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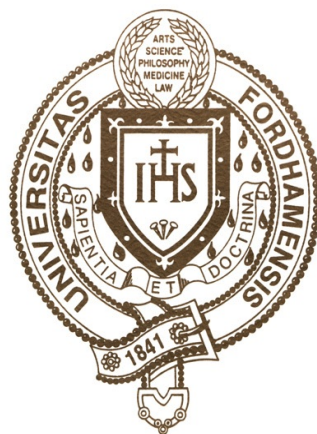
Youngjae Lee

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By

YOUNGJAE LEE
ASSOCIATE PROFESSOR OF LAW

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The Defense of Necessity and Powers of the Government

Youngjae Lee*

If one of the lessons of the ubiquitous and highly problematic “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. It has been hotly debated, and a number of arguments have been made against the idea of formulating the torture policy on the basis of the ticking-bomb hypothetical. 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, what implications, if any, should the government be able to draw from the existence of the defense as it formulates its torture policy? This Essay discusses – and rejects -- one common answer to this question – that the nature of the necessity defense is such that it can generate no forward-looking prescriptions. This Essay then advances a new argument on the basis of the nature and function of the necessity defense as not only spelling out morally permissible instances of harm infliction but also effecting a division of power between the state and citizens.

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. It has been hotly debated, and a number of arguments have been made against the idea of formulating the torture policy on the basis of the ticking-bomb hypothetical.²

Some, like Henry Shue, argue that “artificial cases make bad ethics”³ and 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.”⁴ Some point out that there is a difference between answering a moral question in a particular

* Associate Professor of Law, Fordham University School of Law. Thanks to Sandra Marshall, Julie Suk, Ian Weinstein, and Ben Zipursky, and participants at the “Criminal Law in Times of Emergency” conference at Hebrew University in May, 2008.

¹ For cogent criticisms, see Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235 (2007); David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35 (KAREN J. GREENBERG ED., 2006); David Luban, *Unthinking the Ticking Bomb*, in *GLOBAL BASIC RIGHTS* (ROBERT GOODIN & CHARLES BEITZ EDs., forthcoming 2008).

² For a collection of representative essays, see *TORTURE: A COLLECTION* (SANFORD LEVINSON ED., 2004). For a useful summary of positions, see Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION*, *supra*, at 232-36.

³ Henry Shue, *Torture*, 7 PHIL & PUB. AFF. 124, 141 (1978).

⁴ *Id.* at 141. For similar arguments, see Luban, *Liberalism, Torture, and the Ticking Bomb*, *supra* note 1, at 44-51; Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE: A COLLECTION*, *supra* note 2, at 281, 284; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1715 (2005) (“[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.”).

situation and designing an institution and implementing a set of practices.⁵ Some argue that the necessity defense should be used only as a “decision rule” and not as a “conduct rule,”⁶ because once guidelines are promulgated on when it is permissible to torture, it is inevitable that some government officials would push the practice of torture beyond the confines of the necessity defense and the scope of permissible torture could consequently enlarge.⁷ Yet others worry that even if it is the case torture may be sometimes morally permissible, loosening the absolute prohibition on torture by formally acknowledging an exception to the prohibition would have the effect of corrupting our legal system and shaking the moral foundations of our society.⁸

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,⁹ what implications, if any, should the government be able to draw from the existence of the defense as it formulates its torture policy? We have two well-known government documents that address this question.

First, in a much discussed opinion from 1999, the Supreme Court of Israel considered the question whether the General Security Service could legally engage in interrogation tactics that involved “physical means,” such as shaking, sleep deprivation, excessive tightening of handcuffs, and forcing subjects into uncomfortable positions.¹⁰ The Israeli Supreme Court handed down a pair of decisions that seem paradoxical. The Court decided that if a GSS investigator is facing criminal prosecution, the necessity

⁵ See Luban, *Liberalism, Torture, and the Ticking Bomb*, *supra* note 1, at 47-51.

⁶ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

⁷ Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION *supra* note 2, at 291, 296 (“If 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.”); Shue, *supra* note 3, at 143 (noting that there is “considerable evidence of torture’s metastatic tendency”); Waldron, *supra* note 4, at 1716 (“What we know . . . is that against the background of any given regulatory regime in these matters, there will be some enthusiasts who are prepared to ‘push the envelope,’ trespassing into territory that goes beyond what is legally permitted.”).

