

## **Abstract for *Torture, Necessity and Existential Politics***

This paper takes up the political theory sketched by the Office of Legal Counsel memorandum of August 1, 2002. That memorandum proposed a theory of executive emergency powers, including the power to use torturous interrogation techniques otherwise barred by domestic and international law. According to the memorandum, both the power to deploy torture and other forms of coercive interrogation, and the general freedom of the executive to direct policy in times of war, are grounded in a justification of *necessity*. The central aim of my paper is to explore the force and limits of necessity claims in moral and political theory.

I argue that we must distinguish two concepts of rights, one that designates the protections and goals around which political institutions are built, and another that operates within political institutions, and is subject to welfarist overrides. Instances of the former are core human rights protections; instances of the latter are rights over property. We must also distinguish between two concepts of necessity, as *fact* and as *justification*. When necessity is deployed as a forward-looking justification, it vitiates the content of the principles it claims to override, and lends itself to the psychological and institutional abuses. Understanding necessity as fact, by contrast, demands that we resist the impulse towards justifying and institutionalizing the exception, while acknowledging the limits of our principles.

I also pursue in this paper the parallels between the Administration's claims of emergency power and exceptional justification, and the political theory of German constitutional theorist Carl Schmitt. As with Schmitt's theory, the administration's theory gains executive effectiveness at the cost of rejecting two of the deepest legacies of the Enlightenment: the inviolability of the individual and the priority of right to power.

# Torture, Necessity and Existential Politics

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“[I]f there is something worse than accepting slavery, it consists in defending it.”<sup>2</sup>  
–Bernard Williams, *Shame and Necessity*

## I. Introduction: The costs of rights

Rights have costs: that is their point. The cost of rights is in the coin of foregone welfare gains. No one minds a rights claim when honoring the right simultaneously enhances welfare. The distinctively modern achievement for speech and conscience has been to demonstrate the consilience of rights protecting those domains with the promotion of a flourishing public and private life. As a result, claims of rights to free speech and conscience are among the most easily accepted in public life. The test of a claim of right, however, comes not when its exercise serves the public good, directly or indirectly, but when it represents a direct hit to welfare. At the level of institutional and philosophical discourse, we in the United States used to honor the right against torture in this way. We saw it as justified independently of the costs or gains that might accrue

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<sup>2</sup> Bernard Williams, *Shame and Necessity* 111 (University of California Press, 1993).

from respecting it.<sup>3</sup> Now things are different: the Bush administration has decided not to pay those costs, and instead to make use of coercive, even torturous interrogation.<sup>4</sup> The override of detainee rights against torture has been justified on grounds of “necessity,” i.e., that the general welfare cost of observing the right would be intolerable.

Legitimacy also has costs. Legitimacy, as normatively understood, refers to the conditions under which exercises of institutional power can be justified. If the form of justification were merely welfarist considerations, then the concept of legitimacy would lack any bite: any sufficiently effective and benevolent despot could claim political legitimacy whenever his choices served the common good. While some rulers have *claimed* legitimacy on this basis, our contemporary concept of legitimacy is constrained, at the least, by demands for actual, direct or indirect popular participation in and support of political decisionmaking, as well as respect for basic rights. As with free speech

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<sup>3</sup> I echo here David Luban’s claims in his paper, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35 (Karen Greenberg and Joshua Dratel eds., 1983). I am throughout indebted to his discussion.

<sup>4</sup> The direct forms of interrogatory techniques that uncontroversially satisfy legally binding definitions of torture include water-boarding, false burial, “Palestinian hanging,” (where the prisoner is suspended by his arms, manacled behind his back), being left naked in a cold cell and doused with cold water, and being made to stand for 40 hours, shackled to a cell floor. In addition, the Administration has frequently transported detainees to the security services of other nations widely believed to use interrogatory torture in many different forms.

While there may be debates over whether some other well-documented techniques (mild assault, sexual humiliation, terrorization with dogs) constitute torture or merely “cruel, inhuman, or degrading” treatment, there is no reasonable debate whether these techniques fit comfortably within the definition of torture. They do. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *WASH. POST*, Nov. 2, 2005, at A1; Brian Ross and Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, *ABC NEWS*, Nov. 18, 2005, [abcnews.go.com/WNT/Investigation/story?id=1322866&page=1](http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1); Jane Mayer, *A Deadly Interrogation*, *THE NEW YORKER*, Nov. 14, 2005, [www.newyorker.com/fact/content/articles/051114fa\\_fact](http://www.newyorker.com/fact/content/articles/051114fa_fact); Mayer, *Outsourcing Torture*, *THE NEW YORKER*, Feb. 14, 2005, [www.newyorker.com/fact/content/?050214fa\\_fact6](http://www.newyorker.com/fact/content/?050214fa_fact6).

rights, roughly democratic conceptions of legitimacy brook little dissent in general, because they are highly consilient with overall welfare, as instruments for both revealing preferences and constraining authoritarian abuses of power.

Nonetheless, the fact that decisionmaking is constrained by non-welfarist criteria means that some choices that arguably promote welfare must be foregone. Given clear domestic legislation<sup>5</sup> and *jus cogens* international law norms that remove torture and other forms of inhumane treatment from the plate of policy options, whatever the welfare gains, legitimacy stands between the desire of a political actor to employ torture and its permissibility. The effort by Bush administration lawyers to argue against the constraining force of this legislation, and by policymakers to argue for preserving the CIA's ability to deploy torture overseas,<sup>6</sup> represents a deliberate unwillingness to pay the costs of legitimacy. Instead, the administration has put forward an even broader theory of necessity: when the country is at war, the executive must be unconstrained by law in order to serve the demands of military necessity and national security.

My aim in this Essay is to take up the question of torture's justification at both of the levels raised by the infamous (and now withdrawn) OLC memorandum of August 1, 2002,<sup>7</sup> which argued that those acting under presidential authority could be considered

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<sup>5</sup> S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; 18 U.S.C. §§ 2340-2340A (enabling legislation for the CAT, reserving serious criminal punishment for cases of torture).

<sup>6</sup> R. Jeffrey Smith and Josh White, *Cheney Plan Exempts CIA From Bill Barring Abuse of Detainees*, WASH. POST, Oct. 25, 2005, at A1.

<sup>7</sup> Memorandum for Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, RE: Standards of Conduct for Interrogation under 18 U.S.C.

unconstrained by international and domestic limits of interrogation. Although this Essay is critical of the positions put forward in that memorandum, criticism is not my main point. It is easy to condemn the administration's policy on interrogation, for general wisdom suggests that torture is as ineffective practically as it is disturbing morally. My aim, instead, is more analytical in two respects.

First, I argue that attention to the concept of necessity as a justification for torture, and especially to the limits of that justification, reveals something deep about the nature of rights as we deploy them institutionally. In particular, I argue, we make use of two very different concepts of right, one concept that serves to impose limits on institutional, welfarist considerations, and another that is far more sensitive to such considerations. Instances of the former are core human rights protections; instances of the latter are rights of disposition over property. We must also distinguish between two concepts of necessity, as *fact* and as *justification*. The confusion displayed in legal and philosophical thought concerning torture *in extremis* is a consequence of the failure to grasp these distinctions.

Second, I argue that the Bush administration's theory of executive power displays striking parallels to the political theory of Carl Schmitt, the conservative German constitutional thinker, who developed an argument about the need for extra-constitutional executive power in times of existential crisis for the Republic. Schmitt was

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18 U.S.C. §§ 2340-2340A, Office of Legal Counsel, Department of Justice, August 1, 2002, *reprinted as* Memo 14, *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172-217 (Karen Greenberg and Joshua L. Dratel eds., 2005). The nominal author of the memo is Jay Bybee, now a Judge on the Ninth Circuit; it was written by John Yoo, now Professor of Law at Boalt Hall, University of California at Berkeley.

uncompromising in his rejection of the modern, post-Hobbesian ideal of the law-governed state, whose fallacy he saw as revealed in times of national emergency. By comparing the Administration's subordination of ordinary law to emergency, I mean to show how deeply radical their theory of political legitimacy is, and how subversive it is in undermining a basic precept of liberal political thought and institutional design: that there must be no source of unlimited political authority. As with Schmitt's theory, the Administration's theory gains (potential) executive effectiveness at the cost of grave dangers of abuse and error. But I also want to argue that both the justification offered by the Administration for using torture in specific cases and the justification offered for broad executive authority commonly misconstrue the force of claims of necessity in these instances. Necessity cannot serve, I argue, as a justification for overriding rights against torture or congressional authority to dictate constraints on warfare. Taking these points together, the Administration's policy can be seen as rejecting two of the deepest legacies of the Enlightenment: the inviolability of the individual and the priority of right to power.

My plan is as follows. Part II sets out the Administration's justification of torture under claims of necessity and situates these within positive law. Part III, the heart of the paper, takes up the claim of necessity in ethics, first in relation to the infamous "ticking bomb" example so often put forward to establish a principle of permissibility. The ticking bomb case is a particular example of a general problem for deontological (non-welfarist) ethics, namely making sense of thresholds to rights claims without giving up the core of deontological theory. I distinguish here between two different, familiar and ubiquitous conceptions of rights, rights inherently sensitive to necessity claims, and those insensitive, of which, I argue rights against torture are the leading case. Part IV then

argues that the proper response to catastrophic claims for the latter sort of rights involves distinguishing two forms of necessity, necessity as justification and necessity as fact. Part V provides a synopsis of Schmitt's existential model of political authority and develops the parallel to the administration's theory of executive power, arguing that both suffer from a similar, devastating weakness: both permit the prospect of necessity to defeat the claim of constitutional limits. Questions of executive power in times of national necessity, like questions of necessity at the individual level, must recognize the force of the two different forms of right. Part VI concludes with observations about the role of necessity in political thought.

## **II. Micro- and macro-necessity**

As the story is now familiar, I will summarize: the leak of government memoranda creating a legal basis for US personnel to use torture in interrogations was a shock to many outside the administration. The shock lay less in the acknowledgment that the US was deploying torture than in the lawyerly *justification* of a practice whose gradual eradication is one of the defining features of post-Enlightenment liberal politics. The administration had made clear in the days immediately following the September 11<sup>th</sup> attacks that in Dick Cheney's words "we have to work, though, sort of the dark side."<sup>8</sup>

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<sup>8</sup> Richard Cheney, MEET THE PRESS, Sept. 16, 2001, transcr. available at [www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html](http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html). As Cofer Black, former Director of CIA Counterterrorist Center, subsequently testified to Congress, "All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves come off." Testimony of Cofer Black to Joint House and Senate Select Intelligence Committee, Sept. 26, 2002, accessed at [www.fas.org/irp/congress/2002\\_hr/092602black.html](http://www.fas.org/irp/congress/2002_hr/092602black.html)

With a political go-ahead, the CIA decided to use a number of formerly proscribed interrogation techniques on “high value” interrogees, notably including “water-boarding,” or the repeated submersion in cold water to create the impression of drowning.<sup>9</sup> At some point, before or after the interrogations had actually begun, the CIA apparently became worried that its personnel might be subject to the harsh penalties dictated by 18 U.S.C. §§2340-2340A, the implementing legislation for the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment, which the U.S. signed in 1988 and ratified in 1994.<sup>10</sup>

Prompted by the CIA’s request, the Office of Legal Counsel (OLC), under the signature of Jay Bybee, provided a memorandum to the White House on August 2, 2002. This memorandum, which I will call the Bybee memo, made a number of arguments aimed, first, at reducing the scope of §2340 to include only the most heinous forms of torture; second, the memo sought to establish as a principle of constitutional law that the statute could not bind the President in exercise of his powers as Commander in Chief; and third, the Bybee memo aimed to eliminate the force of the statute against torture altogether, by proposing a number of criminal defenses U.S. personnel could deploy if charged under the statute.<sup>11</sup>

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<sup>9</sup> Douglas Jehl and David Johnston, *CIA Expands its Inquiry into Interrogation Tactics*, NEW YORK TIMES, Aug. 29, 2004 at A1; Mark Danner, *Abu Ghraib: The Hidden Story*, NEW YORK REVIEW OF BOOKS, Oct. 7, 2004.

