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The Bounds of Necessity

Jens David Ohlin*

Abstract

The current controversy surrounding the legality of torture can only be understood through an analysis of the distinction between justified necessity and excused necessity. Although there may be strong prudential reasons for international criminal courts to declare torture unlawful under any circumstance, this would not necessarily prevent a court from recognizing that an excuse may apply. However, the hallmark of the necessity excuse should not be understood, as it is in German law, as an exception that only applies when a defendant breaks the law to save someone close to him. Rather, the basic principle of the excuse ought to be that the impending harm so weighs on the conscience of the defendant that his autonomy is impermissibly infringed by the necessity of the situation. Given that the prospect of massive casualties might compel a police or military official to engage in torture, the relationship between the defendant and the potential victims is irrelevant. All that matters is that the defendant is torn between, on the one hand, a deontological commitment to treat all suspects humanely, and on the other, a consequentialist concern with the deaths of many innocent victims. Commentators have wrongly assumed that these consequentialist concerns are only relevant for justified necessity. But if a court finds that the pull of the latter is so strong that to resist it would require an act of extreme moral courage, the culpability of the defendant is negated and the defence of excused necessity could be applied.

1. Introduction

In the last five years we have witnessed an increasing acceptance of torture in our contemporary legal discourse. For unknown reasons the public is no longer shocked by images of torture. Although, on the one hand, images from Abu Ghraib provoked shame and humiliation on the part of American citizens, on the other hand, torture has gained a renewed currency in a political climate obsessed with terrorism and asymmetrical warfare. While legal scholars such

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as Alan Dershowitz and John Yoo make arguments designed to justify official policies of state torture against terrorism suspects, the public's opposition to such practices has waned. Perhaps the image of a suspect being brutalized no longer shocks the conscience as it once did, as the American public has grown increasingly desensitized by casual brutality. While the brutality of punishment was long since erased by Enlightenment virtues and the efficiency of Benthamite punishment.² its shadow remains, reaffirmed in the image of the hypothetical terrorist receiving his due at the hands of a CIA interrogator in a ticking time-bomb thought experiment. The overexposure of pain in our popular culture has led us to become immune to the once humanizing effects of these images.³ It is a final irony, perhaps, that international criminal law, as a discipline, has done so much to bring images of brutality and destruction to public awareness, by creating a historical and legal record of wartime atrocities, but now the suffering of others itself suffers from overexposure. It is against this backdrop that the public is willing to accept government policies that encourage torture.

Amidst the fallacious reasoning and intellectual dishonesty, there is a lacuna of reasoned legal argumentation.⁴ The existing literature has been overly focused on *justifying* torture by appeal to hypothetical scenarios, such as the ticking time bomb, that may never come to pass.⁵ In addition to the

- 1 Cf. S. Sontag, Regarding the Pain of Others (New York: Penguin, 2004), 111 ('It has become a cliché of the cosmopolitan discussion of images of atrocity to assume that they have little effect, and that there is something innately cynical about their diffusion.'). Sontag notes the great variety of responses that can be generated by photographic evidence of atrocities, which can be dismissed as staged or misused as propaganda by altering a caption (at 11). Sontag also notes that the same photograph can be a rallying cry for both peace and revenge, depending on the viewer (at 13).
- 2 This subtle evolution is charted by Michel Foucault in *Discipline & Punish: The Birth of the Prison* (New York: Vintage Books, 1975, trans. A. Sheridan, 1991). Indeed, Foucault's book starts with one of the most gruesome passages ever recorded: the description of a convict being drawn and quartered in 1757 in a botched execution (at 3–5). Foucault's interest here is in the 'disappearance of torture as a public spectacle', a process whereby punishment against the physical body is replaced with punishment against the mind of the offender. While this process is usually thought to represent the continued evolution of human decency and civility. Foucault produces a counter-narrative about this so-called 'gentle way in punishment', (at 104), demonstrating the increasing levels of control and power that are manifested in this inward turn. The most obvious example is the Panopticon, designed by Jeremy Bentham, to allow for constant surveillance of all prisoners. The design works by shining a light on the prisoner and keeping the guard tower in darkness, thus eliminating a prisoner's ability to detect whether he is under surveillance or not at any moment in time, thus producing an ever-present 'disciplinary gaze' (at 174).
- 3 Cf. E. Scarry, The Body in Pain: The Unmaking of the World (New York: Oxford University Press, 1987), 27 (discussing torture as inward and private pain made visible and public, thus creating a 'spectacle of power').
- 4 Famous examples include A. Dershowitz, Shouting Fire: Civil Liberties in a Turbulent Age (Boston, London: Little, Brown, 2002) and Why Terrorism Works: Understanding the Threat, Responding to the Challenge (New Haven: Yale University Press, 2002). His arguments are attacked by J. Waldron in 'Torture and Positive Law: A Jurisprudence for the White House', 105 Columbia Law Review (2005) 1681.
- 5 See Dershowitz, Why Terrorism Works, supra note 4, at 143.

over-reliance on poorly designed philosophical thought experiments, ⁶ part of the problem stems from an insufficient attention to the doctrinal differences between justifications and excuses. In a few notable cases, though, scholars have indeed focused on the more fruitful intellectual avenue of excusing torture if certain strict requirements are met. ⁷ But even these promising endeavours have sometimes failed to adequately draw the appropriate boundaries of excused necessity. This article is an attempt to remedy that deficiency.

First, a point about methodology. Although there is well-developed case law at the ad hoc tribunals regarding the elements of the crime of torture, hone of it touches upon the interplay between torture and the defence of necessity. As to the more general case law at the tribunals regarding necessity and duress, the existing doctrine is still far from being solidified, given that the *Erdemović* case was decided by a mere 3-2 vote and the dissenting opinion by Judge Cassese has had as much influence as the majority opinion. Furthermore, the Rome Statute provision on necessity and duress has never been applied by a court (thus further establishing the lacuna). A proper analysis of the issue must therefore depart from the standard method of confining one's analysis to the relevant case law at the tribunals (of which there is little) and instead look to basic principles of criminal law and their application in domestic legal systems.

