictates of morality when they conflict, and the necessity defense should be understood as a way of supplementing legislation, as opposed to a general all-purpose policy of not punishing individuals who do the right thing all things considered.⁶³

So this is one way in which the necessity defense spells out the terms of the relationship between individuals and the state: even if harming others’ interests in violating a law may be morally permissible as a necessary means to choose a lesser evil, one may not raise the necessity defense to avoid prosecution for the violation if the legislature has made a determination to foreclose the availability of the defense in that situation. The relationship the law imagines is the one in which the law decides what is allowed and what is not allowed and the necessity defense permits individuals to do what the law prohibits in situations where the balance of evils analysis produces a certain result -- but only so long as no one forgets who is the boss.⁶⁴

That the necessity defense is concerned not only with permitting illegal behavior when it is morally permissible but also with spelling out the terms of the relationship between individuals and the state can also be seen in the “imminence” or “emergency” requirement of the necessity defense.⁶⁵ That is, it is not enough that a violation of the law resulted in a lesser evil than the evil avoided through the violation (and that it was

⁶¹ MPC commentary 3.02 p. 13

⁶² *But see* State v. Wooton, Crim. No. 2685, Cochise County, Arizona, September 13, 1919, as reproduced in *The Law of Necessity as Applied in the Bisbee Transportation Case*, 3 ARIZ. L. REV. 264 (1961) (“The law of necessity . . . is based purely upon the natural rights of the individual. It can neither be granted nor taken away by statute.”).

⁶³ KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 289-90; *see also* United States v. Schoon, 971 F. 2d 193 (1992) (“In some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances.”).

⁶⁴ *Cf.* JOSEPH RAZ, THE MORALITY OF FREEDOM 77 (“It is not that the law claims that one ought to obey the law come what may. There are many legal doctrines specifically designed to allow exceptions to legal requirements, doctrines such as self-defense, necessity, public policy, and the like. The point is that the law demands the right to define the permissible exceptions.”).

⁶⁵ LaFave; Although the Model Penal Code version of the necessity defense does not contain the imminence requirement, imminence is commonly required. George Fletcher, *Rethinking Criminal Law*

not precluded by the legislature). The violation also must have been the only legal option that the actor had available to address the choice of evils he was facing.⁶⁶

The point of the imminence requirement, then, is to allow violations of law only when the government is unavailable to prevent the harm that the actor seeks to avoid. The government is authorized to make decisions that harm individuals' interests for the common good, and private individuals are prohibited from doing so, and the necessity defense allows private individuals to do the balance of evils calculation themselves and act on them in ways that hurt others' interests only when the government is effectively out of the picture due to the imminence of harm. If a legally sanctioned response to the harm is unavailable, then the permission to act as if the government does not exist is granted.⁶⁷ Of course "acting as if the government does not exist" does not mean that anything goes; there is still the requirement of engaging in conduct that is *morally* justifiable as well. The point, rather, is that *when* an individual may engage in this kind of moral reasoning to guide his conduct in contemplating violating a law, as opposed to legal reasoning only, is severely constrained by the requirements of the necessity defense.⁶⁸

Why does the necessity defense have this particular structure? George Fletcher has argued as follows:

The limited range of competence to invoke the necessity defense stands in contrast to the free-ranging legislative power to prescribe general rules of socially desirable conduct. Every socially justified prohibition benefits some people and harms others, yet it is the legislature's prerogative to make these judgments that impose uncompensated costs on some people. The legislature is empowered, in short, to pick the victims of the common good. Yet these are not the costs that we wish private individuals to impose on each other, even if the private judgment of social welfare is correct.⁶⁹

Fletcher then concludes that a private citizen is authorized to violate the law only when "the legislature can no longer make reliable judgments about which of the conflict interests should prevail" due to the imminence of the danger.⁷⁰

Victoria Nourse has similarly argued that:

⁶⁶ In *Nelson v. State*, for instance, taking a government owned truck without permission to remove defendant's truck that was stuck in mud was not justifiable because the legal option of calling a tow truck existed. Also, attempts to raise the necessity defense to justify trespassing by protesters have failed because "lawful political activity to spur [legislative] action [to reform a law or policy] will always be a legal alternative" and "the fact that [a protester] is unlikely to effect the changes he desires through legal alternatives does not mean . . . that those alternatives are nonexistent." *United States v. Maxwell*, 254 F.3d 21 (2001).

⁶⁷ See George Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PENN. L. REV. 1691 (2003).