<sup>10</sup> 18 U.S.C. § 2340A provides for punishments of up to 20 years imprisonment for non-fatal torture, and capital punishment or imprisonment for any term for fatal torture.

<sup>11</sup> I discuss the Bybee memos at greater length, and the specific role of the OLC lawyers, in two papers: *The Lawyers Know Sin*, in TORTURE DEBATE 241-46; and *Causeless Complicity: The Case of the OLC Lawyers*, forthcoming in CRIM. L AND PHIL. (2006).

I am concerned here with the second and third points of argument in the memorandum, which I take up in reverse order. After giving its restrictive definition of torture, the memo contemplates the possibility that US personnel might nonetheless be found to have engaged in acts within the scope of the statutory prohibition, namely to have inflicted with specific intent or attempted to inflict severe physical or mental pain or suffering. It then considers some common-law defenses, nominally recognized by federal law, to the crime: necessity, also called “choice of evils”; and self- or other-defense. According to the memo, which follows Model Penal Code and hornbook law in this regard, both defenses revolve around a claim of necessity. Under the M.P.C. definition and at common law, necessity fully justifies a defendant in violating a penal norm when he reasonably believes that conduct violating the norm is necessary to avoid a “harm or evil” that is “greater than that sought to be prevented by the law defining the offense charged,” but only so long as there is no specific legislation or “legislative purpose” to exclude the justification.<sup>12</sup>

Necessity is an open-ended defense, which in principle justifies otherwise criminal acts against objects other than those directly posing the threat to the interests the actor seeks to defend. In its paradigm instances, for example, it justifies sailors

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<sup>12</sup> Model Penal Code §3.02. More exactly, §3.02 provides for a defense whenever defendant believes, reasonably or not, that he is in a situation of necessity; but unreasonable defendants can still be liable for crimes of recklessness or negligence. Since §2340 is a crime of specific intent, this would suggest that under the M.P.C. definition even a negligent torturer claiming the defense could be exculpated, though potentially liable on a charge of reckless assault. The M.P.C. view is arguably too permissive, in excusing many cases of substantively reckless criminality, when there does not happen to be a fallback crime of reckless conduct. Hence the standard interpretation of the defense, and its standard formulation, requires a reasonable belief. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §10.1(d)(3) (2003).

jettisoning cargo to save their ship or a hiker breaking into a cabin to escape a sudden storm.<sup>13</sup> Necessity is, therefore, the natural candidate for the situation under consideration in the memo: the decision whether to torture an already subdued, and therefore immediately harmless, detainee, who may have information that may help avert a threat that may arise. In the context at issue, the claim would be used to justify an act of interrogatory torture believed to be the unique effective means of avoiding yet worse harms. Oddly, however, the Bybee memo also proposes that a claim of defense of others might also excuse in the circumstances – oddly, because claims of self- and other-defense only apply to instances of force directed at a person who himself poses the immediate threat.<sup>14</sup> Evidently, the memo discusses this non-applicable defense for two reasons: first, because the caselaw of self-defense provides authority, while the caselaw of necessity does not, for the use of violence against others; and second, because self- and other-defense claims can properly be seen as a specific case of the broader necessity defense. In general, as the memo correctly states, self- or other-defense justifies the use of lethal force against someone posing a direct and imminent threat of serious bodily harm to oneself or another, when the defender reasonably believes that such force is “immediately necessary” to avoid the harm.<sup>15</sup>

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<sup>13</sup> MODEL PENAL CODE AND COMMENTARIES §3.02, Comment 1, at 9-10.

<sup>14</sup> As Luban notes, the only authority for the memo’s extension of self-defense to the case of an unthreatening victim is a philosophical article by Michael Moore making an abstract argument about moral responsibility, not a claim about the scope of self-defense law. Bybee memo at 211-212; Luban at 62-65.

<sup>15</sup> Bybee memo at pp. 209-213, citing M.P.C. §3.04 and WAYNE LAFAVE AND AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW vol. 1, 649ff (1986 & 2002 Supp.). The memo goes on to broaden the definition considerably – indeed to broaden it past recognition –

But self- and other-defense claims are inapplicable in cases of torturing a detainee who does not pose a direct threat. So the argument for the justifiability of torture must stand or fall with the force of the general necessity defense and its limitations. Let us return, then, to the general justificatory element of necessity, specifically, the “necessity” of deploying force in order to deflect or defeat a more serious harm. In principle, this would seem to limit the defense to cases in which the use of force is the only possible response to the threat and is sure to be an effective response to the threat. (It cannot be “necessary” to respond to a threat by doing something ineffective, even if ineffective responses are all that remain.)

In fact, the necessity defense presents much softer constraints than true necessity would indicate, in large part because it is applied partly subjectively, relative to the actor’s beliefs about the threat and its alternatives. An actor can mount the defense so long as he reasonably believes in the necessity of his acts, both as to the lack of options and as to the relative social values of the choice, but even if in fact there is no threat, or the means he chooses is not effective. But let us put aside this qualification as well, for the subjective justification clearly gets its normative force from an objective, ideal situation, in which the defendant’s act really is a necessary response to a real threat.<sup>16</sup>

Only if force could be justified in fact can an actor’s *judgment* about when it is justified

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so as to include cases of use of force to defend against uncertain and non-immediate threats, and when the direct object of that force – the interrogee – is not physically the source of the threat.

<sup>16</sup> The effect of rendering the justification subjectively is both to include objectively unjustified but morally non-culpable actors, and to exclude coincidentally justified but morally culpable ones. The essentially objective character of the justification is evident in LaFave and Scott’s treatment, and is manifest in the memo, which discusses the defense as providing a genuine justification, and not just exculpation.

be itself justificatory; otherwise necessity would instead be an excuse for an error in judgment.

What actually weakens the necessity constraint is a different epistemological point, one relative to the time frame of the defense rather than the perceptions of the defendant: the defense must apply to conduct undertaken before the threat materializes. It is frequently impossible to know whether the threat really would have been realized – perhaps the attacker would have run rather than shooting, or a rescue ship would have appeared on the horizon. And it is almost always impossible for anyone, let alone the defendant, to know in advance whether the use of force will be effective in meeting the threat. The result is that the defense must be read to justify not just in (unknowable) cases of actual necessity, but in cases where the probabilities of materialization of the threat, non-existence of options other than force and effectiveness of the force option must all be very high, approaching certainty at least with respect to the existence of the threat. Rephrased positively, the defense properly says that extralegal acts are justifiable when and only when they are highly likely to avert a virtually certain threat and it is also highly likely that there are no other options.<sup>17</sup> This definition lacks the term of necessity, but it is, I suggest, the only possible form the necessity defense can take, given the impossibility of discerning counterfactual futures. In sum, it is a slightly restrictive form of consequentialist, cost-benefit analysis, which justifies criminal acts when, given only

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<sup>17</sup> At common law, self-defenders are not even held to such a high standard, as the majority of states do not require defenders to choose to retreat, even when they can do so in safety, and one need never retreat from a home. See LAFAVE & SCOTT, §10.4(f). The memo's discussion of necessity seems to invoke these much weaker criteria, by treating the indices of certainty as mere continua of probability. Bybee memo at 209.

two options, good consequences outweigh the bad.<sup>18</sup>

The memo's assertion of a criminal law defense of necessity to charges of torture is remarkable, though not unprecedented, as the Israeli Supreme Court has also famously mooted the possible application of the defense.<sup>19</sup> But this form of the defense applies only at the retail, act-specific level. The Bybee memo does something equally remarkable but this time without precedent when it raises the claim of necessity at the wholesale level, in its argument that domestic legislation (and *a fortiori* customary international law) cannot constrain the executive from responding to the exigencies of war by authorizing whatever policies he deems necessary under the circumstances. Thus, in addition to the *micro-necessity* claim of the criminal law defense, the Bybee memo also invokes a *macro-necessity* claim in its constitutional argument. According to the memo,

[T]he Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign. . . . Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument. [internal citations omitted]."<sup>20</sup>

The memo's argument is that "intelligence operations, such as the detention and

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<sup>18</sup> The treatises and M.P.C. commentary, as well as the memo, straightforwardly treat the defense as a piece of utilitarian reasoning. See M.P.C. COMMENTARY, §3.02, Comment 3; LaFave, §10.1(a); Bybee memo at 208.

<sup>19</sup> *Hat'm Abu Zayda v. The General Security Service*, (consolidated with other cases), HCJ 6536/95, Israeli Supreme Court sitting as High Court of Justice (1999), unofficial translation available at [www.law.yale.edu/outside/pdf/Alumni\\_Affairs/torturedecision.pdf](http://www.law.yale.edu/outside/pdf/Alumni_Affairs/torturedecision.pdf).

<sup>20</sup> Bybee memo, pp. 204-05.

interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign” and that the waging of such campaigns is exclusively given to the executive by the Constitution.<sup>21</sup> In other words, the President can authorize his agents to use any ordinarily extra-legal means when he judges such means appropriate (the real sense of “necessary and proper”) to meet a military objective he has set.

On its face, this is an extraordinarily generous standard, which does not even require a state of war, but only the context of a “national security” concern. The position can be read as a broad form of necessity justification. While the Bybee memo authors put forward the justification for this position as a matter of constitutional text, structure, and original understanding, its underlying normative logic is recognizably that of necessity as well. The governmental structure under the Constitution is itself conceived functionally, an instrument for preserving the “security of the nation,” and the president’s role within that scheme is defined derivatively, as necessary to effect the goal of security. Thus, extra-legal policies are justified immediately as exercises of instrumentally justified discretion, and ultimately therefore themselves by reference to the national security they promote.

As an interpretation of common law, the Bybee memo has come in for severe attack. According to many critics, its legal reasoning ranges from the ludicrous to the

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<sup>21</sup> Bybee memo, p. 207.

unconvincing.<sup>22</sup> As David Luban elaborates, the memo bizarrely derives its definition of torture from a health statute. It fails to acknowledge the total lack of caselaw behind its assertion that the necessity defense might apply to acts of violence under color of law (as well as the fact that the necessity defense is only recognized in federal criminal law to be rejected in each instant case).<sup>23</sup> In order to avoid the central limitation that necessity defenses not contravene legislative purpose, the Bybee memo interprets the categorical prohibition by §2340 of acts of torture as, by negative implication, not precluding the defense of necessity.<sup>24</sup> And finally, as I mentioned above, it wrenches self- or other-defense claims from their standard setting to justify force used against a non-threatening, but possibly useful, third-party.<sup>25</sup>

As for the constitutional argument for exclusive executive authority, the Bybee memo fails to cite the principal caselaw on executive restraint in time of war<sup>26</sup> or mention

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<sup>22</sup> If Eric Posner and Adrian Vermeule were right that this is “standard lawyerly fare,” at least outside the context of the most zealous advocacy, we would be in very bad shape indeed. *A ‘Torture’ Memo and its Torturous Critics*, WALL ST. J., July 6, 2004.

<sup>23</sup> Luban, pp. 65-67.

<sup>24</sup> Bybee memo, p. 209.

<sup>25</sup> Luban, pp. 62-65. The derivation of “severe pain,” as applied to the meaning of “torture” is a particularly outrageous example of what I call orthographic or Lexis-based positivism, in which legal texts are interpreted against other texts with which they share no content-related basis, but only similarities in word-choice. See also Jeremy Waldron’s marvelous paper, *Torture and Positive Law: A Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005), which also takes up the peculiar, and disturbing, nature of the memo’s interpretive approach to positive law.