Consequently, Part 2 will analyse the distinction between justified and excused necessity and argue that the latter is the most fruitful avenue for analysing cases of torture. Part 3 will suggest that the defence should be available to any defendant, regardless of his relationship to the potential victims who might die in a state of emergency. Part 4 will argue that the true hallmark of the defence of excused necessity is that a consequentialist concern with the lives of innocents compels or causes the defendant to commit a wrongful act, and that an act of extreme moral courage would be required to resist the pull of these consequentialist concerns which are usually associated with the justification version of the necessity defence. Part 5 will consider several objections to this theory of excused necessity and will consider the

- 6 For criticisms, see D. Luban, 'Liberalism, Torture, and the Ticking Bomb', 91 Virginia Law Review (2005) 1425, at 1455; C. Kutz, 'Torture, Necessity and Existential Politics', 95 California Law Review (2007) 235; H. Shue, 'Torture', 7 Philosophy & Public Affairs (1978) 124. Although thought experiments have a long tradition in moral philosophy and metaphysics, they are of a more recent vintage in legal scholarship. Moreover, the philosophical literature places extreme constraints on the design and execution of such experiments. See, e.g. R.A. Sorensen, Thought Experiments (New York: Oxford University Press, 1992). However, the legal literature has so far not demonstrated the same degree of theoretical rigour in its use of these rhetorical techniques.
- 7 See, e.g. the profound analysis of necessity by K. Ambos in this volume.
- 8 See, e.g. Judgment, Furundžija (IT-95-17/1), Trial Chamber, 10 December 1998, § 139; Judgment, Čelibići (IT-96-21), Trial Chamber, 16 November 1998, § 495; Judgment, Kunarac (IT-96-23&23/1), Trial Chamber, 22 February 2001, § 49. The ICTY case law regarding the elements of torture is well analysed by Christoph Burchard in this volume and I will not repeat it here. See also G. Mettraux, International Crimes and the Ad Hoc Tribunals (Oxford: Oxford University Press, 2005) 110–116.

possibility that international criminal law should demand from defendants the acts of moral courage that are required to live up to the law's deontological constraints. But even if international criminal law should require an act of moral courage on behalf of an interrogator tempted to cross the line during his interrogation of a suspected terrorist, the foregoing analysis in this Article is still required to properly conceptualize the bounds of excused necessity — a defence that has received far too little attention in the scholarly literature and case law since Nuremberg.

2. The Distinction Between Necessity as a Justification and Necessity as an Excuse

The exact theoretical contours of the necessity defence have long confounded criminal law scholars. It has been treated, alternatively, as a justification and as an excuse, while the German Penal Code allows for both approaches and codifies both a defence of justified necessity (Rechtfertigender Notstand)9 and one of excused necessity (Entschuldigender Notstand). 10 Justified necessity usually appeals to some version of choice of evils, as one might find in the US Model Penal Code.¹¹ The idea here is that under extreme circumstances, the defendant acts reasonably to avoid a disastrous result but in so doing commits an otherwise unlawful act. If the outcome 'sought to be avoided' by the defendant is sufficiently grave compared to the defendant's act, then the act is justified by virtue of the necessity of the situation. 12 On the other hand, the defence can be construed as an excuse, where the possibility of the negative outcome sought to be avoided somehow impinges on the defendant's ability to do the right thing. In these situations, though the defendant's act is still wrong, the defendant is excused because the law views him — charitably — as not culpable. The law instead views him as lacking moral courage, a defect which, while unfortunate, is nonetheless not criminal. The paradigmatic example is the defendant who commits an otherwise criminal act to save his family. This defence is motivated by the intuition that we cannot demand (though we might encourage) conformance with the criminal law to the point where a citizen must sacrifice his own family. Needless to say, of course, the defence still does not transform the excused act into a lawful one.

As has been noted previously, the Rome Statute is completely insensitive to the distinction between these two versions of necessity. Article 31(1)(d)

⁹ StGB § 34.

¹⁰ StGB § 35.

¹¹ See Model Penal Code \S 3.02(1) ('Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable').

¹² See Model Penal Code § 3.02(1)(a) ('the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged').

¹³ Cf. K. Ambos, 'Other Grounds for Excluding Criminal Responsibility,' in A. Cassese, P. Gaeta, J. Jones (eds), The Rome Statute of the ICC: A Commentary, Vol. I (Oxford: Oxford University Press, 2002), at 1035–1036.

simply lumps everything together in a muddle, offering a duress provision that appears to also apply to cases of necessity, by virtue of the following language that the threat may be 'constituted by other circumstances beyond that person's control. The provision is a hybrid in that it combines elements of the justification (because it requires the lesser of evils and reasonableness) and the excuse (because it is paired with duress). However, Article 31(3) allows the ICC to recognize extra-statutory defences by appeal to basic principles of criminal law under Article 21, which would therefore provide an avenue for the court to entangle the provision and recognize two versions of necessity. ¹⁴ The ICC is therefore in the position, in the coming years, of deciding whether to recognize justified necessity or excused necessity in its jurisprudence, or adopt both. I shall argue in this article that the ICC should indeed recognize both, but that the court must be careful to draw the appropriate boundary between the two concepts. I shall argue here that this clear line is essential for an appropriate treatment of some of the most vexing cases that will surely appear on the court's docket in the near future, including those involving torture.

The international case law demonstrates a similar degree of confusion. In some cases the defence has been accepted, but in others not. In cases where it is accepted, it is often collapsed with duress (including the Rome Statute), but as Cassese and other commentators correctly note, the concepts are clearly distinct.¹⁵ Furthermore, in some of the cases where it is upheld, it is genuinely unclear if it is being posited as a justification or as an excuse, or if it is really duress. For example, in *Krauch and Others (I.G. Farben)*, the US Military Tribunal at Nuremberg concluded that the defence of necessity was unavailable to industrialists, charged with using slave labour, who argued that they were under orders from Nazi government officials.¹⁶ The defence of necessity was, however, accepted in *Flick and Others*, when two defendants were acquitted on slave labour charges because they lived in a 'reign of terror' that caused fear of punishment from secret government police if they disobeyed orders or failed to meet production quotas.¹⁷ Again, though, this situation

- 14 Although the principle of legality, *nulla poena sine lege*, usually counsels against judicial elaboration of new criminal law doctrine, this only applies to doctrine that would generate liability, not doctrine that generates new sources of exculpation. Another way of putting the point is that the necessary conditions for liability are closed, in advance, by legislative enactment, but that the list of exceptions for defeating liability remains open. See G.P. Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why* (New York: Oxford University Press, 2008), 33.
- 15 See, e.g., A. Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 243 (noting that necessity is a broader category that includes duress).
- 16 The court concluded that the defence failed because the defendants were not deprived 'of a moral choice as to his course of action'. The courts also noted that the defence is unavailable where the defendant is responsible for the order or decree, or his participation went beyond the requirements of the necessity, or 'was the result of his own initiative'. See *Krauch and Others*, reprinted in VIII *Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council No. 10* (1942) 1081, at 1179.
- 17 See Flick and Others, reprinted in VI Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council No. 10 (1942) 1187, at 1199–1202.