⁸ See, e.g., MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 143 (2004); Jean Bethke Elshtain, *Reflection on the Problem of “Dirty Hands,”* in TORTURE: A COLLECTION, *supra* note 2, at 77, 84; Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 352-56 (1989); Steven Lukes, *Liberal Democratic Torture*, 36 BRIT. J. POL. SCI. 1 (2005); Waldron, *supra* note 4, at 1715. Cf. Alon Harel & Assaf Sharon, *What Is Really Wrong with Torture?*, 6 J. INT’L CRIM. JUSTICE 241 (2008).

⁹ While I assume in this Essay that, in certain situations, the necessity defense may be available for a defendant facing prosecution for torture, this is by no means a foregone conclusion. First, the choice-of-evils analysis might always come out in the direction of prohibiting torture no matter how much evil is avoided through torture if torture is thought to be an absolute evil that outweighs whatever evils may be on the other side of the scale. 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. MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 2 at 12 n.5 (1985). Under this reading of the law, the concern that recognizing the defense for the crime of torture would have on the rule of law generally, see, e.g., sources cited in *supra* note 8, can be counted as one of the “evils” in the choice of evils calculation. For a criticism of this way of applying the necessity defense, see Alan Brudner, *A Theory of Necessity*, 7 OXFORD J. LEGAL STUD. 339, 343 (1987).

¹⁰ H.C. 5100/94, Pub. Comm. Against Torture in *Isr. v. Gov’t of Israel*, 53(4) P.D. 817, as reprinted as Supreme Court of Israel, *Judgment Concerning the Legality of the General Security Service’s Interrogation Methods*, in TORTURE: A COLLECTION, *supra* note 2, at 165.

defense would be available to him if all the requirements of the necessity defense are met. The Court also held, however, that 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.

Second, in the notorious “Torture Memo,”¹¹ 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,¹² and what kinds of defenses would be available should a governmental official be found to have violated the convention, which is implemented in the United States as federal criminal provisions.¹³ The Bush administration relied on this memorandum when it devised interrogation practices used by the C.I.A.¹⁴ 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. Implicit in the Memo is the proposition that if one could raise a successful necessity defense in certain situations for the crime of torture, the government may 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.

The Torture Memo has a lot of problems as a matter of legal analysis, and it has been heavily criticized for its various faults.¹⁵ But it is not at all obvious whether and why we should prefer the Israeli Supreme Court approach to the Torture Memo approach on the narrow issue of the significance of the necessity defense for the shape of the

¹¹ 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.” Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice to Alberto R. Gonzales, Counsel to the President, White House Counsel, White House (Dec. 30, 2004); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice to William J. Haynes II, General Counsel, U.S. Dep’t of Defense (Mar. 14, 2003). The first was addressed to the White House counsel Alberto Gonzales, and the second was addressed to the Department of Defense. In this Essay, by “Torture Memo,” I mean to refer 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: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 141-76 (2007).

¹² Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

¹³ 18 U.S.C. §§ 2340-2340A.

¹⁴ GOLDSMITH, *supra* note 11, at 141-76. The memo was later replaced by the so-called “Levin Memo,” dated December 30, 2004, which asserted that no interrogation practice approved under the old memo needs to change under the new memo. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice to James B. Comey, Deputy Attorney General, U.S. Dep’t of Justice (Dec. 30, 2004); see also GOLDSMITH, *supra* note 11, at 164-65. The Levin Memo does not discuss the necessity defense, stating that consideration of the defenses to the crime of torture “would be inconsistent with the President’s unequivocal directive that United States personnel not engage in torture.” See Memorandum from Daniel Levin, *supra*, at 2.

¹⁵ See, e.g., DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 176-80 (2007); Luban, *Liberalism, Torture, and the Ticking Bomb*, *supra* note 1, at 55-68.

torture policy.¹⁶ That is, if an official may successfully raise the necessity defense to avoid prosecution for torturing a person under ticking-bomb type scenarios, what is wrong with an official being guided by the necessity defense as he contemplates violating the prohibition on torture?