<sup>26</sup> *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952) (holding that President Truman must rely on explicit legislation or Constitutional provision even when acting during wartime on grounds of military necessity). The *Hamdi* decision, handed down

the contrary constitutional text lodging in Congress the power to “make Rules regulating the land and naval forces” and to “discipline” the militias.<sup>27</sup> In its excursion into original intent, it further relies on extremely exiguous material. The memo quotes Alexander Hamilton, in Federalist 23, on the need for broad national power to “provide for the defence and protection of the community,” as though this implied something about the specific authority of the President in relation to Congress.<sup>28</sup> And even if original intent were controlling, it is highly implausible that the Framers, students of Montesquieu and of the English debates on the limits of royal power, would have endorsed so sweeping a view of the executive’s authority. As Jack Rakove, one of the leading historians of the Founding era, has said, “On balance there is little evidence that the ratifiers expected either that the president would have the dominant voice in the making of foreign policy or that the Senate would be reduced to acting as a mere check on the executive.”<sup>29</sup>

Indeed, given the genuinely high reputations of the OLC lawyers, the poor quality of legal argument, and the number of lawyerly and policy hands it passed through, it is

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after the memo’s authoring, further finds justiciable due process constraints on the executive’s conduct of war. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>27</sup> U.S. Constitution, Art. 1, §8, cl. 14 & 16. The memo’s quotation of Hamilton, on the need for broad national power to “provide for the defence and protection of the community,” implies nothing about the authority of the President in relation to Congress.

<sup>28</sup> Bybee memo at 205, quoting THE FEDERALIST No. 23.

<sup>29</sup> Jack N. Rakove, *Making Foreign Policy -- The View from 1787*, in, FOREIGN POLICY AND THE CONSTITUTION 16 (Robert A. Goldwin & Robert A. Licht, eds 1990). See also Rakove’s more extended discussion of the original conceptions of presidential power in Chapter IX of his ORIGINAL MEANINGS (1996). While the Framers did change a draft version of Congress’ authority to “conduct” war to its authority to “declare” war, this is fully consistent with a conception of executive authority to conduct war subject to Congressional regulation. Art. 1, §8, cl. 11; ORIGINAL MEANINGS 263.

hard to escape the conclusion that the positions put forward in the Bybee memo are meant primarily as arguments not of law but of policy, giving a preferred normative view of how resorting to torture might be conceived and justified as an ethical and political matter. After the memo was leaked, and in the face of the confirmation hearings of Alberto Gonzales, OLC withdrew the memo as a matter of authoritative legal statement and then specifically repudiated its arguments as to the scope of “torture.”<sup>30</sup> The repudiating memo, under the signature of Daniel Levin, displays far higher standards of legal reasoning. But it does not mention the Bybee memo’s attempt to find criminal defenses for a torture charge; and it explicitly declined to repudiate the Bybee memo’s claim that legislation could not constrain the President from acting on military necessity during times of war.<sup>31</sup>

The Levin memo’s stated basis for declining to address the claims of executive authority was itself peculiar: the President’s “unequivocal directive” that US military personnel not engage in torture or other forms of inhumane treatment.<sup>32</sup> In other words, because of an exercise of executive discretion, ostensibly, the limits on executive power

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<sup>30</sup> Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Assistant Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§2340-2340A, December 30, 2004 <<http://www.usdoj.gov/olc/dagmemo.pdf>>.

<sup>31</sup> The legal justification for the Administration’s controversial program of warrantless domestic surveillance by the National Security Agency appears to rest, in part, on the same claim of legislatively untrammelled executive authority in national security matters. See Department of Justice White Paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, Department of Justice (Jan. 19, 2006), available at <http://permanent.access.gpo.gov/lps66493/White%20Paper%20on%20NSA%20Legal%20Authorities.pdf>.

<sup>32</sup> Levin memo at 2.

need not be addressed. Perhaps the Levin memo was intended, in light of the President's directive, to clarify the scope of torture so that U.S. personnel would know what forms of unauthorized conduct receive the most serious punishments.<sup>33</sup> But surely the Levin memo should also have examined the Bybee memo's argument for untrammelled executive authority. Between the issuance of the Bybee memo and the superseding Levin memo, OLC apparently took non-public action to ensure that US interrogation did not henceforth rely on the controversial executive power analysis (with the evident implication that the analysis had been relied on to justify practices in the interim).<sup>34</sup> But the reasoning behind the memo has still not been repudiated, at least to anyone's knowledge outside the government. And given the Administration's efforts to expand executive power generally and to maintain as much room as possible for methods of interrogation that otherwise would violate ordinary assault law, at the least, I think we

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<sup>33</sup> Actually, there appears to be a darker reason for the Levin memo, evidenced by the Administration's current efforts to exempt the CIA from pending legislation that would prohibit any US personnel, not just military, from engaging in inhumane conduct as well as torture. Since CIA personnel frequently operate side-by-side with military personnel, the effect of the new definition would be to protect a space for the CIA, and hence US overseas operations generally, to engage in cruel and inhumane treatment not rising to the level of torture. In any event, the Levin memo leaves unanswered the key question whether OLC still considers the most extreme practices apparently deployed by the CIA – waterboarding and false burial – outside the scope of “torture.” For invaluable discussion, see the blog posts of Marty Lederman at <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html>.

<sup>34</sup> See Letter from Daniel Levin to William Haynes, II, General Counsel at the Department of Defense, February 4, 2005, available at <http://balkin.blogspot.com/Levin.Haynes.205.pdf>. The Levin letter refers to a decision announced in December 2003 by OLC to withdraw a still-unreleased memo by John Yoo of March 14, 2003, which apparently incorporated the executive power arguments of the Bybee memo. For discussion, see Lederman's commentary, <http://balkin.blogspot.com/2005/07/graham-hearing-on-detainees-progress.html>.

may treat the theory as still very much in force and reflecting a broad political theory about the need for decisive executive power, if not law.<sup>35</sup>

In short, the Bush administration has put before us two distinct propositions about the justifiability of torture and has supported those propositions as a matter of normative, instrumental argument, even as it has backed away from its legal claims. Those propositions are:

- (i) Micro-necessity: a governmental actor may use torture in interrogation at least when torture is the only available and a highly likely means of avoiding a near certain threat of harm graver than that incurred by the act of torture.
- (ii) Macro-necessity: the President, pursuing national security or other military objectives, may authorize torture as, at least, a necessary response to a threat to national security.

I turn now to considering these propositions as matters of ethical and political theory.

### **III. Necessity, thresholds and ticking bombs**

As I remarked at the beginning of this paper, the core philosophical notion of a right is that rights provide us with reasons to act (or not act) even when aggregative welfarist considerations point the other way.<sup>36</sup> To put the point differently, there are

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<sup>35</sup> Dana Priest and Robin Wright, *Cheney Fights for Detainee Policy*, WASH. POST, Nov. 7, 2005 (“Cheney’s camp believes the president needs nearly unfettered power to deal with terrorists to protect Americans.”)

<sup>36</sup> For various versions of this claim, which I believe to be a consensus view of a deontological (as opposed to instrumentalist) conception of rights, or of duties grounding rights claims, see, obviously, IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* Bk. II (1785); ROBERT NOZICK, *ANARCHY, STATE & UTOPIA* 30-34 (1977)

many bad reasons not to honor a rights claim – reasons whose badness is overdetermined by considerations of consequence and individual dignity. Were the force of a right's claim only maintained in such cases, it would have no distinctive content, but would be simply a convenient repackaging of consequentialist considerations in a non-consequentialist shell. The core of a deontological conception of right is that it applies even in the face of putatively good reasons, in particular in the face of credible claims that social welfare would be maximized in some aggregative manner by violating the right.

It should therefore be clear why a general ethical defense of micro-necessity and a deontological conception of right are incompatible. The necessity justification proposes precisely what the rights claim denies: that action may be taken when the goods, taken together, pay for the bads, as measured by the “cost” of the rights violation. An unconstrained micro-necessity justification consists, effectively, in the forcible conversion of a deontological ethical framework into an act-consequentialist one.

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(rights as side-constraints on utility-maximization); Thomas Nagel, *War and Massacre*, reprinted in *MORTAL QUESTIONS* 53-74 (1979) (deontological constraints as limits on consequentialist justifications); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 80-83 (rev. ed. 1994) (agent-centered restrictions as constraints on consequentialist justification).

Ronald Dworkin's famous metaphor of “rights as trumps,” suggests a concept of rights as claims that categorically defeat considerations of general policy. However, Dworkin's particular deployment of the concept of a right relies on a quasi-utilitarian theory, according to which rights claims are justified when determinations of general welfare would be corrupted by what Dworkin styles “nosy” or “external” preferences. Such preferences are ruled out by an underlying individual right to treatment (by the state at any rate) as an equal, entitled to respect. See DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); for discussion see Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 *J. LEGAL STUDIES* 301 (2000).

Necessity justifications leave nothing to the concept of right.

Since criminal law protects individual rights as much as social interests, one would think this point would be obvious and consequently that theoretical discussions of necessity would recognize the inherent limits of the defense in short order. But on the contrary, Anglo-American criminal law theorists and treatise writers, including the authors of the M.P.C., are typically critical of the courts for affording the necessity defense such stingy treatment. Theorists complain about the failure of common law courts to extend the justification from its well-recognized instances (where it typically justifies regulatory violations, such as speeding en route to the hospital, or very local property violations).<sup>37</sup> And on so-called “economic” theories of criminal law, where the point of the criminal norm is to block transactions that could, were they Pareto-improving, go through with mutual consent, the necessity defense would, indeed, exemplify the logic of the criminal law in general – a form of “efficient breach” theory.<sup>38</sup>

To some extent, legal theorists’ quick assumption that necessity can be assimilated into the criminal law generally reflects the contingent fact that many of these writers have, independently, utilitarian sympathies. But the lack of attention to the

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<sup>37</sup> On the potential justifiability of killing non-threats, see LAFAVE, §10.1(a); M.P.C. COMMENTARY, §3.02, Commentary 3; GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART §237 (2d ed. 1961); SANFORD H. KADISH, BLAME AND PUNISHMENT 122-23 (1987). George Fletcher is a rare criminal law theorist who explicitly rejects a much less restrictive necessity test. See his RETHINKING CRIMINAL LAW §10.4 (1978). J.C. Smith notes that if English law does permit the defense to cases of homicide (unclear, given the infamous *R. v. Dudley & Stephens* precedent, 14 Q.B.D. 273 (1884)) the defense does not extend past cases of killing some lest all die. SMITH & HOGAN’S CRIMINAL LAW 271-74 (10<sup>th</sup> ed. 2003).

<sup>38</sup> See Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUMBIA L. REV. 1193-1231 (1985).

evident incompatibility of right and necessity reflects more than ideological blinders. There are several further factors at work. To begin with, the basic comparative-value conditions of the necessity defense are virtually never satisfied in practice. Criminal conduct is paradigmatically conduct that causes far more harm to the victim and society than it gains the perpetrator, whether or not the criminal norms are themselves justified in deontological or consequentialist terms. Were society rife with wanton Benthamites rather than egoists, the question of necessity's scope would be ever-present. As it is not, the illusion of consonance is more easily maintained.

The relatively few decisions on the necessity defense meet this pattern: necessity claims usually lose, and when they win, it is for easy cases, far short of the infliction of violence, let alone homicide (excluding self-defense). This statement from a recent California case, *People v. Coffman*, is typical: "It is not acceptable for a defendant to decide that it is necessary to kill an innocent person in order that he (or she) may live."<sup>39</sup> To the extent there is any Anglo-American authority for granting the defense in cases of homicide, it is typically in cases (or, more often, hypotheticals) involving a choice between certainly killing some and probably letting all die, as with shooting down a possibly hijacked jet plane, or pulling a fear-frozen shipwreck victim from a ladder so that others might pass, or throwing some passengers into the sea lest all drown in the overcrowded lifeboats.<sup>40</sup> Commentators have sought to extend this line of cases into true

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<sup>39</sup> 96 P.3d 30, ¶¶ 100-02 (Cal. 2004) (denying defense on grounds in robbery-murder, where defendant alleged co-perpetrator had threatened the life of her son as well as herself.)