appears more akin to duress than necessity, in that the defendants pursued the action under direct threat to themselves. ¹⁸ Given that the alleged threat in both cases came from a specific individual, the defence should have been analyzed as one of duress, even though the tribunal characterized it as one of necessity. Indeed, the two defences are so closely intertwined that commentators, such as Cassese, posit the same conditions for both, namely: an immediate threat to life or limb, no other means of averting the evil, a proportionality constraint, and a requirement that the situation was not voluntarily brought about by the defendant. ¹⁹

In each of these cases it remains totally unclear whether, at its heart, these defences constitute justifications or excuses. In both *Flick* and *Krauch*, the judgments appear to use the language of excuse, in that the use of slave labour did not appear to be necessary under the circumstances but was, rather, excusable given the extreme nature of the Nazi regime. Apparently, the justices felt no need to explicitly resolve the doctrinal issue one way or the other, though the issue can no longer be avoided in future cases as international criminal law increases its analytic rigor. This is particularly important since current controversies regarding torture put direct pressure on this distinction. Those advocates who have supported a policy of interrogational torture against terrorist suspects have done so explicitly by appeal to the moral permissibility and justification for such actions, at least in certain extreme situations where a suspect may have actionable intelligence that will save lives. Putting aside, for the moment, whether this argument can be legally justified under international criminal law, or whether it is morally justified,

- 18 Ibid. (acting under 'clear and present danger').
- 19 See Cassese, International Criminal Law, supra note 15, at 242–243.
- 20 See *Flick and Others*, *supra* note 17, at 1200 (defendants faced 'savage and immediate punishment' if they resisted); *Krauch and Others*, *supra* note 16, at 1179 ('deprive the one to whom it is directed of a moral choice as to his choice of action').
- 21 See, e.g. A. Dershowitz, *Why Terrorism Works, supra* note 4 (suggesting torture 'warrants'); Memorandum from Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President (1 August 2002) [hereinafter Bybee Memorandum] (limiting torture to cases of severe and pain and suffering that could lead to organ failure or death); Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defence (9 January 2002) [hereinafter Yoo Memorandum] (terrorists not protected by the Geneva Convention's prohibition against torture).
- 22 See P. Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?' 2 Journal of International Criminal Justice (2004) 785–794 (arguing that a torturer can never successfully plead a defence of necessity in cases of interrogational torture). In her excellent and thought-provoking article, Gaeta makes the interesting argument that the defence of necessity only excuses criminal acts committed against innocent individuals, which on her reading would exclude terrorists, who may very well be responsible for creating the state of necessity in the first instance. While a novel argument, its acceptance leads to a perverse result, because it implies that a truly innocent individual could be tortured under such circumstances and would receive less protection than a truly culpable terrorist (at 791). Gaeta's other ground for rejecting the necessity defence is the uncertainty that a particular suspect in custody would have information that could stop another terrorist attack, thus calling into question whether the torture was truly 'necessary'. This argument presumes

it matters whether the necessity defence is properly construed as a justification or an excuse.²³ If it is justified under certain circumstances, then it may well be the case that an *ex ante* policy supporting it may be justified as well.²⁴ If, on the other hand, torture is simply excusable, in the sense that defendants may have a defence against *ex post* conviction and punishment, then this fact lends no support to the suggestion that such a policy should be enacted, either on legal or policy grounds.²⁵ All sorts of conduct may be excusable under certain circumstances or as per certain defendants, but by definition such conduct is still unlawful and an inappropriate candidate for a policy that promotes its use by state officials.²⁶

The distinction is also deeply relevant for the context of torture as we trace the contours of complicity. First, since a justification negates the unlawfulness of the act itself, accomplices and aiders and abettors cannot be held liable for contributions to the crime.²⁷ However, since an excuse only negates the culpability of the actor, accomplices who do not have the benefit of the excuse may not appeal to the principal's excuse in seeking to avoid liability, since the unlawfulness of the criminal act remains.²⁸ It is therefore entirely plausible for an accomplice to face liability for which an excused principal has escaped,

that taking an action that merely increases the chance of saving an innocent life can never truly be 'necessary', a presumption that implicates many other cases of necessity outside the context of torture.

²³ This distinction is explored in depth by K. Ambos in his article 'May a State Torture Suspects to Save the Life of Innocents?' in this volume.

²⁴ This appears to be the implicit structure of the Bush Administration legal arguments. See Yoo Memorandum, *supra* note 21, at 1 (analysing the legal question in terms of the federal War Crimes Act); Bybee Memorandum, *supra* note 21, at 31 (president cannot be constitutionally constrained from ordering torture because of his commander-in-chief powers).

²⁵ This distinction played a major part in two recent foreign cases. First, the Israeli torture decision concluded that a government official could never lawfully authorize torture in advance, but that a police official who used interrogational torture would nonetheless have the option of pleading a necessity defence in any ex post criminal trial. See HCJ 5100/94, *Public Committee against Torture in Israel v. Israel*, Supreme Court of Israel, Judgment of 6 September 1999. A similar rationale was offered by the German Constitutional Court when it declared that no law could authorize, in advance, state officials to shoot down a hijacked plane, because the action would violate the human dignity of the innocent passengers. However, the law's unconstitutionality did not implicate the availability of the necessity defence in an *ex post* trial of a government official who went ahead and ordered a military strike anyway. See *Bundesverfassungsgericht*, Judgement of 15 February 2006, available at www.bverfg.de/entschei¥dungen/rs20060215.1bvr035705.html (visited 8 March 2008).

²⁶ For an extensive discussion of the relationship between *ex ante* policies and *ex post* excuses, see A. Harel and A. Sharon, 'What is Really Wrong with Torture', in this volume.

²⁷ This analysis is defended by G.P. Fletcher in *Rethinking Criminal Law* (New York: Oxford University Press, 2000), 759–761 (determination that the conduct is justified 'presupposes a judgment about the superior social interest in the conflict'). Cf. K. Greenawalt, 'The Perplexing Borders of Justification and Excuse', 84 *Columbia Law Review* (1984) 1897, at 1925–1926 (arguing that the distinction between justification and excuse does not adequately track cases where third-party intervention and support is permissible).