⁶⁸ John Gardner, *Justifications and Reasons*

⁶⁹ Fletcher, *Domination in the Theory of Justification and Excuse*

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The necessity defense demands deference to the state for reasons [having to do with the idea of] “taking the law into one’s own hands.” . . . The critic of necessity fears that violent opponents of the draft or abortion or nuclear power have acted “above” the state, exempting themselves from the rules applicable to others.⁷¹

And she concludes that the necessity defense is designed in order to avoid the possibility of permitting individuals to “legislate” and is therefore available only “where the state is unavailable.”⁷² Malcolm Thorburn has made a similar argument with a slightly different emphasis, by arguing that justification defenses like the necessity defense allow “private citizens [to] make themselves instruments of the state” and that private citizens are “entitled to violate the criminal law’s general prohibitions only when they act as tools for the promotion of certain ends normally forwarded by state officials.”⁷³

These arguments all differ somewhat, as Fletcher focuses on the idea of a private citizen imposing costs on others, Nourse on the idea of private legislation, and Thorburn on the idea of private citizens “exercising a delegated state power,” and there is no need to evaluate comparative merits of these different descriptions here. I will argue below that all three formulations are crucially misleading, but what does seem clear, however, is that the necessity defense is about, as Fletcher notes, “the proper allocation of authority between the state and the citizen.” Once a law has prohibited a conduct, it demands compliance even if a citizen may have many good reasons not to comply in certain situations, and the law does that by “occupying” the field and replacing various reasons to engage or not engage in a conduct with the prohibition.⁷⁴ The necessity defense lifts the prohibition, and the reasons for and against performing the act come roaring back in, and the law places strict limitations on when that prohibition is lifted, by requiring that the danger be “imminent” and that legally sanctioned ways of dealing with that danger be unavailable due to the emergency nature of the situation. In other words, at least to the extent that the necessity defense restricts the ways in which private citizens may use force that harms another’s interest, the limited scope of the necessity defense is one of many tools that help sustain the state’s monopoly on legitimate violence.

B. Necessity and Government Actors

Let’s now go back to where we started. Is there anything wrong with an argument that starts from the premise that the necessity defense may be available against prosecution for torture to the conclusion that the government can determine when torture is or is not allowed at least partly on the basis of the availability of the necessity defense? If the necessity defense is about allocating power between individuals and the state and is a way of sustaining the state monopoly on violence, then the argument in question

⁷¹ Nourse, REconceptualizing Criminal Law Defenses

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⁷³ Thorburn, Justifications, Power, and Authority

⁷⁴ Raz, Morality of Freedom 38-69

amounts to a sleight of hand. The necessity defense is an exception to the general rule that only the state may act in certain ways; it creates a space in which citizens are empowered to act as if the state has disappeared from the scene, and it is improper for the state to refer to the existence of that space to expand the scope of its own power. The necessity defense effects a division of power, with the state reserving itself the power to harm individuals' interests as a general matter but letting individuals have such powers in situations of emergency. The necessity defense, in other words, exists to empower individuals where individuals are supposed to be powerless; it cannot be used to confer powers on the state as well.

One might object to this conclusion. If it is indeed the case, the objection might go, that an individual is empowered to act as if he is a government official in situations of emergency, does it not follow then that a government official is also able to act in the way that a private individual is allowed to act in such situations? If we think back to formulations of Nourse, Fletcher, and Thorburn that private citizens in situations of emergency are allowed to act as if they are government officials, then this kind of objection seems to follow. That is, how can one start with the presumption of state monopoly on violence and argue that the state monopoly is sometimes shared with private individuals *and* conclude that a state cannot do what a private individual is allowed to do? If a private individual can do it when he acts as if he is a governmental official, then *a fortiori*, a government official can do it in the same situation. Therefore, the argument would conclude, it is entirely appropriate for a government body to examine what is allowed under the necessity defense and seek guidance as to what it is allowed to do. After all, the government's power is greater than what is allowed to private individuals under the necessity defense, and the greater (state's monopoly on violence) must necessarily include the lesser (individual's use of violence).

The problem with this argument is its conflation of the *domain* of governmental power with *authorized uses* of governmental power. The state monopoly on violence is a statement about the domain of governmental power in relation to its citizens. The monopoly prohibits everyone other than the state to use violence, but that of course does not mean that *any* use of violence by the state is legitimate. For instance, only the state may punish, but the power of the state to punish is strictly regulated as to whom, when, how, how much it may punish. Neither does the state monopoly on violence mean that a private individual's authorized use of violence necessarily has a governmental counterpart every time. All that the necessity defense does is to lift the prohibition on private uses of violence thereby creating a domain in which individuals are empowered to use violence, temporarily weakening the monopoly, but such a lifting of prohibition does not create a corresponding power for the state.