<sup>40</sup> SMITH AND HOGAN; *United States v. Holmes*, 26 F. Cas. 360, 1 Wall Jr. 1 (C.C.E.D. Pa. 1842). By contrast, the defense was famously denied in *Regina v. Dudley & Stephens*, in

trade-offs, such as the M.P.C. hypothetical in which an inhabited family farm is deliberately flooded in order to save a town. But this highly revisionary aspect of the M.P.C. defense has not been incorporated into law, and the fact remains that there are no decisions in Anglo-American law, nor any documented decisions not to prosecute, in which innocents not otherwise in harm's way are assaulted or killed in order to avert harm from others.<sup>41</sup>

The same appears also to be true in European jurisdictions. France's Penal Code exculpates a defendant who, "facing an immediate or imminent danger to himself, another, or his property, performs an act necessary to save the person or property, provided the means used are proportionate to the seriousness of the threat." In principle, the defense covers all crimes, including assault or homicide, but I have found no recorded decisions showing even rejection of the defense in such cases.<sup>42</sup> Germany's Penal Code has a virtually identical provision, called the "state of emergency" [*Notwehr*] defense, but it adds a requirement that the means be "appropriate" to the harm averted. This is read by

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part on the grounds that there was no reason why the cabinboy should have been killed for food, rather than any of the others. The other ground for rejecting the defense was a lack of imminence: Lord Coleridge, though not the jury, thought they had not waited long enough for rescue before turning to cannibalism. For more discussion of this peculiar case, see A.W.BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

<sup>41</sup> *CODE PÉNAL* Art.122-7, [my trans.]. In principle, the defense covers all crimes, including assault or homicide, but I have found no recorded decisions showing even rejection of the defense in such cases.

<sup>42</sup> Jacques-Henri Robert writes that "although one can defend using force against someone posing a threat to the household [patrimoine] . . . necessity will not lie against an innocent [my trans]." *DROIT PÉNAL GÉNÉRAL* (Paris: Presses Universitaires de France, 5<sup>th</sup> ed. 2001), p. 272. The defensible cases of necessity he instances are of the familiar Anglo-American variety: sailors jettisoning some of their number lest all die, and surgeons cutting flesh without consent in order to save life.

some commentators, including George Fletcher, categorically to exclude at least homicide from the scope of the defense.<sup>43</sup> Again, I have found no cases justifying assault or killing of an innocent not already in harm's way. Fletcher does cite one case rejecting the defense, in which a German officer was found guilty of battery for beating Soviet prisoners in order to interrogate them regarding whether they had been stealing food and thereby, the officer maintained, threatening the well-being of all.<sup>44</sup> The standard Continental examples of successful necessity defenses are, in essence, gleaning cases: squatters found justified in taking over abandoned housing, breaking and entering to shelter poor children, and in principle the theft of food (though it is generally impossible to show that theft was the only option).<sup>45</sup>

This leads to the two positive, deeper, reasons why legal commentators and moral philosophers continue to discuss micro-necessity as though it were easily compatible with systems of rights. First is the deontologist's embarrassment at the stance's apparent absolutism, its rejection of any concessions to catastrophic considerations in the name of

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<sup>43</sup> DEUTSCHES STRAFGESETZ §§ 32-34. German and French criminal law do, unlike Anglo-American law, in principle permit the excuse of duress for killing of the innocent, as does the I.C.C. Statute, §31(1)(d), although the homicide limitation had been recognized before, e.g. in *Prosecutor v. Erdemovic*, ICTY (Appeals Chamber), IT-26-92, judgment of 7 October 1997. For discussion, see GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 146 (The Hague: T.M.C. Asser Press, 2005). In German law, interrogatory torture is subject to multiple specific prohibitions, apart from any inherent limitations in the necessity defense. Notwithstanding the prohibitions, in a recent article Winfried Brugger performs interesting interpretive acrobatics to show how torture might be justified under German law. *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 (2000).

<sup>44</sup> FLETCHER, *RETHINKING*, p. 784.

<sup>45</sup> ROBERT, *DROIT PÉNAL GÉNÉRAL*, 272; FLETCHER, §10.2.

right. *Fiat justitia, pereat mundus* ought to be disproof of a moral theory, not its motto. To reckon with the embarrassment, rights-enthusiasts therefore declare themselves deontologists up to a “threshold” of “disaster,” after which point welfare considerations are taken to dominate rights claims.<sup>46</sup> But the solution of positing a threshold only makes the embarrassment more acute, since once the threshold establishes the principle of individual rights/general welfare tradeoffs, all that is left is dickering over the price. This is, of course, the intellectual force of the ticking-bomb hypothetical, which I turn to below.

To be sure, as a formal matter one can define the force of a rights claim discontinuously, so that it blocks all utilitarian considerations but only to a point. But describing such a discontinuity is one thing and justifying it is quite another. In fact, the problem of thresholds is only a special instance of the deepest, and most notorious, puzzle about deontological conceptions: the so-called paradox of rights. This paradox inheres in the fact that rights claims bar consideration of consequences even when these consequences include identical (and larger-scale) rights-violations. Thus, one person’s right not to be killed (or murdered) will not be outweighed by the benefit of saving two,

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<sup>46</sup> Leading claimants of the threshold theory are Nagel, *War and Massacre*, e.g., or *Personal Rights and Public Space*, reprinted in *CONCEALMENT AND EXPOSURE* 31-52, 66 (2002); NOZICK, *ANARCHY* 41; and CHARLES FRIED, *RIGHTS AND WRONG* (1978). But some version of the position is nearly universal among non-instrumental rights theorists. Michael Moore uses the metaphor of the dam: welfarist considerations build up on one side of the deontological dam, until finally they spill over. But the dam remains, and returns once the waters recede. Although the image is apt, it also merely describes, rather than explains, how deontological principles could function in this way; they of course have no underlying physical anchor, as does a literal dam. Michael Moore, *Torture and the Balance of Evils*, 23 *ISRAEL L. R.* 280, 332 (1989). For discussion, see Larry Alexander, *Deontology at the Threshold*, 37 *SAN DIEGO L.R.* 893 (2000).

or more, others from being killed (or murdered). How can the considerations that support honoring the right on one side of the relation not simultaneously demand honoring it on the other side? At this point, philosophers have mainly *described* rather than argued for stances and commitments consistent with tolerating the paradox: that the value of the person protected by the right is not aggregable across persons, but instead simply demands respect,<sup>47</sup> or that the reasons supporting rights claims are in the form of principled demands, not invitations to maximize.<sup>48</sup>

These formulations are appealing but they are not justifications. Each might be seen as expressing a conception of individuals as free and equal beings, with lives of individual and distinct value. This was Kant's view, and whether or not one accepts his argument for it on the basis of rational necessity, it remains a deeply entrenched and fundamentally attractive feature of modern political and ethical thought. Nozick has put the point poignantly: "[Using] a person [for another's gain] does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has."<sup>49</sup>

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<sup>47</sup> This is Nagel's position, as well as Frances Kamm's, in her *Non-consequentialism, the Person, as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUBLIC AFFAIRS 381-89 (1992); both are interpretations of Kant's claim in the *Groundwork* that the value of rational agency can only be captured by the concept of "dignity" rather than "price." GROUNDWORK 4: 434. For still the most acute discussion of the paradox, which insists on its puzzling character, see SCHEFFLER, REJECTION.

<sup>48</sup> T.M. SCANLON, WHAT WE OWE TO EACH OTHER 83-85 (2000). More precisely, Scanlon says that the reason not to violate an agent-centered restriction could be grounded on a principle whose justification itself lies on the contractarian footing that no one searching for principles to provide a fair basis for regulating common life could reasonably reject; this is not, in his view, a "teleological" (or maximizing) conception of value.

<sup>49</sup> NOZICK, ANARCHY 33.

But the paradox remains, especially in the face of catastrophe, when the actor is faced with a choice between honoring the value in one instance and countenancing its destruction many times over.

Let us look quickly at the infamous ticking-bomb, which can seem to present that puzzle in a particularly troubling way. In the standard story, an interrogator is faced with a terrorist who has planted a bomb that will kill many of innocent citizens. Torturing the terrorist is the last, best hope for saving them. The first thing to be said, and the first thing that was said, in Henry Shue's seminal article twenty-five years ago, is that at best the ticking-bomb hypothetical is of virtually no practical significance, and at worst it is utterly corrupt in the illicit conclusions it invites.<sup>50</sup> The hypothetical gains its force from its stipulatively perfect satisfaction of all the traditional criteria of necessity: the interrogator is certain of the threat and its attendant costs, knows that the person to be tortured is responsible for the bomb, and is reasonably certain that torturing him is the sole means of avoiding catastrophe and is likely to be effective. While under these conditions, there might be widespread consensus that torture would be justifiable, relax any of the dimensions of justification -- maybe it's a hoax, maybe it's the wrong guy, maybe the interrogator has chosen to torture the terrorist's child instead, maybe the suspect will lie -- and dissensus emerges immediately.

In the real world, it is most likely that some or all of the traditional criteria will be unsatisfied. Moreover, institutions and institutional actors tend to abuse the limits of their discretion, and coerced confessions are demonstrably of inferior intelligence quality

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<sup>50</sup> Henry Shue, *Torture*, 7 PHIL. & PUBLIC AFFAIRS 124-43, 142-43 (1978).

to detective work.<sup>51</sup> For all these reasons, there is no way to institutionalize any principle of permissible torture without falling into the swamp of Abu Ghraib and Bagram, in which innocents are routinely subjected to abuse for the amusement of sadists playing “intelligence” games.<sup>52</sup> All of these points were evident on September 12<sup>th</sup>, 2001, even if they might have been forgotten in the heat of the moment. To the extent that the Bybee memo goes beyond the hypothetical exploration of an *ex post* defense to a charge of torture and actually lays out *ex ante* an institutional space for torture, I believe it is tantamount to criminal complicity.<sup>53</sup>

With all these considerations against it, it might seem hard to account for the persistence of the ticking bomb hypothetical. Since the conditions under which its conclusion results never actually obtain, it might be best to treat it as a kind of ethical “singularity”: a black-hole that swallows up intuition and lets nothing emerge. But, in fact, the ticking bomb example is no harmless anomaly. It persists because of a series of related mistakes in thinking about rights under pressure from welfare, and how to

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<sup>51</sup> John Langbein quotes Sir James FitzJames Stephen’s A HISTORY OF THE CRIMINAL LAW OF ENGLAND, concerning “the proclivity of the native police [in India] for torturing suspects. ‘It is far pleasanter to sit comfortably in the shade rubbing red pepper in some poor devil’s eyes than to go about in the sun hunting up evidence.’” John H. Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION 93-103, 101 (Sanford Levinson, ed 2004). Notably, Justice Frankfurter also quotes Stephen in *McNab v. United States*, 318 U.S. 332, 343 (1943), an important coerced confession case in which the Court asserted its inherent authority to regulate federal investigatory authority.

<sup>52</sup> On the abuses at Bagram, see Tim Golden’s exposé, *In U.S. Report, Brutal Details Of 2 Afghan Inmates’ Deaths*, N.Y. TIMES, May 20, 2005, at A1.

<sup>53</sup> I defend these claims in *The Lawyers Know Sin*, and *Causeless Complicity*. Briefly, there exists a basis for accomplice liability for any purposefully abetted acts of assault or torture, and for purposefully abetting acts, in reckless disregard of the risks, that led, through recklessness or negligence, to the deaths of some of the detainees.

conceive the role of necessity in these cases. Necessity really does justify overriding some kinds of rights claims in many instances, but these are rights of a fundamentally different nature from the ones involved in the ticking bomb example. Criminal theorists have over-generalized the appropriate normative scope of the necessity defense by confusing those rights whose abrogation the defense can legitimately justify with all rights.