²⁸ But see Greenawalt, *supra* note 27, at 1921–1922 (Another reason why attempts to develop systematic distinctions between justification and excuse in terms of the rights of others are misguided is because no single sharp-edged distinction is capable of both capturing the rights

but it is doctrinally incoherent for an accomplice to face liability when his justified principal has escaped it.²⁹ Given that theories of complicity such as command responsibility and joint criminal enterprise are the leading modes of liability at the ICTY, this issue cannot be avoided. This is especially true of torture, which is most likely to be committed in either interrogational or prison camp contexts, where large numbers of perpetrators are likely to be involved. Deciding whether a torturer is justified or merely excused for his actions will have great consequences for future judgments of a tribunal faced with multiple defendants from the same military organization.³⁰

3. The Close Family Connection Requirement

The relevant question, then, given the fact that the ICC is open to new defences. is how it should draw the contours of the necessity defence, if indeed it adopts one. Given the general state of confusion regarding the relationship between necessity and duress, as well as the internal definition of necessity as a justification or excuse, one attractive possibility is to import the German provisions, with their rich distinctions, so that international criminal law might include both justified necessity and excused necessity. If the ICC were to adopt this suggestion and define, through judicial interpretation, two separate defences, justified necessity and excused necessity, there would be significant pressure to adopt the distinction wholesale from German criminal law. However, the statutory provision of excused necessity found in Article 35 of the German Penal Code reflects serious doctrinal inconsistencies that the tribunals would do well to avoid. Specifically, the German Penal Code requires a close family connection (einem Angehörigen oder einer anderen ihm nahestehenden Person) between the defendant and the individual whose life is threatened by the objective circumstances that the defendant seeks to avoid with his conduct. For example, in the famous Daschner case, the Frankfurt Court quickly dismissed the applicability of excused necessity as a defence for this reason.³¹ The defendant in that case was a police official who authorized the threat and use of torture against a suspect who was being interrogated in an investigation regarding a kidnapped child. Although the suspect was never tortured, he did confess

of others and conforming with the facts as they actually exist rather than with how they are reasonably perceived.').

²⁹ US case law is not always sensitive to this distinction.

³⁰ For example, the prosecutions involving torture at Abu Ghraib involved multiple defendants, including military police and their commanding officers. See 'Further UCMJ Proceedings for Violations of Humanitarian Law', 100 American Journal of International Law (2006) 714 (more than 100 soldiers disciplined for abuse at Abu Ghraib and several faced charges).

³¹ See Landgericht Frankfurt a.M., Judgment of 20 December 2004, Neue Juristische Wochenschrift 2005, 692–696 [hereinafter cited as Daschner]. The case is discussed in depth by F. Jessberger in 'Bad Torture — Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany, 3 Journal of International Criminal Justice (2005) 1059.

when he was threatened with physical force, and informed the police that the boy was already dead. The police official was prosecuted and found guilty, in part because excused necessity was unavailable to him as a defence.³² The police official had no close connection to the boy whose life he was trying to save.³³

While at first glance this constraint may seem justifiable, it bears scrutiny. Moreover, the constraint would pose severe doctrinal problems in cases involving conduct such as torture. And the relevance of the discussion extends well beyond controversial cases of torture. Examining the exact bounds of necessity will allow international courts to appropriately appreciate the theoretical ground for these defences, and will help the court understand the proper relationship between justifications and excuses generally.

Turning to the specifics of the close connection requirement, one reason might appeal to public policy. Maybe the criminal law should require the connection for excused necessity as a way to strengthen these types of familial relationships. Other types of relationships would not receive the benefit of these protections. In other words, by giving close family relationships extra protection and status within the law, especially the criminal law, one would protect and encourage certain familial relationships — a policy goal that the legal system might be interested in achieving.

For example, there was once a similar requirement for defence of others, at least in the common law, but it was rightly rejected as representing an outdated view of the paterfamilias. A similar view once held sway in the common law of torts as well.³⁴ The idea was that a man could use force to protect his family and his servants — in other words, individuals with whom he had a proximate interest or was under a preexisting duty to protect. However, this view has long since been abandoned in the common law, both in American criminal law and tort law, because it flowed from the antiquated idea of a man's dominion over his wife, family and slaves.³⁵ It is now universally recognized that any individual can exercise a right to stop an unlawful attack, even in the absence of a pre-existing relationship with the person being defended.³⁶ Interestingly, both French and German criminal law rightly avoided this connection requirement in the first place, in their provisions on legitimate defence and necessary defences respectfully,³⁷ thus making it all the more striking that German law requires the connection in its excused necessity provision.

- 32 See Daschner, supra note 31, at 29.
- 33 Ibid. (also noting the absence of an extra-statutory excuse as well).
- 34 Restatement (First) of Torts § 76.
- 35 Restatement (Second) of Torts § 76 (the 'restriction of the privilege to intervene on behalf of third persons to those who are members of the actor's family or household was founded upon conditions long since past').
- 36 See Salmond, *Torts* 375 (11th ed. 1953) ('every man has the right of defending any man by reasonable force against unlawful force'), quoted in *Restatement (Second) of Torts* § 76. According to the Restatement Reporter's Notes for Section 76, the original limitation to relatives, servants or close associates derives from *Leward v. Baseley*, 1 Ld. Raym. 62, 91 Eng. Rep. 937 (1695), but there is 'no modern case holding that there is no privilege to defend a stranger'.
- 37 Code Pénal, Arts 122-125, StGB § 32.

The first problem, therefore, is that the close connection requirement makes the defence underbroad, in the sense that it would seem to invalidate the defence in many circumstances where the defendant is sincerely moved to act by the circumstances, even though neither a spouse nor a child is involved.³⁸ But the requirement also makes the defence overbroad in a significant respect and has the potential to give the torturer a free pass. Even if the criminal act is not motivated by a compulsion consistent with a state of necessity, the close connection requirement functions as a presumption that defendants who commit illegal acts when the lives of their loved ones are at stake, are doing so for the right reasons. This is not necessarily the case. The torturer may be otherwise motivated (sadism, racism, or bald hatred) and thus take advantage of the situation. He may engage in the illegal act anyway because he knows the law is likely to look charitably on his situation, on the assumption that the close family connection was his motivation. This gets to the heart of the requirement, both its virtue and its vice. By requiring a close family connection, the law limits the defence to a particular area where it is thought that it might legitimately apply, with the hopes of relieving the court of the burden of inquiring into the defendant's true motivations.