The confusion of *domain* and *authorized uses* of governmental power can easily arise in discussions of the necessity defense because the common examples used to illustrate the nature of the necessity defense involve situations in which the prohibited yet justified conduct by the individual is something that public officials are permitted to engage in as routine parts of their job (such as running a red light). The discussions encourage the perception that what an individual is doing is the job that a government official normally does or that an individual is doing what a government official or the legislature would allow him to do if they were around to give permission during situations of emergency (say, permission to park in front of a fire hydrant). But that

perception is wrong. What is allowed to happen during the suspension of the state monopoly on violence has no implications for how the state is allowed to act within its own domain. What the state is allowed or not allowed to do is determined by a whole another set of power-conferring rules, such as the Constitution, legislations, and regulations. This is why it is improper for the state to go from the proposition that the necessity defense allows individuals to act in certain ways in situations of emergency to the conclusion that government officials are therefore allowed to act in the same way.

Does this conclusion – that the necessity defense empowers private citizens in situations of emergency but has no implications for the government’s power – imply that in fact that the necessity defense is available for private individuals in the ticking bomb-type scenarios but not for public officials? It does not. What it implies, rather, is that when a public official raises the necessity defense for torture, he cannot raise it in his capacity as a public official but can raise it only in his capacity as a private individual. That is, assuming that torture is illegal and assuming that he is not authorized to torture, when he tortures he cannot justify his conduct as flowing from his power as a government official. However, he still can raise the defense of necessity as a private individual, and this is because the fact that he is acting *ultra vires* does not deprive him of his status as an individual who is as entitled to criminal law defenses as everyone else. He just does not get to hide behind the cloak of governmental authority; he is on his own. It is true the fact that he finds himself in a privileged position of preventing a terrorist attack has everything to do with his status as a government official, but that does not turn every conduct by him into official government conduct.

C. Implications

What are the implications of my argument so far for the debate as to whether it is coherent to maintain an absolute prohibition on torture while allowing the necessity defense? My argument here does not address every debate that I identified above. For instance, my argument does not address the question whether the ticking bomb hypothetical is dangerously misleading (I think it is, but that conclusion is not an implication of the argument developed in this Essay). Neither does my argument address the issue as to whether allowing torture in certain situations puts us on a slippery slope at the bottom of which is a radical expansion of torture beyond situations of emergency.

However, my argument is relevant to the remaining three debates. First, it seems to me that one of the things that are wrong with the torture memo *does* have something to do with the nature of the necessity defense. However, it is not the “ad hoc,” “case by case” nature of the defense that we should focus on; rather, it is the power allocation function of the necessity defense that is the key to the question of whether something about the nature of the necessity defense calls into question the government’s reliance on the necessity defense to justify an exercise of power.

Second, the argument in this Essay is closely related to the argument made by the Israeli Supreme Court, Gur-Arye, and Kremnitzer that we need to distinguish between criminal law defenses and authorizations. Putting it in terms of the defense-authorization distinction is inaccurate, however, as the defense does authorize *somebody* – namely the private citizen facing a situation of emergency without having recourse to the government or government-sanctioned responses to the situation. A better way of formulating the

idea is that the defense of necessity provides a defense to everyone in his or her private capacity by authorizing conduct that is normally prohibited in situations of emergency but it does not enlarge the scope of government officials' authority. Above, I noted that the distinction between defenses and authorizations does not adequately address the following questions:

Namely, if it is the case that an official may be able to successfully raise the necessity defense to avoid prosecution for torturing a person under ticking bomb-like scenarios, what is wrong with a government official deciding how to act on the basis of the goal of avoiding prosecution and breaking the law only when it is justified? Furthermore, if it is the case that the necessity defense is available under certain conditions, what would be wrong with bringing that decision point *before* the fact as opposed to *after* the fact so that we permit and regulate torture using, say, torture warrants in advance, as opposed to applying the necessity defense after all is said and done? In fact, it seems unfair to withhold legal advice about what is allowed and what is not allowed from government officials when we *know* that, due to the nature of their work, they would frequently do their job in proximity to edges of law.

The answer to these questions should now be clear. First, it is not that there is something necessarily wrong with a government official deciding how to act on the basis of the availability of the necessity defense. It is just that there is a difference between a government official planning his conduct to ensure that he avoids criminal prosecution and planning his conduct so that he acts within the scope of his authority. And the difference is that a government official who raises the necessity defense would be raising it in his capacity as a private individual acting outside the scope of his authority.