That is the question that this Essay attempts to answer. Part I of this Essay presents one common answer to this question – that the nature of the necessity defense is such that it can generate no forward-looking prescriptions -- and explores its shortcomings. Parts II and III advance a new argument based on the nature and function of the necessity defense as a device effecting a division of power between the state and citizens.

I. The Defense of Necessity as an “Ad Hoc” Device

The Israeli Supreme Court’s decision that the necessity defense cannot serve 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 an argument about the general nature of the necessity defense.¹⁷ 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.”¹⁸ The Court concluded, “Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power.”¹⁹

The Court’s argument has been defended by others. Alan Dershowitz, for example, 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.”²⁰ Mordechai Kremnitzer and Re’em Segev have similarly argued that “the basic idea 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.”²¹ In other words, acknowledging the potential applicability of the necessity defense for the crime of torture cannot have general forward-looking implications for the permissibility of torture simply because the necessity defense is not capable of generating such general prescriptions.

The logic of this argument, however, 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

¹⁶ Cf. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 171-80 (2007) (criticizing what they call the “outlaw-and-forgive approach”); *see also id.* at 294 (describing the Israeli Supreme Court’s distinction between defense and authorization to be “a rather subtle one”).

¹⁷ Supreme Court of Israel, *supra* note 10, at 178.

¹⁸ *Id.* at 179.

¹⁹ *Id.*

²⁰ Alan Dershowitz, *Is It Necessary to Apply “Physical Pressure” to Terrorists – and to Lie about It?*, 23 *ISR. L. REV.* 192, 197 (1989).

²¹ 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, 538 (2000).

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.²² It is unclear 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.²³ 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.²⁴ If necessity is a defense of justification, then, according to the standard account, it can provide a reason for action for citizens.²⁵ 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 the official, in a situation of emergency, temporarily lost his capacity to reason, 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 to those in charge of anti-terrorism efforts.²⁶ 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. 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.²⁷ And it is this element of what the society

²² MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 1 at 9-10.

²³ Cf. George Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1275-76 (1974).

²⁴ Cf. Kremnitzer & Segev, *supra* note 21, at 535-37 (discussing the significance of justification-excuse distinction in this debate)

²⁵ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 810 (2000); PAUL ROBINSON, *CRIMINAL LAW* 54 (1997); Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, not an Excuse – And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 864 (2003).

²⁶ See JOHN GARDNER, *The Gist of Excuses*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 121, 128-30 (2007).

²⁷ R.A. Duff, *Rule-Violations and Wrongdoings*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 47, 61-68 (STEPHEN SCHUTE & A.P. SIMESTER EDS., 2002).

demands of us that constitutes the guidance aspect of the necessity defense, even if it is understood to be an excuse defense.²⁸

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.

II. The Defense of Necessity as a Device for Effecting a Division of Power

Those who have tried to defend the Israeli Supreme Court’s treatment of the significance of the necessity defense for policy setting were nevertheless correct to focus on the nature of the necessity defense. They were wrong only in thinking that the answer had to do with the ad hoc nature of the defense, as the truth of the matter is elsewhere. In order to defend this claim, we must start by asking what the necessity defense *does*.

A typical way of thinking about criminal law defenses is to assume that the essence of the defenses mirrors moral principles.²⁹ According to this view, contours of justification defenses should track morally permissible instances of violations of prohibitions. If this view were taken seriously, then it does seem odd to recognize the necessity defense for certain instances of torture on one hand yet deny that the government may engage in torture in similar situations. 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 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 citizens and the state.³⁰

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

²⁸ For a discussion of necessity as an excuse in the torture context, see Jens David Ohlin, *The Bounds of Necessity*, 6 J. INT’L CRIM. JUSTICE 289 (2008).

²⁹ 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).

³⁰ See, e.g., George P. 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); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070 (2008).

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.³¹

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-citizen 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 interpretations of general terms can lead to uncertainties about what the rules allow and prohibit.³²

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."³³ 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."³⁴ If this were the correct reading of the necessity defense, then the driver who runs a stop sign in the middle of desert in

³¹ For an example of this approach, see Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449 (2008).

³² LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 28-32 (2001).

³³ WAYNE R. LAFAVE, *CRIMINAL LAW* § 10.1(a), at 524 (4th ed. 2003).

³⁴ MODEL PENAL CODE § 3.02.

broad daylight 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.³⁵

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. 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.³⁶ 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 guidance³⁷ – 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. 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.”³⁸ That is, the defense does not contemplate principles of morality trumping legislative judgments in certain situations; 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

³⁵ Cf. KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 293 (1987) (observing that the Model Penal Code necessity 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”).

³⁶ Brudner, *supra* note 9, at 342.

³⁷ JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979).

³⁸ MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 2 at 13.

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.³⁹

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.⁴⁰

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 citizens and the state can also be seen in the "imminence" or "emergency" requirement of the necessity defense.⁴¹ 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 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.⁴² 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.⁴³ Of course, this does not mean that anything goes once the government is not available; there is still the requirement of choosing the lesser evil. The point, rather, is that *when* an individual may engage in this kind of balance of evils

³⁹ GREENAWALT, *supra* note 35, at 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.").

⁴⁰ *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.").

⁴¹ LAFAYETTE, *supra* note 33, § 10.1(d)(5). Although the Model Penal Code version of the necessity defense does not contain the imminence requirement, imminence is commonly required. FLETCHER, *supra* note 25, at 795-96.

⁴² 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. *Nelson v. State*, 597 P.2d 977 (1979). 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).

⁴³ *See* Fletcher, *supra* note 30, at 569-70; Nourse, *supra* note 30, at 1713; Thorburn, *supra* note 30, at 1108, 1126.

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.⁴⁴

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.⁴⁵

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 conflicting interests should prevail" due to the imminence of the danger.⁴⁶

Victoria Nourse has similarly argued that:

The necessity defense demands deference to the state [in order to prevent one from] "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.⁴⁷

And she concludes that the necessity defense is designed to minimize permitting individuals to "legislate" and is therefore available only "where the state is unavailable."⁴⁸

Malcolm Thorburn has also argued recently:

[P]rivate citizens . . . are entitled to decide that it is justified to violate a prohibition to avoid a greater harm . . . only when it is essential to make that decision promptly and there are no properly qualified public officials available to consult. This tells us that there is an important division of labor taking place between public officials and private citizens. Whatever the moral standing of private citizens to use force in these situations, the criminal law in most Anglo-American jurisdictions quite clearly treats private citizens as exercising these powers only as stand-ins for public officials who have the power to make these decisions. Private citizens do not have the authority to make such decisions in their own right. Rather,

⁴⁴ John Gardner, *Justifications and Reasons*, in OFFENCES AND DEFENCES, *supra* note 26, at 91, 106-07.

⁴⁵ Fletcher, *supra* note 30, at 569.

⁴⁶ *Id.* at 570.

⁴⁷ Nourse, *supra* note 30, at 1712.

⁴⁸ *Id.* at 1713.

they have such authority, it seems, only insofar as they stand in the shoes of public officials to whom this authority belongs.⁴⁹

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 citizens standing “in the shoes of public officials.” 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 is that the necessity defense is about, as Fletcher notes, “the proper allocation of authority between the state and the citizen.”⁵⁰ 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.⁵¹ 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.

III. The Defense of Necessity and Powers of the Government

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 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

⁴⁹ Thorburn, *supra* note 30, at 1126.

⁵⁰ Fletcher, *supra* note 30, at 570.

⁵¹ RAZ, *supra* note 40, at 38-69.

emergency are allowed to act as if they are state actors (imposing costs on citizens, “legislating,” “standing in the shoes of public 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 something only when he is allowed to act as if he is a state actor, 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, and 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 run a red light). 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 proceed 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 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.

In other words, 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. 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 motivation⁵²) 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 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 a conclusion that the memo reaches is that, “under the current circumstances, necessity . . . may justify interrogation methods that might violate Section 2340A.”⁵³ 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.

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. Much has been said on the latter question, 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.

⁵² GOLDSMITH, *supra* note 11, at 67-70.

⁵³ Memorandum from Jay S. Bybee, *supra* note 11, at 2.