4. The Causal Theory

These controversies stem from an underlying uncertainty over the theoretical ground for the necessity defence. In order to properly understand the defence, it is crucial to understand *why* a state of necessity would negate the culpability of the defendant. By virtue of what fact is the actor not culpable?

Consider the following thought experiment as a way of elucidating the problem. A police inspector is interrogating a suspect who is the leader of a large criminal organization. The organization has kidnapped 100 innocent individuals and is threatening to kill them, and the leader of the organization not only has the information about their location, he also has the authority to order their release, should he wish to do so. He also, incidentally, has the authority to have them killed. The police inspector in charge of the case now has to decide how to proceed. The standard investigative techniques have been exhausted, yielded nothing, and time is now running out. The police inspector has no close relationship with the hostages and indeed, he does not even know their names. He simply knows that 100 individuals, including women and children, may soon die unless the police succeed in getting actionable intelligence in the case. Nonetheless, the fact that the police inspector does not know the names of the individuals in no way diminishes the degree to which their lives hang in the balance and he is acutely aware of this fact. In deciding whether to threaten the suspect with torture — or use actual force that may cross the line of permissible force — he feels an inescapable pull to save the lives of the

³⁸ Cf. *Dashner*, *supra* note 31, at 34 (concluding that Daschner did not deserve punishment even though the German provisions on excused necessity could not be applied in the case).

innocent 100 hostages. He knows nothing about them but this does not matter. The great tragedy of 100 people dying is all that he can think about and a great swell of emotion builds inside of him. He engages in torture because he feels he cannot do otherwise — the lives of the innocent demand protection, even if one individual must be tortured. The suffering that will be caused by the 100 is just unbearable to him.

Should the defence of excused necessity apply to the police official? Although he had no direct connection to the victims, he did experience every other hallmark of excused necessity. In essence, the police official in our thought experiment is a classic consequentialist and the only thing that matters to him morally is the amount of pleasure and pain. Given that one act of torture will cause pain that is far outweighed by the suffering that will be prevented as to the 100 hostages, the police official feels compelled — by some unspeakable force — to engage in the torture. The point here is that there is a causal connection between the lives that would be lost and the torturer's decision to commit the crime, i.e. it is the fact that someone else will die that causes the police official to break the law and torture the suspect.³⁹ This is the infringement of personal autonomy that is at the heart of excused necessity. What matters is that some cause intervenes to obstruct a lawful individual's autonomy and causes him to commit, through compulsion, an unlawful act. This demonstrates that the sine qua non of excused necessity is that the potential deaths of innocents so weighs on the defendant that it infringes his autonomy and prevents him from living up to the demands of the law.40

The key point here is the existence of a *causal* connection between the threat to the potential innocent victims and the defendant's decision, insofar as the threat to them provides the defendant with a reason for acting. Although defendants will always have reasons for acting, many of which are influenced by other factors (and other agents), excused necessity presents an extreme version of this general phenomenon. In some circumstances, the necessity of the situation may be so extreme that it interferes with the agent's usual decision-making process and interrupts the usual causal relationship between the agent's respect for the law and his decision to obey it. In the specific hypothetical case of the police official who authorizes an act of torture, the lives of the potential victims might intervene in this decision-making process, pulling at the agent's conscience, and providing him with reasons to engage in the unlawful torture that cannot be so easily challenged. By accepting this

³⁹ Cf. M.S. Moore, 'Causation and the Excuses', 73 California Law Review (1985) 1091 (rejecting causal theory of excuses). Moore argues that the causal theory is wrong, amongst other reasons, because all actions are caused, by virtue of determinism, thus rendering the notion of causation unhelpful for distinguishing between actions that should be excused and those that should not.

⁴⁰ See ibid., at 1122 (discussing autonomy as necessary postulate for criminal adjudication).

⁴¹ On reasons for acting, see D. Davidson, 'Actions, Reasons, and Causes', in *Essays on Actions and Events* (Berkeley: University of California Press, 2001) 3, at 4.

causal theory of excused necessity, as intervening excessively in the decision-making process of the defendant to such a degree that it infringes his autonomy, one is led to a renewed and deeper understanding of the defence of excused necessity. It is no longer treated as an excuse akin to insanity, where a defendant engages in an irrational act, but rather an infringement of the defendant's autonomy caused by external factors that cannot be ignored by most reasonable individuals.⁴²

One might object that this account makes excused necessity sound too much like justified necessity. After all, the appeal to consequentialist lines of thought — the number of lives that can be saved, and so on — sounds strikingly similar to the choice of evils interpretation of justified necessity that one finds in other criminal statutes, such as the Model Penal Code. As owen not reclassify the defence in the thought experiment as a justification. But this is precisely the point of my argument. We may not want to call it a justification because the conduct is, at its heart, wrongful. In this context — interrogational torture — the law follows deontological lines of thought. No amount of social benefit will justify the infliction of torture on a suspect, precisely because this kind of balancing of interests is inappropriate where human life or dignity is concerned. Although positive consequences may flow from a decision to torture, international criminal law — as a discipline — may indeed follow the lead of national legal systems that decline to entertain such lines of thought, given the great potential such arguments have for abuse.

The fact that the conduct is still unlawful because it infringes some deontological constraint (such as human dignity), does not change the fact that the police official lacks full autonomy because the lives of the victims cause him to waiver from the law's deontological commitments. And recall, this lack of autonomy is the hallmark of the excuse. Autonomy is embodied in the basic structure of criminal law generally, ⁴⁷ and international criminal law

- 42 In deciding whether an individual could have resisted a compulsion, it is necessary to make reference to some standard of reasonableness. For an analysis of how such standards function in the common law as opposed to civil law systems, see G.P. Fletcher, 'The Right and the Reasonable', 98 Harvard Law Review (1985) 949 (discussing common law system of single standards based on reasonableness, versus civil law standards commencing with an absolute right to be modified by limitations).
- 43 See Model Penal Code § 3.02.
- 44 This line of thinking is evidenced by provisions such as the German constitutional protection for human dignity. See GG $\S 1(1)$ ('Human dignity shall be inviolable.').
- 45 The German Constitutional Court used similar reasoning in striking down a statute that authorized the executive to shoot down hijacked aircraft, arguing that such a law would violate the human dignity of the innocent aircraft passengers. See *Bundesverfassungsgericht*, 15 February 2006, 115 BVerfGE 118, available at http://www.bundesverfassungsgericht.de.
- 46 The German Constitutional Court held that 'the duty to respect and protect human dignity generally forbids making any human being a mere object of the actions of the state. Any treatment of a human being by the state that because it lacks the respect for the value that is inherent in every human being would call into question his or her quality as a subject, [his or] her status as a subject of law, is strictly forbidden. The language here contains obvious allusions to Kant and is implicitly deontological.
- 47 See Fletcher, Rethinking Criminal Law, supra note 27, at 770.