Let us put aside, for a moment, the cases of torture and ticking bombs and shift to the law of torts and property. As controversial as a legal decision authorizing homicide or torture would be, so uncontroversial are decisions in tort cases like *Vincent v. Lake Erie Transp. Co.*, or *Ploof v. Putnam*<sup>54</sup> -- intentional trespasses upon property clearly justified as necessary under the choices of evils at hand. So clear is the force of the necessity defense in such cases that no prosecutor would consider them, and the question of justice is simply who should pay the costs. As I discussed above, criminal necessity defenses are generally found to lie in affronts to property rights, as well as to violations of regulations that impair no rights.<sup>55</sup> The difference might be thought simply a matter of the relatively weaker interests at play, property versus life, but I think it goes deeper than that, to the kind of right the law of property protects, versus the kind of right protected by homicide law – or, in the instant case, by §2340 and the massive body of international

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<sup>54</sup> 124 N.W. 221 (Minn. 1910); 81 Vt. 471 (1908).

<sup>55</sup> Arguably, this is not quite right: if one accepts a right to be free from certain degrees of *ex ante* risk, then a speeding driver on the way to the hospital may be violating the rights of those he endangers. French criminal law explicitly treats the issue in this way, and deems it a matter of justified necessity. ROBERT, DROIT PÉNAL, p. 273, citing CA Metz, 8 mars 1990, *Dr. pén.*, 1991, comm. 49.

treaty and customary law that stands behind it. This is the difference between what I want to call *institutional* and *pre-institutional* rights.<sup>56</sup>

Institutional rights are the rights consequentialists defend: individual claims secured by a general promise that their respect will promote welfare. Pre-institutional rights, by contrast, are claims that institutions must honor, and the institutions' basic justice or legitimacy is assessed by reference to these claims. At least since David Hume, property rights have been broadly understood to be of the institutional sort, both philosophically and positively: they constitute a conventional system of assigning ownership whose specific forms are grounded instrumentally, not in claims of natural right. As a matter of positive law, informal social institutions, and economic arrangement, this point is clearly true. There is simply no way to understand our complex system of divided interests and fractionated claims, much less to justify the economic systems that depend upon them, except on an instrumental, conventionalist basis.<sup>57</sup>

Within contemporary philosophical thought, to the extent that views of property rights as natural have any lingering force, it is largely to defend claims that the *capacity*

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<sup>56</sup> I borrow the idea of the institutional vs. pre-institutional distinction from John Rawls, though he uses it to discuss the related issue of desert. THEORY OF JUSTICE §48 (2d ed. 1999).

<sup>57</sup> See Elizabeth Anderson's interesting reflections that Lockean property rights would be incompatible with the conditions of modern capitalism: "How Not to Complain About Taxes II," <[http://left2right.typepad.com/main/2005/01/why\\_i\\_reject\\_na.html](http://left2right.typepad.com/main/2005/01/why_i_reject_na.html)>. In the U.S., of course, intellectual property is instrumental and conventional as a matter of constitutional text, in Art. 1, §8, cl. 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

to own property must be conceived pre-institutionally, or that individuals must have some minimum of personal property in order to be recognizable as equal subjects under law.<sup>58</sup> Even if one accepts the most prominent version of a stronger, Lockean theory of pre-institutional property rights, that of Robert Nozick, this theory does nothing to vindicate current patterns of holdings, or the legal doctrines that prevent disturbances to those patterns. Current patterns of holdings, on any realistic view, are built on histories of force and fraud, and cannot be consistent with any understanding of what pre-institutional rights to acquisition and transfer would demand. As an account of the way in which property is normatively conceived today, we are deeply committed to both conventionalism and instrumentalism.<sup>59</sup>

Now, the problem with instrumentalist conceptions of rights is that they only work well in the easy cases, when honoring them also promotes welfare. For this reason, they are commonly regarded as pseudo-rights. Given some natural assumptions about the value of stable institutional expectations, many cases will turn out to be easy, and markets transferring those rights can function efficiently. But sometimes the instrumental calculus points the other way, even taking into account indefinite future costs and benefits. And when defenders of an instrumentally-justified right are faced with the clear choice – respect the right or promote welfare – they must opt for welfare, on pain of

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<sup>58</sup> These are, roughly, the “personality theory” views of Kant and Hegel, well-discussed by JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1990); Margaret Jane Radin is a modern inheritor of these views; see her *CONTESTED COMMODITIES* (1991).

<sup>59</sup> In these paragraphs I have oversimplified grotesquely. I discuss the failings of pre-institutional property theories at greater length in *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 *PHIL. & PUBLIC AFFAIRS* 277-312 (2004).

being accused of deontological “rule-worship.”<sup>60</sup> The consequence is that instrumentally-justified rights must go hand-in-hand with an unrestricted limit of necessity: the right will be respected so long, and only so long, as that respect pays out in the long term aggregation of welfare.

We know what an explicit version of such a scheme looks like because we live with it everyday: Takings doctrine, according to which property rights are secure so long, and only so long, as the state has not determined that the public would not further benefit from an alternative use of the property.<sup>61</sup> The recent *Kelo*<sup>62</sup> decision perfectly represents the instability of an instrumental approach to property. As Thomas Merrill has observed, what was chiefly remarkable about *Kelo* was the public furor it evoked, notwithstanding its unremarkableness as a piece of doctrine.<sup>63</sup> *Kelo* simply followed doctrinally in a long line of cases permitting takings that the state could justify by reference to some

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<sup>60</sup> These are familiar points, found most easily in J.J.C. Smart’s *An Outline for a System of Utilitarian Ethics*, in Smart and Bernard Williams, *UTILITARIANISM: FOR AND AGAINST* (1973). Contrary to Smart, I do not want to claim that rule-utilitarianism “collapses into” – is extensionally equivalent to – act-utilitarianism. As Donald Regan has shown, rule-based forms of utilitarianism can promote utility in a way that individualistic act-utilitarianism cannot, by solving coordination problems. *UTILITARIANISM AND COOPERATION* (1980). But the case at issue here is not coordination-dependent.

<sup>61</sup> Note that while the point of the “just compensation” requirement is to push takings in the direction of Pareto-efficiency, given that actual compensation is frequently less than the owner’s subjective value, the actual normative justification is more Kaldor-Hicks than Pareto. A different version of the same principle is at work in the *Vincent* cases: there will be no criminal liability, assuming Kaldor-Hicks efficiency, and then *ex post* compensation to bring the transfer to “objective” Pareto standards.

<sup>62</sup> *Kelo v. New London*, 545 U.S. \_\_\_ (2005).

<sup>63</sup> Testimony of Thomas A. Merrill to Senate Committee on the Judiciary, Sept. 19, 2005, accessible at < [http://judiciary.senate.gov/testimony.cfm?id=1612&wit\\_id=4661](http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661)>.

aggregative benefit, independent of any formalistic requirement of public “use.”

Translate “public use” into “public necessity,” in Blackstone’s phrase, and it is clear that Takings law embodies the concept of micro-necessity.<sup>64</sup> Whatever substantive criteria of judicial review remain in Takings doctrine can best be seen as forcing the assessments of competing values in the direction of the certainty of a welfare gain. When the contingent, instrumentalist foundations of property rights were suddenly laid bare for all to see in the ensuing media coverage, public uproar was entirely to be expected, at least by those who feared their property might become subject to public use or necessity.

There is another scene where rights become uniformly subject to necessity, and that ought to disrupt more than bourgeois complacency.<sup>65</sup> This is the scene of civilians caught in war, where rights to life are balanced against aggregative concerns. Under the principles and agreements of International Humanitarian Law/the Law of Armed Conflict, while civilians or their property may not be directly targeted, they may incidentally be killed or their property destroyed, subject to military necessity.<sup>66</sup> Their

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<sup>64</sup> What is puzzling is Justice Thomas’ dissenting argument that the Framers, by changing what appears to be Blackstone’s *prohibition* on takings even for “public necessity” into a permission to take, provided just compensation is paid, for “public use,” somehow meant to capture the restrictiveness of Blackstone’s own view. 545 U.S. \_\_\_, slip. op. at 1 (Thomas, J., dissenting).

<sup>65</sup> I say this as a complacent bourgeois.

<sup>66</sup> See, e.g., Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 147. “Military necessity” is an extraordinarily plastic term. According to one classic statement, “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.” *United States v. List*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS 1253-54 (1950). The regime of military necessity is

rights to life and property are to be respected, so far and only so far as that respect is not overly costly to the tactical goals of the military commanders. This form of utilitarianism is more restrictive, insofar as potentially optimal strategies of targeting civilians are categorically ruled out, and insofar as the requirements of “necessity” and “proportionality” are supposed to have more bite than simple weighing of costs versus benefits. But the consequences of this regime for civilians caught in war are enormous. The invading and subsequently occupying U.S. military in Iraq is probably as disciplined and effective as any force in history at attempting to keep civilian casualties within the guidelines of international law. The effect is that rights generally honored in near-absolute terms become subject to a highly institutionalized and conventionalized calculus, whereby target-planners route their proposals through military lawyers to ensure conformity with law. Even so, estimates of civilian casualties directly traceable to U.S. (or coalition) actions are in the range of 7-10,000 dead, with estimates of total civilian deaths in the range of 25-30,000.<sup>67</sup> And these are the good times for civilians caught in war: estimates of civilian/combatant casualty ratios for the twentieth century as a whole range from 2 to 10: 1.

My point is not that war is terrible for civilians. It is rather to suggest what a regime of rights limited by necessity looks like. Importantly, the regime of legal rights

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more like egoism than utilitarianism, albeit constrained by protection of the innocent from deliberate targeting.

<sup>67</sup> The figures come from the “Iraq Body Count” project, which is regarded as very credible. It consolidates all reports by news agencies of civilian deaths, and claims to triple-check all of them. They attribute 37% of the civilian deaths directly to U.S. and coalition military action. <<http://www.iraqbodycount.net/press/pr12.php>>

against torture does not look like this, any more than the right against homicide in domestic law looks like the right to property under the discipline of the Takings clause. That the right against torture is not like this, not subject to instrumental calculation, is – ironically – perhaps most evident at war, where the torture of even a captured combatant with tactical knowledge is absolutely proscribed.<sup>68</sup> This point had become so deeply embedded in the law and training of the modern military before the Iraq and Afghanistan invasions and occupations that no one was more angry about the attempt by the civilian leadership of the Bush administration to relax the rules on interrogation than the professional military, especially its lawyers and officers – in particular, in Bush’s terms, to subordinate detainee rights against inhumane treatment to “military necessity.”<sup>69</sup> What disturbed the officers, apart from concerns about reciprocity inflicted upon our own soldiers, was that a right specifically excluded from the instrumental calculus was now included. For the right against torture, along with the other rights violation of which constitutes grave breach of the Geneva framework,<sup>70</sup> are the background set of principles against which the particular institutions, permissions and conventions of war are

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<sup>68</sup> Geneva Convention Common Article 3(1)(a).

<sup>69</sup> Memorandum for the Vice President from President George Bush, Re: Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, *reprinted in* Greenberg TORTURE PAPERS 134-35, 135, par. 3.

<sup>70</sup> These are rights against murder, cruel or degrading treatment or other “outrages upon dignity,” being taken hostage, or summary execution. Common Art. 3(1). While POW rights to facilities for “sports and games” (GC III, Art. 39) might be an instance, it is hard to imagine what else now-Attorney General Gonzales had in mind by labeling as “quaint” the provisions of the Convention.

justified.<sup>71</sup> To put it positively, they are the pre-institutional backdrop against which the institution itself can legitimately be maintained. With no restriction on torture or execution of non-combatants, there can be no permission to kill combatants in war.