The possibility of confusion of the two is great in the Torture Memo because it was written not to advise government officials about how to avoid prosecution (although that was clearly an important motivation⁷⁵) but to answer the more vaguely formulated question of what government officials are allowed to do under the law – as the Bush Administration was at the time in the process of designing an interrogation policy that would be implemented by the C.I.A. In the August 2002 Torture Memo, the discussion of the defenses follows a long discussion of the scope of criminal statutes that govern interrogation practices and their relationship to the President's Executive Power, which the Memo describes in a notoriously broad manner, and the conclusion that the memo reaches is, "We conclude that, under the current circumstances, necessity . . . may justify interrogation methods that might violate Section 2340A."⁷⁶ Because of the purpose of the memo, which was to green light a government policy and help the government design an interrogation program, its invocation of the necessity defense without warning that the availability of the defense for a government official does not necessarily mean that he is acting within the scope of his authority was a category mistake, amounting to an unduly expansive interpretation of the scope of the powers of the government.

⁷⁵ Jack Goldsmith, Terror Presidency

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So should the Office of Legal Counsel have left out its discussion of the necessity defense in its memos? And would that not be unfair to government officials who are out there, risking their own lives in their fights against terrorism? The least we could do, some might argue, is to give them good legal advice about how to avoid going to prison for defending the country. The answer is that the Office of Legal Counsel could have mentioned the necessity defense, but it should have made clear that, in this context at least, a government official who was breaking the law and relying on the necessity defense to exculpate himself would be doing so in his private capacity as an individual and not as a government official authorized to use force in his official capacity as a federal employee.

My analysis also shows what is wrong with the idea that once we conclude that a conduct can be justified under the necessity defense, the same decision can be brought to the time *before* as opposed to *after* the criminal conduct in question. Bringing the decision as to whether to torture up in time means that it would be part of the government's interpretation of what kinds of powers it has, and, as I have been arguing, the necessity defense cannot be used that way.

The discussion thus far does not fully address the argument that acknowledging the possibility of a necessity defense for torture in effect legitimates torture. This argument may come from two directions. First, some may argue that because allowing the necessity defense for engaging in conduct as grave as torture would legitimate it, the necessity defense should not be allowed.⁷⁷ Second, like Posner and Vermeule, some may argue that since the necessity defense legitimates uses of torture in situations of "necessity," there is no difference, as far as legitimization is concerned, between a system in which the absolute prohibition is intact but the necessity defense is available and a system in which torture is legalized and regulated strictly so that it is used only in situations of necessity.

The first criticism, it seems to me, is serious. It is true that there could be some legitimization effect, and perhaps the symbolic power of torture is so great that allowing the necessity defense would create the kind of risk to our self-identity that is not worth taking. The second criticism, however, is less valid, and the discussion thus far shows what is wrong with it. The mistake of this view is that it assumes that there is no difference between empowering the government and acknowledging the need to temporarily suspend the usual ways of doing things in moments of emergency. In normal times, the division of labor between the government and private citizens dictates that only the government engage in uses of violence, and the policy of "legalize and regulate" increases the scope of the government's power within the same structure of power relations. In times of emergency, the division of labor itself becomes suspended, and private individuals can act in ways that are inconsistent with the division of labor. The two situations are thus radically different; one is "business as usual" with just more power given to the government, and the other is anything but. And it is simply not true that the public focuses only on "outcomes," as Posner and Vermeule claim, and cannot tell the difference between the two states of affairs.

⁷⁷ The case of Dudley and Stephens may be read in this way, although that is not by any means the only way to interpret that case.

CONCLUSION

This Essay has argued that we can give a coherent account of combining the absolute prohibition on torture and acknowledging the potential applicability of the necessity defense under certain narrow circumstances. The focus of my discussion – the difference between empowering the government on one hand and permitting private individuals on the other -- settles only the question as to *whether the defense of necessity empowers the government*; the question *whether to empower the government along the lines of the necessity defense* remains. That is, as Kremnitzer and Segev asked: “If an act is justified and every individual is permitted to perform it, then why not empower the appropriate authority to carry out such action as well? In fact, why not confer on every governmental authority the general power to perform *every* justified act?”⁷⁸ Much has been said on this topic already, and I have little to add here. For the purposes of this Essay, the important point is that the act of *empowering* must occur before the government starts acting in certain ways. The power cannot be implied from the existence and potential use of the necessity defense; neither is it nonsensical or disingenuous to deny that power to the government while acknowledging the availability of the defense.

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