as well.⁴⁸ It is a predicate principle on which criminal liability is based, and it shines in the background of the Rome Statute, as well as the international case law going back to Nuremberg.⁴⁹ The whole point of international criminal law is to hold autonomous individuals responsible for their autonomous decisions and the fate of our hypothetical police official straddles the border between justified and excused necessity. But if forced to pick one over the other, the facts of our hypothetical fit closer to excused necessity than justified necessity. His actions were not justified, though the lives of the potential victims weighed so heavily on his mind that his autonomy, for all meaningful purposes, was infringed.

This theory of excused necessity is consistent with the notion of 'dirty-hands.' The idea of dirty hands, already well worked out in the scholarly literature, is that the torturer may engage in a morally wrongful act, thus sparing the civilian population, or those he is sworn to protect, from getting their hands dirty with a morally disreputable act, even if in some sense the act is 'necessary' by some consequentialist perspective. The official with dirty hands occupies a somewhat curious, liminal space in our moral and legal intuitions, because his actions are simultaneously condemned and treated with great sympathy. The borderline between justified and excused necessity can quite neatly treat such a suspect, because the law may conclude that his actions were unlawful (and hence unjustified), but, at the same time, excused by virtue of a consequentialist necessity that so impinged the defendant's autonomy and decision-making process that moral culpability cannot be attached to him.

What if the torturer thinks that he is justified, i.e. he believes that, in addition to the pressure that the 100 lives exerted on his decision-making, he also believes that the torture was both morally and legally justified by this state of necessity? The question is whether such a subjective state of mind ought to give one pause before allowing a defence of excused necessity to such a defendant. Arguably, though, this fact alone should be irrelevant for ascribing excused necessity to the defendant. It should make no difference that he is wrong about the law and misunderstands the deontological commitments imposed by the law's absolute prohibition against torture. What matters is whether the potential deaths of other particular individuals was so disturbing to the defendant that he was truly *compelled* to engage in unlawful conduct, and that he felt he had to do it, regardless of whether it was right or wrong. It is the lack of *meaningful* choice that is the hallmark of excused necessity, and this is entirely consistent with a defendant who also believes — falsely — that he is also justified.

⁴⁸ See Cassese, *International Criminal Law, supra* note 15, at 236 (discussing absence of freedom of judgement).

⁴⁹ See generally Flick and others, supra note 17, and Krauch and others, supra note 16.

⁵⁰ See M. Walzer, 'Political Action: The Problem of Dirty Hands', in S. Levinson (ed.) *Torture:* A Collection (New York: Oxford University Press, 2004).

The international crime of torture thus helps us understand the bounds of excused necessity as a legal defence. The whole point of the defence is to excuse an individual for failing to have the necessary moral courage, i.e. the moral courage of a deontological commitment to the inviolability of human dignity. Whether his failure stems from a close connection to the potential victims, or misplaced consequentialist commitments, should not matter.

5. Objections to the Causal Theory

There are at least four objections to the causal account of excused necessity that I have not yet resolved. Each will be considered in turn and dismissed.

A. The Problem of Administration

The first objection is that excused necessity under the definition that I propose in this article would be too difficult for courts to administer. Criminal law might need a per se rule to establish the bounds of necessity. This is precisely why the close connection rule was a good idea. It established a proxy to relieve courts of the difficult task of determining an agent's motivations. In cases of close family connections, we could safely assume that, absent evidence to the contrary, the defendant was motivated by the necessity of the situation. A bright line rule is efficient for the administration of justice. Furthermore, this objection is just as relevant in the context of international criminal law as it is in domestic penal law, especially considering the limited resources of the ad hoc and permanent criminal tribunals.

This objection is motivated, inter alia, by a general scepticism about mental states. Some theorists are suspicious that we can ever truly know an agent's motivations or mental states, making the criminal law's reliance on mental elements or *mens rea* especially troublesome. And theorists such as Paul Robinson have gone so far as to revise doctrines around exclusively objective phenomena, in order to resolve this theoretical anxiety. However, this theoretical anxiety is misplaced both as to criminal law generally and as to torture specifically. The objection proceeds from the starting assumption that we know our own mental states because we have direct phenomenological access to them. When an agent has a belief or desire, he need go no further than his mind, his own self-consciousness as it were, in order to find this belief or desire. However, no such direct access is available to learn other people's mental states.

⁵¹ See supra note 44 and accompanying text.

⁵² See K. Shapira-Ettinger, 'The Conundrum of Mental States: Substantive Rules and Evidence Combined', 28 Cardozo Law Review (2007) 2577.

⁵³ See P.H. Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability', 23 UCLA Law Review (1975) 292.

The sceptics take this lack of direct access to third-party mental states as evidence that we can never truly know anything about another person's mental states, and that criminal courts cannot either. This is where the argument takes a wrong turn. Criminal courts learn about a defendant's mental states by looking at objectively manifested events in the world and then *attribute* mental states to defendants. And criminal courts are not the only institutions that engage in this kind of attribution of mental states. Every interlocutor, the moment that they engage in rational conversation with another agent, must play the game of interpreting linguistic behaviour and attributing mental states that make sense of their interlocutor's utterances. Failure to attribute mental states in this manner would make basic behaviour interpretation (and conversation) impossible.

In the end, the sceptic takes a basic asymmetry and uses it as evidence that we cannot understand mental states. While we learn about our own mental states through introspection, we learn about other people's mental states through a wholly different process: attribution and behaviour interpretation. ⁵⁶ But the fact that we use a different method when dealing with third parties cannot be a warrant for concluding that we can never truly know what a third party is thinking. The fact remains that by looking at the available evidence, by finding out what the defendant said, how he acted (his movements, his circumstances, etc.), we can attribute certain motivations to him. In so doing, we can determine whether his decision-making process was excessively altered by the prospect of a huge number of innocent people being killed and whether he was compelled to break the law.