A full account of the force of the right against torture would focus on the peculiar horror of torture, the combination of suffering with the deliberate subordination of the victim's consciousness to the will of the interrogator.<sup>72</sup> But it would share with the peacetime right against homicide a commitment to the value of the individual life, a value that cannot be aggregated, or so our legal and moral theories have generally presumed. The scene of torture, in the imagination of those who reject it, makes the nature of this value especially clear: the interrogee is not confronted as a part of an armed host, but as an individual, already disarmed and vulnerable.<sup>73</sup> This is the field of basic, pre-institutional human rights. There can be something unfortunate about Dworkin's oft-invoked metaphor of "rights as trumps." The metaphor suggests that rights are moves in a game, and that the game is separable from the players. This might be an appropriate picture of rights in a court of law introduced as part of a debate about what ought to be done. But there is no argument in the torture chamber; there is merely one person preparing to do violence to another. In such a context, rights are simply constraints on how one person may treat another. They may not be observed, but they exist as moral

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<sup>71</sup> I take up some of these points in *The Difference Uniforms Make: Collective Violence in Criminal Law and the Law of War*, 33 PHIL. & PUBLIC AFFAIRS 148 (2005).

<sup>72</sup> For excellent discussions, see Luban; David Sussman, *What's Wrong With Torture?*, 33 PHIL. & PUB. AFF. 1 (2005).

<sup>73</sup> Of course, from the perspective of the interrogators it is this scene that renders the victim least human, as Hannah Arendt observed of the concentration camp inmates.

claims whether or not the justificatory game is played.

In criminal law, the defense of necessity runs out when it confronts pre-institutional rights, whose value is not the product of an instrumental, welfarist calculus.<sup>74</sup> My point is not that we could not conceive it in these terms, nor even that we do not, since obviously some people do. My point is that our most deeply sedimented bodies of common law and our clearest positive prohibitions reflect a deeply held conviction that we ought not value rights against torture or killing in this way. Criminal law theorists have commonly remarked that the absolute value of life shows that the law is “not utilitarian after all.”<sup>75</sup> It would be more precise to say that the law responds in a utilitarian fashion to institutional rights, and a non-utilitarian fashion to pre-institutional rights.

#### **IV. Necessities at war: Fact versus Justification**

I have so far argued that we operate across ethics, politics and law with two distinct concepts of rights. Institutional, instrumentally justified rights, of which property rights are exemplary, are subject to override by what I have called a micro-necessity justification. But pre-institutional rights, which reflect a conception of the distinct value of individuals, are as a conceptual matter immune to micro-necessity overrides. Assertion of a necessity justification in their face simply denies their deontological status.

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<sup>74</sup> I want to put aside the very different case of knowingly running *ex ante* risks of statistical deaths, even risks up to a moral certainty. Such risks can, I think, be justified on a basis consistent with individual rights. I discuss this briefly in *Self Defense and Political Justification*, 88 CAL. L.R. 751-58 (2000).

<sup>75</sup> See, e.g., KADISH, BLAME AND PUNISHMENT, xx.

Rights against torture are core examples of pre-institutional rights and so it follows logically that they are immune from violation justified by necessity.

But, while recognizing this distinction helps to make clear why necessity justifications have the limits they do, this does nothing to solve the puzzle posed by the ticking-bomb case, or more generally by the paradox of rights. Pernicious as the example is, it still demands a rational account, for it puts great pressure on the essential element of deontological reasoning: its categorical, exceptionless character. If justified departure is not the response, what is?

At this point it is worth paying even closer attention to the way the standard necessity justification is not really about necessity, but about the conditions under which actors may exercise judgment to depart from conventionally secured rules. As I explained above, real, existential necessity does not play a role in the necessity defense: in the real world, there can never be absolute certainty that the threatened harms will materialize, or that there are no other options, or that the strategy in question will be effective. Functionally, the necessity justification is an *ex post* application of an *ex ante* (and unconfirmable) probabilistic weighing of various courses of action. But in the hypothetical, idealized case, the ticking-bomb example does confront us with real necessity, if only in our imaginations. Confronted by real, existential necessity, we find that our principles yield. But we must be precise about what this means. The image of ourselves torturing, or authorizing torture, is not a *deduction* from ethical principles. It is rather a *recognition* that our principles could imaginably be unable to withstand the pressure from concrete opposing values.

This may seem a peculiar, even unintelligible, claim: that we can respond to

necessity in a way that neither excuses (for we are responsible for our choices) nor justifies. It is, all the same, a familiar stance, one whose invisibility is itself a product of its familiarity. Bernard Williams' magnificent account of ancient Greek ethical thought, *Shame and Necessity*, provides a possible model in its discussion of slavery. Chattel slavery was an ordinary and deeply rooted part of ancient Greek life, and the economies of the city-states pervasively depended upon it. It was a kind of chance that made people – mostly non-Greek-speaking peoples, to be sure – into slaves: the chance of being captured at war, or by slave-hunters. What is essential to Williams' account is that this chance-like feature of slavery was widely recognized by Greeks. They saw it, he says, as "arbitrary and cruel," as "a paradigm of disaster, of which any rational person would complain." All the same, it was a part of their world, and they lacked the imagination, or the will, to put anything else in its place. As a consequence, Williams says, they saw the slavery system "not just but necessary." They treated slavery as necessary in fact but derived no lesson of justification from this necessity.<sup>76</sup>

Aristotle, however, departed from this stance. He did not merely accept slavery, but actively defended it. In the *Politics*, he set himself the task of showing why the slave system was not only necessary but also just.<sup>77</sup> Prefiguring later racist ideology, Aristotle argued that slaves were essentially animals rather than humans, suited by nature to be coerced by their masters, who in turn were suited by nature to rule.<sup>78</sup> Regarding this step

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<sup>76</sup> WILLIAMS, SHAME 101, 116-117.

<sup>77</sup> ARISTOTLE, POLITICS, 1252a30ff:

<sup>78</sup> WILLIAMS, SHAME 114. ARISTOTLE, POLITICS, 1252a33-b5:

from necessity in fact to justification, Williams remarks, “if there is something worse than accepting slavery, it consists in defending it.”<sup>79</sup>

Why should this be so? Why not think that the attempt to offer a justification for a disputed practice at least credits the power of reason, as mute acceptance does not – the tribute of vice to virtue, in the words of La Rochefoucauld? In cases of genuine normative dispute, the practice of seeking justification in terms of broader principles is part of the underlying practice of ethics itself. But when the acts or institutions to be justified present, on their face, such a disruption to ordinary principles of ethical thought – in slavery’s case, concerning the lives people hope to lead -- the practice of justification looks more like rationalization than genuinely ethical deliberation.

I do not mean to downplay the danger on the other side, of mistaking mutable human institutions or natural circumstances as insuperable necessities. The Greeks clearly did so, seeing false necessity in the institutions they knew. If the stance of accepting necessity as fact makes sense, it does so only at the moment of crisis, when the appearance of necessity is challenged at the forefront, both intellectually and practically; and when a return to ordinary principles comes quickly. The sedimentation of necessity into routine practice is the obverse of justification’s transformation into rationalization.

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For that which can foresee by the exercise of mind is by nature intended to be lord and master, and that which can with its body give effect to such foresight is [] by nature a slave. . . . For [nature] is not niggardly, like the smith who fashions the Delphian knife for many uses; she makes each thing for a single use, and every instrument is best made when intended for one and not for many uses. [Jowett trans.]

<sup>79</sup> WILLIAMS, SHAME 110-112.

Thus, my point is not that the Greeks were right to accept slavery as necessary, nor that blind acceptance of an injustice is better than a fallaciously justified acceptance. My point (and Williams') is that, given a people who see slavery (or another injustice) as necessary, at least let them see it as a brute and inevitable affront to their principles, not as something their principles can domesticate and make safe to perpetuate.<sup>80</sup> Let this hypothetical people indeed marshal their principles – as the Greeks did not – in a struggle *against* the perceived necessary evil, and *not* work to accommodate it on the level of principle, lest they fall – as Aristotle did – into outright justification.

#### **V: Macro-necessity and the Politics of Existence**

As a matter of constitutional principle the Bybee memo insists, and more general administration arguments urge, that the existential demands of the nation limit the force of law. As I argued in Part II, the Bybee memo essentially put forward an argument that ordinary, constitutionally-limited politics, understood as Congressional regulation of the armed forces, must yield to the necessities of war, determined by the judgments of the executive. This I called macro-necessity. I want to argue now for two claims. First, there is an instructive parallel to the Bybee memo's political theory of macro-necessity in the political theory of Carl Schmitt – instructive because the weaknesses and dangers of Schmitt's theory are exactly the weaknesses and dangers here. And second, I will argue that the theory of macro-necessity repeats the mistake of micro-necessity, confusing

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<sup>80</sup> This is true even if, as some critics have charged, Williams understates the degree to which "ordinary" Greek thought was infected by a less sophisticated version of Aristotle's racism, seeing "barbarians" as naturally fit for slavery. See, e.g., Nick Fisher, *Shame and Necessity*, 45 CLASSICAL REVIEW 71 (1995).

necessity as fact with necessity as justification. By removing politics from the restraint of the principles that legitimate it, the theory of macro-necessity makes necessity into a device for overriding all rights, in the name of the security of a nation whose political identity has perforce been lost.

The OLC lawyers are of course not the first to argue for a doctrine of emergency powers, motivated by political necessity. Extraordinary legal powers have been part of the constitutional imagination since at least the ancient Roman Constitution, under which the Senate could direct the appointment of a dictator, who would then rule Italy by decree until the danger had passed.<sup>81</sup> Although celebrated by Machiavelli and Rousseau, this personal model of emergency rule has generally given way in modern thought to a legalistic model, in which an ordinary office such as the Presidency, rather than an individual, is temporarily invested with extraordinary powers, usually by reference to explicit constitutional provisions.<sup>82</sup> European constitutions, including the French Constitution of 1958 and Italy's Republican Constitution, formalized provisions for states of emergence, while the Anglo-American constitutional tradition has preferred to leave them informal (although traces of such thinking can be seen in the U.S. Constitution's

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<sup>81</sup> John Ferejohn and Pasquale Pasquino, *The Law of the Exception: a typology of Emergency Powers*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 210, 213 (2004).

<sup>82</sup> The Romans in fact had both forms: the dictatorship and the enhanced powers of the consulate. Rousseau and Machiavelli agree that true emergency (but only true emergency) calls for the time-limited dictatorship. JEAN JACQUES ROUSSEAU, *DU CONTRAT SOCIAL*, Bk. IV, ch. 6 [1762]; NICCOLO MACHIAVELLI, DISCOURSES ON LIVY, ch. 34 [1517][both available online at [www.constitution.org](http://www.constitution.org)]. See also Ferejohn and Pasquino, *Law of Exception*, 213.

provision for legislative suspension of habeas corpus).<sup>83</sup> The exception has frequently been noted, and during the Cold War, when a post-nuclear state of emergency was envisioned, conservative political theorist Clinton Rossiter argued for legislation to provide for a Roman-style commissarial dictatorship during times of emergency.<sup>84</sup>

As part of a general theory of broad executive power, the Bush Administration has not sought to make sense of national necessity through the forms of law. As I mentioned above, the chief argument underlying the assertion of the President's supra-statutory authority in times of national emergency is frankly functional: the Constitution is, at bottom, a plan for state survival, and it must be construed to provide the means adequate to survival. Since, by hypothesis, only supra-statutory executive authority is sufficient to ensure survival, the Constitution must legitimate this authority. The Constitution, on this view, demands that its own framework of separated and balanced powers be subsumed by the goal underlying that framework, across a broad range of contexts calling, at first instance, for executive action. Law, which as a conceptual matter aims to provide reasonably determinate criteria demarcating the legitimate from the illegitimate, becomes instead a general imperative: the executive should do what needs to be done. The job of law is essentially to get out of the way.