Nonetheless, such attributions of mental elements are empirically difficult, which is what makes criminal law fact-finding, whether by a common law jury or by a judge in an international court, so contentious. What if the only evidence of the agent's motivations is his own testimony, which inevitably may be self-serving? One response to this dilemma is to shift the burden of demonstrating the excuse to the defence, by making it an affirmative defence (as opposed to an element of the offence).⁵⁷ If the defence cannot establish it with some

- 54 See Shapira-Ettinger, supra note 52, at 2585.
- 55 This point can be deduced by noticing that all behaviour interpretation and communication requires basic attribution of mental states to one's interlocutors, thus demonstrating that the problem is not specific to the criminal law's need to attribute mental states to defendants. See D. Davidson, 'Belief and the Basis of Meaning', in *Inquiries into Truth and Interpretation* (New York: Oxford University Press, 2001) (1984), 141.
- 56 Such attributions are based on what Davidson calls the Charity Principle. In attributing mental states to another agent, whether an interlocutor or a defendant in a criminal trial, we assume that the agent's behaviour is more, rather than less, rational, unless we are faced with evidence to the contrary.
- 57 Some justifications are treated by the rules of evidence as similar to the elements of the offence, in the sense that the prosecution has the burden of demonstrating that the justification does not apply. Almost every jurisdiction in the United States treats self-defence in this manner. But see Ohio Rev. Code Ann. § 2901.05(A) (1982); *Martin v. Ohio*, 480 US 228 (1987) (holding that Ohio statute shifting burden of self-defence from the prosecution to the defence did not violate constitutional constraints on due process). Also, evidence rules might mitigate the softness of

credible evidence — i.e. some corroboration above and beyond the defendant's own testimony — then the defence might be disallowed. There is no reason that a fact finder needs to accept a defendant's testimony at face value.

B. Detached Reflection

One might also object that a defendant's evaluation of the value of the lives in danger demands a level of detached reflection and contemplation that is inconsistent with the view that the defendant simply lost control and acted under a compulsion. Under this view, the defendant is engaging in an extremely complex utilitarian calculus that suggests a carefully plotted course of action. If the course of action is carefully plotted, with dispassionate analysis, then it must fall on the justification side of the line, and bears none of the hallmarks of loss of control or impulse usually associated with excuses.

This objection fails because it treats the defendant's consideration of the endangered lives as a proxy for detached and careful consideration. In other words, the objection assumes that a defendant motivated by utilitarian considerations must have engaged in careful deliberation, while the defendant motivated by, say, a close family connection, must have acted impulsively or by compulsion. While this is true in many cases, it is certainly not true in all cases. One can easily imagine an individual who learns about the imminent death of innocents and acts impulsively, just as he might if he learned that a family member was in danger. Similarly, one may imagine an individual who learns about the danger faced by a family member and instead of acting impulsively, calmly considers the ramifications and the appropriate course of action. But why should the law rely on such broad generalizations as proxies when the more relevant underlying factors can be scrutinized? If the defendant in a particular case was compelled, impulsively, to act in order to save the lives of many innocents, in such a way that his autonomy was compromised, why should it matter that most other individuals would only so act after careful deliberation of the costs and benefits of proceeding? In a similar vein, why should a defendant whose family is in danger get the benefit of the excuse if he was not compelled to act by the danger faced by a close family member, but instead was calmly considering the course of action based on dispassionate utilitarian considerations, even if most individuals in a similar situation would have rushed pell-mell to engage in torture simply because their family member was in danger? Surely, the only thing that ought to matter was the defendant's decision-making in this particular instance and whether it was compromised.

How then to tell the difference between the two classes of defendants? One avenue might be to require that the defence produce some evidence of 'snapping' to demonstrate that the defendant was under such extreme moral

the substantive rule by limiting the types of evidence that can be introduced in cases of torture. See generally R.A. Bierschbach and A. Stein, 'Mediating Rules in Criminal Law', 93 *Virginia Law Review* (2007) 1197.

pressure caused by the conflict between deontological commitments on the one hand (the duty not to torture) and consequentialist commitments on the other (the lives that could be spared) that he just snapped. The rationale for increasing the evidentiary burden for the defence would be to impose certain conditions in order for the defence to succeed. Like in cases of extreme emotional distress, such a requirement works to ensure that the autonomy of the torturer was challenged and that he should get the benefit of the excuse. But the burden would fall on the defence to make the evidentiary showing, through objectively manifested actions, instead of simply relying on crude generalizations as a proxy.

C. The Protection of the Innocent

A third objection to our account might appeal to the inviolable rights of the person being tortured. For example, in *Erdemović*, the majority argued that a duress defence was unavailable to a charge of killing innocent civilians, regardless of the harm that Erdemović and his family faced from his military commanders. The majority ruled that the defence could not be entertained as a matter of law, under any circumstances, because innocent civilians deserved the greatest protection under international criminal law and *jus in bello*. The *Erdemović* decision implicitly relied on the very deontological commitments that are at issue in our present discussion.

The question is whether the $Erdemovi\acute{c}$ argument should apply in this case as well. In some sense, a suspect in an interrogation deserves as much protection as a civilian $hors\ de\ combat$, although it might be an exaggeration to describe a suspected terrorist as an absolute innocent whose dignity is being infringed in order to save innocent lives. The suspected terrorist may be the author of the very state of necessity that would excuse the police official from using torture, although in any given situation one can never be sure if the suspect is an involved terrorist or was wrongly arrested. There is, to be sure, an information gap that plagues all such cases of interrogational torture, a thorny annoyance that several commentators have already seized upon.

One possible solution to this problem would be to make the defence conditional on the culpability of the suspect who is being interrogated. In other words, if the suspect is indeed innocent, the *Erdemović* rule might apply. If, on the other hand, the suspect is guilty of engineering (or complicit in) the very situation that causes the necessity for the torture in the first place, the *Erdemović* protection would not apply, for the simple reason that the suspect is not truly 'innocent' in an analogous sense to the victims in *Erdemović*.

⁵⁸ Judgment, Erdemović (IT-96-22), Appeal Chamber, 7 October 1997.

⁵⁹ Specifically, the majority held that no rule could be found in customary international law establishing a defence of duress for the killing of innocent persons, because legal systems tended to treat the issue differently. See Judgment, *Erdemović* (IT-96-22), Appeal Chamber, 7 October 1997, § 72.