Certainly many presidents in U.S. history have argued for, and acted upon, a

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<sup>83</sup> FRENCH CONSTITUTION OF 1958, Art. 16; ITALIAN CONSTITUTION OF 1948, Art. 77, cl. 2 [trans. for both available at [www.oefre.unibe.ch/](http://www.oefre.unibe.ch/)]; U.S. Constitution, Art. I, Sec. 9, cl. 2. Germany's Basic Law, Art. 115, provides for exceptional powers wielded by a Joint Committee in a "State of Defense" (an envisioned invasion by the Soviet Union). [Available online at [www.iuscomp.org/gla/statutes/GG.htm#115k](http://www.iuscomp.org/gla/statutes/GG.htm#115k).]

<sup>84</sup> CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948).

presumption of extra-statutory authority.<sup>85</sup> Most famous, of course, were Jefferson's purchase of the Louisiana territories, and Lincoln's expansion of the Army and suspension of habeas corpus. Both presidents justified their acts by reference to public necessity. But, as Jules Lobel and Daniel Farber have argued, both also accepted the authority of the law they broke, seeking post-hoc Congressional ratification, and holding themselves responsible to the legal consequences should that ratification not be forthcoming.<sup>86</sup> On this view, states of emergency occur at the brink of legitimacy. We must therefore be careful to distinguish what must be done from what can be done under principles of justified authority.

The Bush Administration has taken a different course. Rather than concede legitimacy to actions taken within constraining constitutional structure, it broadened the definition of legitimacy to include all situationally-governed, executive decisions in the field of war. Put aside historiographic claims whether this is a plausible interpretation of the Framers or Ratifiers' views of executive power.<sup>87</sup> The real roots of the position are theoretical, and are better illustrated by the early work of German constitutional theorist, Carl Schmitt, who was prompted by the threats of both right and left radical politics to

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<sup>85</sup> Jules Lobel's article, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989), has a useful survey of emergency powers invocations.

<sup>86</sup> See Lobel, *Emergency Power* 1386-1391; DANIEL FARBER, *LINCOLN'S CONSTITUTION* 192-95 (2003). I am indebted to Farber's valuable book

<sup>87</sup> Rakove argues persuasively in *Making Foreign Policy*, *supra* note [xx], that such a broad view of executive power clearly postdates ratification, and is instead a product of Alexander Hamilton's controversial view of 1793, voiced in the Helvidius-Pacificus debates, concerning the extent of George Washington's authority to proclaim U.S. neutrality in the European wars.

Weimar's democracy to undertake an investigation into the relation between states of emergency and political authority.<sup>88</sup> During the 1920's and early 1930's, when Schmitt produced a wide-ranging theory of politics, law, and legitimacy, the Weimar government functioned substantially under the authority given to the Reich President (then Hindenburg) by Article 48 of the Constitution of 1919.<sup>89</sup> Article 48 permitted the President to "take the measures necessary to reestablish law and order, if necessary using armed force," and "[i]n the pursuit of this aim," to suspend specified civil rights, notably rights of privacy, free expression, assembly, and security of home.<sup>90</sup>

In a debate with the leading lights of German liberalism (notably Hans Kelsen), Schmitt argued for an expansive understanding of the President's emergency authority, as including but not restricted to the particular powers mentioned. Thus, according to Schmitt, Article 48 specified the particular civil rights that could be suspended, while enabling all other manner of extra-legal authority.<sup>91</sup> While Schmitt was mindful of the

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<sup>88</sup> CARL SCHMITT, *POLITICAL THEOLOGY* (George Schwab trans, Cambridge: MIT Press, 1985 [1922, 2<sup>nd</sup>. ed. 1934]). For broader discussion, see GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005) [available online at [www.press.uchicago.edu/Misc/Chicago/009254.html](http://www.press.uchicago.edu/Misc/Chicago/009254.html)]; Peter C. Caldwell, *Controversies over Carl Schmitt: A Review of Recent Literature*, 77 *J. MODERN HISTORY* 357 (2005); CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW* (1997).

<sup>89</sup> This history is summarized by AGAMBEN, *STATE OF EXCEPTION*, 14-16.

<sup>90</sup> WEIMAR CONSTITUTION OF 1919, Art. 48: "In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 154, partially or entirely." [Available online at [www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php).]

<sup>91</sup> CARL SCHMITT, *LEGALITY AND LEGITIMACY* 68-74 (Jeffrey Seitzer trans., 2004 [1932: 71-77]); see also the helpful introduction by John P. McCormick, pp. xxxvi-xxxix.

danger that a dictator charged with returning the state to normal politics might simply perpetuate his own extraordinary rule, he thought the attempt to restrict a dictator through legal forms was both practically mistaken and intellectually dishonest. As a practical matter, a restrictive understanding of the Reich President's emergency powers might prevent him from actually defeating internal political threats to the republic – threats generated by those who, like the Nazis and the communists, used the forms of legal process to subvert the constitutional order. As Schmitt colorfully puts it, “In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”<sup>92</sup>

As a theoretical matter, the liberal argument mistook the real nature of sovereignty, conflating genuine legitimacy, which resides in an executive's protection of the will and real interests of a people, with formal legality. According to Schmitt, law is a system of governance designed to cope with specific circumstances – not, fundamentally, a system of normative authority, as in Kelsen's view.<sup>93</sup> Necessarily, law will encounter legally ungovernable situations, and those situations will demand action by someone in a position to act. The key claim for Schmitt, as for Bush, is that this practical demand for decision and action itself imparts authority, as shown by the popular acceptance of emergency rule. To put it another way, actual political authority shows that authority is logically prior to law. Thus Schmitt's most famous pronouncement:

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<sup>92</sup> SCHMITT, *POLITICAL THEOLOGY*, 15.

<sup>93</sup> This view is best spelled out in Kelsen's major work of 1934, *THE PURE THEORY OF LAW* (1967 [1934]).

“Sovereign is he who decides on the exception.”<sup>94</sup> Real political authority lies with him who can suspend the law, not with him bound to it. Or, using the tag of Hobbes that Schmitt takes as leitmotif: *auctoritas, non veritas fecit legem*. Authority, not truth, makes law.<sup>95</sup>

For Schmitt, the claim that sovereignty consists essentially in the power to rule beyond law captures the core of a broader theory that can be called *existential politics*. Existential politics means making central the concepts of order and national identity, and making peripheral the formal processes of legislation and administration. This model of politics is seen in Schmitt’s other famous aphorism, that “The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”<sup>96</sup> According to Schmitt, just as aesthetics can be summarized in terms of developing criteria for distinguishing the beautiful from the ugly, or economics the profitable from the unprofitable, so politics consists in making and deploying a distinction between “friends,” or co-members of the unified state, and its “enemies,” or those with whom the state is in actual or potential conflict.<sup>97</sup> But unlike aesthetics or economics, whose distinctions supervene on independent characteristics of the objects in their domain, political action itself contributes the characterizations as friend or enemy. Schmitt writes that the friend-enemy distinction is independent of any other distinctions,

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<sup>94</sup> SCHMITT, POLITICAL THEOLOGY, 5.

<sup>95</sup> SCHMITT, POLITICAL THEOLOGY, 33.

<sup>96</sup> CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., 1996)[1932].

<sup>97</sup> SCHMITT, CONCEPT 26-28.

moral or factual. Prior to governance, friendship and enmity (or peace and war) are fluid, depending on mutable affinities and coalitions. Politics gives sharp borders to those concepts. Politics is “existential,” both in that it serves as the basic logical principle of identity – and therefore of conflict – in the world, and in that it serves as the very real condition of physical survival or death.<sup>98</sup>

Existential politics is Hobbesian politics, seeing everything through the lens of conflict. In the absence of politics there is only individualized conflict; politics renders conflict collective by monopolizing force within the collective (thus making “friends”), and holding the potential enemies of the collective at sword’s point. Maintaining order by policing the friend-enemy line is therefore the central task of political authorities, the condition of all “ordinary” political processes. Since law is a product of ordinary politics, order is also the condition of law. And since the executive’s task is to create order, his sovereign authority must thereby transcend law, deciding when ordinary politics can take place, and when instead it must be accepted. Legitimacy resides instead in a people’s acquiescence, understood as non-resistance, to the concrete problem-solving capacities of “administrative” political authority, and while Schmitt maintained that executive authority in contexts of emergency was “democratic,” this amounts largely to plebiscitary basis in popular acclamation.<sup>99</sup> In principle, executive decisionmaking is meant to be

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<sup>98</sup> SCHMITT, CONCEPT 28-32.

<sup>99</sup> SCHMITT, LEGALITY AND LEGITIMACY 28 [1932/32]; 60 [1932/63]. In later work, especially Schmitt’s controversial interpretation of Hobbes, Schmitt argues that the sovereign is not a creator of national identity out of chaos, but rather forms a post-national cultural identity out of pre-national cultural materials. Thus, in his view, Hobbesian “liberalism,” which pretends to be culturally neutral for the sake of preserving

constrained by respect for what Schmitt came to term the “concrete orders” of society – the organic, deep social structure provided principally by religious and civil institutions. On this view, legitimacy is partly functional, or “decisional,” and partly organic. But since structural separation of powers is a key instance of the misguided emphasis on legalism that both obscures real political agency and prevents state responses to genuine existential threats, only the executive determines what these concrete orders demand.<sup>100</sup>

Schmitt’s concept on sovereignty as decisional, but rooted in pre-legal ordering reflects his longstanding cultural and political conservatism. But his increased emphasis on it coincides both with Schmitt’s joining of the Nazi party and with the Nazis’ claim to root their authority not just in response to Weimar’s chaos (inflicted by themselves), but in their capacity to represent and defend real Germanness, there is a lively debate whether Schmitt’s move reflects intellectual conservatism as much as political opportunism. Certainly he offered the Nazis a theoretical grounding they could, and did, make use of.<sup>101</sup>

In our current context, however, Schmitt’s eventual embrace of fascism, through the vehicle of a myth of a legitimating popular spirit, is less interesting than the basic move of relocating legitimacy to the space before law. For in their common emphasis on

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life, actually makes its own cultural stand. For discussion, see Victoria Kahn, *Hamlet or Hecuba: Carl Schmitt’s Decision*, 83 REPRESENTATIONS 67 (2003).

<sup>100</sup> CARL SCHMITT, ON THREE TYPES OF JURISTIC THOUGHT (Joseph Bendersky ed. and trans., 2004 [1934]).

<sup>101</sup> Schmitt also became a prominent anti-Semite, in both writing and deed, for example purging academic ranks of Jewish scholars. As with Martin Heidegger, there is also considerable debate whether Schmitt was merely a deplorable opportunist or a sincere Nazi. See Caldwell, *Controversies over Schmitt*.

the existential demands of order and the need for swift response, there are clear connections between Schmitt's theory of existential politics and the Bush Administration's macro-necessity justifications for executive overrides of legislative authority.<sup>102</sup> Like Schmitt, the Bush Administration sees national security in time of attack as providing a sufficient justification for expanded, extra-legal executive authority, and thereby treats the Constitution as enabling swift and flexible response to enemies of the state. Its broad reading of the Commander-in-Chief power and its reluctance to seek specific legal authority for its acts are precisely Schmittian in their view of legal forms as inimical to national needs.<sup>103</sup> Most importantly, the Administration's theory of wartime executive power echoes the errors of Schmitt's argument as well – indeed, it deepens those errors, by extending the argument from national survival to national security.

The common errors of both Carl Schmitt and the Bush administration are twofold: first, they confuse a condition of the possibility of politics, and of the identity of a polity, with an essentialist claim about politics and political identity; and second (and relatedly)

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<sup>102</sup> Note that I am not claiming that Bush Administration policy deliberately reflects Schmitt's theories. While some of the Administration's theorists of executive power may have had some acquaintance with Schmitt, and certainly with Schmitt's colleague, Leo Strauss (who also saw Hobbes as one of the pre-eminent political theorists), there is no reason to suppose any direct derivation from his views.