⁶⁰ See Gaeta, supra note 22, at 791.

The police official who engages in the torture would bear the burden of showing that the suspect was indeed involved, and if this could not be demonstrated with some reasonable evidence according to an appropriate standard, even the excused necessity defence would be disallowed. The torturer himself would then bear the risk of liability if it turned out that the suspect was a true innocent. Of course, this doctrinal move strains credulity, because the whole idea of the *Erdemović* rule is that the protections from summary killing depend only on the victim's status as a protected person under international humanitarian law or the customary laws of war. The only thing that matters is whether the victims are in custody and *hors de combat*; nothing else about the victims is relevant. This is precisely the doctrinal mistake made by Bush Administration lawyers who believe that the suspected terrorists in custody lose the basic protections of the laws of war simply because of their status as unlawful belligerents.⁶¹

The more promising avenue, if one were inclined to extend the Erdemović rule and outlaw all defences for torture, including excused necessity, would be to hold, as a policy matter, that international criminal law should require that defendants have a duty to engage in acts of extreme moral courage when tempted by cases of extreme necessity. The reader will recall the earlier observation that an interrogator might feel compelled to violate the deontological rights of an accused suspect, when faced with the consequentialist concern for the lives of innocent victims of an impending terrorist attack. Although it may take an act of extreme moral courage to resist the pull of these consequentialist concerns, this may be precisely the kind of moral courage that international criminal law may require of wartime participants. One will recall that, in Erdemović, the majority ruled that there was no customary rule on the subject and that the case law was silent on the issue. Such rulings depend, therefore, on a priori reasoning about the basic structure of criminal law, as evidenced by domestic penal systems, and the relevant asymmetries and policy considerations specific to international conflicts. Although the former may counsel in favour of recognizing excused necessity in all cases, 62 the latter suggests that it may be advisable to disallow all defences in torture cases. At the very least, it must be admitted that there is nothing incoherent in an international criminal law rule that demands that defendants demonstrate the extreme moral courage required to avoid the temptation of torture. Even if this argument were accepted, though, it would mark a significant doctrinal improvement by shifting the debate away from fallacious justifications for torture and towards an adequate understanding of the unique structure of excused necessity.

⁶¹ See Yoo Memorandum, *supra* note 24, at 11 *passim* (arguing that Geneva Conventions did not apply to the armed conflict against Al Qaeda).

⁶² Although German law allows excused necessity in all cases, some countries, such as Canada, do not allow the excuse of necessity for the most violent crimes. See Criminal Code of Canada § 17.

D. The Prohibition on Torture as an Archetype of International Law

There is a fourth objection. Some have argued that the prohibition against torture is more than just a norm of customary international law; it is an archetype of our legal culture that we tinker with at our own peril. ⁶³ Under this view, the prohibition is absolute and no defence, whether a justification or excuse, can be allowed. Assuming arguendo that the prohibition against torture is indeed an archetype of non-brutality embedded in our international legal culture, all this tells us is that torture can never be justified, not whether it can be excused or not. The relevant difference here is between ex ante prohibitions (policies) and ex post exceptions (such as excuses in the criminal law).⁶⁴ Any attempt to establish an ex ante policy of torturing suspected terrorists as the Bush administration has sought to do on numerous occasions — would violate this archetype because the policy purports to allow torture in extreme cases when it is justified — precisely what the archetype argues can never be done. But an ex post excuse does nothing to render the torture justified — a legal conclusion that would run afoul of the archetype — but simply negates the culpability of a particular defendant whose autonomy was compromised by extreme moral pressure. It is significant, then, that the International Torture Convention includes a provision requiring states to criminalize torture, though it does not explicitly state that states must prohibit criminal excuses in such cases.65

6. Conclusion

Nothing in this account of excused necessity questions that torture is unlawful. Allowing a defendant to plead an excuse does not change that. Indeed, the whole torture debate since the Bush administration began the War on Terror has been too focused on justifications for torture, which are ill-advised for a number of reasons. First, as opponents of torture make clear, allowing an *ex ante* policy of torture opens a Pandora's Box of unsavoury consequences, not the least of which is Abu Ghraib and Guantánamo Bay. Moreover, proponents of interrogational torture are over-reaching, in that their major concern is to immunize government officials who might face criminal liability for their decisions. By these lights, it would be preferable to limit the debate to the necessity excuse, which would still leave open the possibility for *ex post* criminal immunity for these officials — if certain criteria are met — while at the same time reaffirming the archetypal prohibition against torture under international law.

- 63 See Waldron, supra note 4, 1681.
- 64 This issue was key in the Israeli Supreme Court's famous torture decision. *Public Committee Against Torture in Israel v. Israel, supra* note 25.
- 65 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, adopted 10 December 1984.
- 66 See J. Goldsmith, The Terror Presidency (New York: WW Norton, 2007).

Although some might argue that even this possibility — an *ex post* excuse weakens the international prohibitions on torture, in reality just the opposite is true. Torture proponents — Bybee, Yoo, Dershowitz et al. — have leveraged our moral intuitions, well supported in the empirical literature, ⁶⁷ that torture can be excused (though not justified) in extreme situations such as ticking time bombs.⁶⁸ These public intuitions were then buttressed by questionable legal arguments to weaken the basic legal prohibition against torture generally and point towards a fallacious justification of the practice. The success of this rhetorical strategy depends on the public not understanding the difference between justifications and excuses, and the difference between ex ante policies and ex post exceptions; the result is a slight-of-hand move. This leads to shameful exercises of torture such as Abu Ghraib, Arguing, in response, that torture is always criminal is precisely the wrong move because it feeds into their argument. Instead, by recognizing that torture can conceivably be excused but never justified — the criminal law may reinforce the general prohibition against torture as standing outside the bounds of justified necessity.

- 67 A Pew Research Centre survey found that 15 percent of Americans believed that torture was often justified, 31 percent said it was sometimes justified, and 16 percent said it was rarely justified. Only 26 percent of respondents said that torture could never be justified.
- 68 There is something deeply problematic about basing legal arguments around a scenario the ticking time bomb that may never come to pass in the world where the legal norms will actually get applied. For a discussion, see Shue, *supra* note 6, 124. The problem was also noted by a UN General Assembly report. See M. Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/6/17/Add.1 (28 November 2007) ('The Special Rapporteur was shocked by the unconvincing and vague illustrations by the ISA [Israeli Security Agency] of when such 'ticking bomb' scenarios may be applicable.').