<sup>103</sup> There are other striking parallels to Schmitt's thought. First is the "theological" aspect of Schmitt's conception of politics, that political decisions and judgments by the executive are to be accepted as revelations, not as arguments, so that differences in politics become, in effect, differences in faith. Compare this with (a) Ron Suskind's interview with Administration officials on the distinction between outsiders in the "reality-based community," versus administration members who "make our own reality," and (b) with Bush's famous pronouncement, "you are either with us or with the terrorists." Second is the Administration's view (echoed by Yoo) that the 2004 election was, in effect, a popular ratification of the strong executive theory.

they confuse the limits of constitutional principle with a justification for disregarding constitutionalism altogether. Taken together, these errors literally threaten to destroy an alternative conception of political legitimacy, one rooted in a conception of political identity that is prior to executive action but not reducible to legislation. This conception of legitimacy, our post-Hobbesian legacy of the Enlightenment, can recognize necessity, but must not surrender to it. Because these points mirror my discussion of micro-justifications of necessity, I now proceed quickly.

Hobbes, like Schmitt, saw an evident truth: without order there can be no politics. As a logical matter, the first question about political authority is whether it is effective in securing order. At the limit, when total disorder or other forms of political extinction become live possibilities, then the only task for political authorities is to preserve or reconstitute order. The question, however, is what follows from this point. For Schmitt, what followed was a claim about the essence of politics, not about the conditions of its possibility. Politics, viewed clearly enough, is nothing other than the work of order; and the identity of a given state is just a reflection of that order. But this is surely a mistake. In ordinary times, when order persists, the essence of politics is familiar: allocating scarce resources, administering projects and personnel, securing justice. Schmitt's radicalism lies in seeing that ordinary political activity as basically epiphenomenal, whereas real politics involves either the stability work of the executive, or the cultural work of social institutions. Ordinary politics, the bread and butter of legislative supremacy, becomes degraded in Schmitt's view, as a deracinated technocracy; and in the

modern view as a rent-seeking market for legislative favors.<sup>104</sup>

Displacing politics so is a mistake. Under conditions of cultural and ideological pluralism, ordinary politics is the vehicle through which a political community determines and expresses its identity and its commitments, its conception of social justice and collective ambition. Just because that identity can be threatened by war does not mean that it does not have content independent of the conditions of existence. Today, any executive claim to legitimacy in organic cultural order would smack of fascism. In a post-9/11 world, claims of national security cannot be dismissed airily. But to collapse the notion of legitimacy in times of war, or some intermediate state that is warlike, but of indefinite extension and with unclear adversaries, into pure functionalism, is to fall prey to the pure decisionism that Schmitt himself tried to avoid. It creates a category of “nation” eviscerated of all internal structure.

The parallel to the individual case is irresistible. It is a brute metaphysical fact about me that my identity is anchored in the chance pairing of the chromosomal DNA of my parents. And it is a brute existential fact about me that when my cellular activity ceases, I cease. But in between those twin facts lie the form and matter of my identity, the shape of my life. Those facts are striking reflections of the limits of my existence, but they are not illuminating. They provide no answer to the individual question: what should I do? That question, asked in the everyday context, can only be answered by

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<sup>104</sup> SCHMITT, *POLITICAL THEOLOGY* 65. This view of the legislative process is implicit in official arguments for executive supremacy, but is highly visible in contemporary work in positive political theory, and in the normative lessons drawn therefrom, as in Judge Easterbrook’s influential theory that statutes ought to be interpreted as arms-length deals between self-interested parties. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

reference to the web of my beliefs, commitments, and values. Schmitt's equation of the political with the scene of actual and political conflict is akin to equating the individual life with the scene of chromosomal pairing and decay. The basic question of politics, asked outside the context of crisis, is what should we do? And that question gets no help from considering the demands of order in states of emergency. To think otherwise is to empty the notion of political identity of both the form – our constitutional DNA as it were – and the matter – our collective values and commitments – which represent the work of a nation operating across historical time. This is not to invoke any metaphysically spooky notion of a unified people existing across time, but only the familiar idea of a national political identity, residing in the agency of individuals and forged through enduring legal and cultural commitments.<sup>105</sup> The true concept of the political lies in the actions of that people, engaged in ordinary politics.

The Bybee memo's parallel mistake is to conceive "national security" in similarly vacuous terms, as the target of executive action, without respect for the content of the nation to be secured. When hijacked jets strike our towers and kill our citizens, or when roadside bombs and ambushes kill our soldiers, there is of course real suffering, real death. But it would be gross exaggeration to say that the security of the nation is threatened just because some its members are killed. The *nation* is rendered unsecure only when its identity and existence comes under siege. The Civil War posed such a threat in America; and many other nations have also faced (and succumbed to) genuine existential threats, sometimes for the better for their people, sometimes for the worse.

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<sup>105</sup> By contrast to Jed Rubenfeld's *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001).

Thus, the assessment of Lincoln's unilateral suspension of *habeas corpus* comes far closer (if not passes) the bar of real constitutional necessity.<sup>106</sup> But terrible as the casualties are in our contemporary struggle with Al Qaeda, that struggle does not rise to the level of existential threat. With sufficient nuclear material, it might; but prospective necessity is not necessity in fact. States must plan for emergencies, to be sure; but planning is not a sufficient basis for lifting the structures of legitimacy.

Nonetheless, there is a sense in which, without exaggeration, we can see an existential threat to our identity, and this comes from the threat to the structure of our governance, and to the content of our normative commitments, at risk by the policies of the Bush administration. This is the second error: Schmitt's (and the Administration's) failure to distinguish between recognizing the limits of constitutionalism and subordinating it to exigency. Legal and political theorists of very different political stripes have recognized that constitutions are made for normal times, and that the ordinary processes and balances they require may make impossible a rapid response to acute threats to the existence of a state.<sup>107</sup> In situations of genuine crisis, as Rousseau wrote, it would be wrong "to make political institutions so strong as to render it

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<sup>106</sup> See FARBER, *LINCOLN'S CONSTITUTION* 115-143.

<sup>107</sup> The conservative view for the need for a constrained executive is put by ROSSITER, *CONSTITUTIONAL DICTATORSHIP*. For a prominent example of such recognition by avowedly liberal constitutionalists, and suggestions for coping in a structural way with emergency, see Bruce Ackerman, Essay, *OUR EMERGENCY CONSTITUTION*, 113 *YALE L.J.* 1029 (2004); and Cass Sunstein, *Minimalism at War*, 47 *SUP. CT. REV.* 48 (2004). For valuable discussion to which I am much indebted, see David Dyzenhaus, "Schmitt v. Dicey: Are states of emergency inside or outside the legal order?" (MS, November 2005).

impossible to suspend their operation.”<sup>108</sup> The question is what to do about this point. One possibility is to treat constitutional structure as a heuristic, a rough and ready guide to ordinary political effectiveness, to be suspended when circumstances indicate that the guidance of the rule is unlikely to be optimal. This is, in effect, what constitutionalism became in Weimar, as continuous states of emergency led to governance almost entirely under the aegis of Article 48. This is constitutionalism as non-constitutionalism, whereby Schmitt’s aphorism about sovereignty becomes self-fulfilling prophecy. The weakness of the heuristic model precisely mirrors the weaknesses of act-utilitarianism in moral thought: all distinctive values, for example political rights against tyrannical domination, or moral rights against torture, are subsumed by a general value of welfare. The rules that ordinarily serve as vehicles for those values become so riddled by exception that the values themselves are lost.

It is not hard to come by alternatives to heuristic constitutionalism, though there is much debate concerning the optimal choice for emergency measures: whether formal or informal provision for emergency, in what ways the temporary character of the provision should be ensured, and so forth. What is beyond controversy is Rousseau’s next point, that “none but the greatest dangers can counterbalance that of changing the public order, and the sacred power of the laws should never be arrested save when the existence of the country is at stake.”<sup>109</sup> What therefore is most important, as a matter of institutional design, is creating institutions to repel claims of constitutional necessity, not to

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<sup>108</sup> ROUSSEAU, *DU CONTRAT SOCIAL* Bk. IV, ch. 6. (G.D.H. Cole trans.)

<sup>109</sup> ROUSSEAU, *DU CONTRAT SOCIAL* Bk. IV, ch. 6.

accommodate them. It does no dishonor to a principled commitment against torture to recognize its limits in the hypothetical of the ticking-bomb, nor do we dishonor a general commitment to life's value by insisting so long as we can that the hypothetical is imaginary, that we remain outside the state of emergency until we can no longer resist its existential claim. Similarly, we do not dishonor our constitutional system, our structured system of sovereign legitimacy, to recognize its limits *in extremis*. We would only dishonor it by entering too quickly into the feverishly imagined state of national emergency and accepting too easily the claims of necessity and the exigencies of national security.<sup>110</sup> The Hobbesian moment, when order must be beaten out of chaos, must be confronted, if at all, only as necessity as fact, not as a rolling justification for executive supremacy.

## **VI: Conclusion**

I have argued that the attempt to justify both torture and extra-legal authority by reference to necessity fails. It rests upon a conflation of necessity as fact with necessity as justification and on a broad and deep misunderstanding of the nature of pre-institutional rights.

There may be no cliché more tired in the current debates over the limits of national security than the line that “the Constitution is not a suicide pact,” as though anyone had ever thought it was. As dictum, it serves entirely as rhetoric rather than

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<sup>110</sup> It would equally be a mistake to pay no heed to the powerful psychological dimension of the ticking-bomb and national emergency hypotheticals. The fantasies of being the leader on the white horse, the secret agent saving the city, are surely as tempting to those in power as they are to the Hollywood imagination.

justification for the issue under dispute. Justice Goldberg, in *Kennedy v. Mendoza-Martinez*,<sup>111</sup> uses it in reference to Congress' draft powers in general, only to uphold the appellees' demand for due process before they could be stripped of their citizenship. Justice Goldberg uses the phrase again in *Aptheker v. Secretary of State*,<sup>112</sup> only to disavow drawing any justification for restricting the travel rights of Communists. The statement had, admittedly, more force in its original utterance, by Justice Jackson, arguing in dissent for upholding the breach-of-peace conviction of a crypto-fascist speaker stirring up an angry mob in the immediate shadow of World War II.<sup>113</sup> But even in that case, suicide was hardly what the more expansive speech protection upheld by the majority entailed. "Suicide," like necessity, makes for cheap rhetoric – and could have made for worse law.

The bedrock principles we have, concerning the dignity of humanity and the limits of legitimate power, are hard-won achievements of the last several centuries. Scrabbled together out of convention, claimed in the shadow of authoritarian power, they have become the marks by which we know our moral identities as both persons and nations. Threats and emergencies demand response, but that response must be grounded in a confidence in our principles' ability to meet the demands of the world on our own terms. This confidence is equally a form of judgment: the determination that threats to our interests not be confused with threats to our existence. Far more dangerous to us, to

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<sup>111</sup> 372 U.S. 144 (1963).

<sup>112</sup> 378 U.S. 500 (1964).

<sup>113</sup> 337 U.S. 1 (1949) (Jackson, J., dissenting).

who we are, is the threat of finding necessity in every conflict with evil and emergency in every war.

At the level of philosophical reflection, the ticking bomb example does show something: it shows that we can *imagine* limits to even our most deeply-held moral principles. But we should use this realization to strengthen our principles and their application in the world, not to abridge them. Here is how the realization of imagined limits can *strengthen* principles such as the right against torture. By their very divergence from real situations (existential necessity can exist only in a hypothetical world), imagined scenarios like the ticking bomb example can continually remind us that we have not reached the imagined limits in reality, that we need to push our principles farther and ever farther, that if we relinquish our deepest precepts in an ideal world of imagined scenarios, there will surely be no hope for them in the real world we all inhabit.