

## TORTURE WARRANTS, SELF-DEFENSE, AND NECESSITY

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Ticking time-bomb cases famously—or infamously—invite us to imagine a scenario wherein the torture of one guilty terrorist will lead to the acquisition of information that can be used to save the lives of many innocents. Despite the contemporary focus on such cases, they have a long tradition, dating to the early 1800s.<sup>1</sup> And, throughout their history, they have appeared in various guises, from the literary to the public to the philosophical.<sup>2</sup> The principal moral question suggested by these cases is whether one harm can be effected such that a worse one is not; while there is certainly dissent, most moral philosophers would answer this question in the affirmative.<sup>3</sup> That said, there is substantial doubt as to whether torture would be the lesser harm or, more generally, whether ticking time-bomb cases gain any purchase in the real world or are otherwise relegated to philosophical fiction. But even if they gain such purchase, then what? In other words, even if torture can be morally justified in exceptional cases, should we authorize it?

In the literature—and conceptually—there are three basic approaches to authorizing torture. The first is not to authorize it at all, which is to say that torture—even if justified—requires some sort of punishable civil disobedience (section 1). Another approach is to authorize torture *ex ante*, such as through torture warrants. On this approach, torture remains prohibited except for when a judge grants permission for its application. Torture warrants have been defended by Alan Dershowitz, and we will evaluate that debate (section 2). Finally, torture can be legitimized *ex post*, which is to say that torture remains illegal but can nevertheless be (legally) justified or excused; our discussion will focus on the justifications of self-defense (section 3) and necessity (section 4).

For the sake of this argument, let us agree that torture is currently illegal, both in domestic and international law. The principal domestic law is USC §§2340–2340A; the US passed this under our obligation to the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT; 1975/1987).<sup>4</sup> Furthermore, torture is decried in §3.1a, §17, §87, and §110 of the Third Geneva Convention (1949).<sup>5</sup> Alongside these legal proscriptions are hortatory ones, including §5 of the Universal Declaration of

Human Rights (1948)<sup>6</sup> and the Declaration of Tokyo (1975).<sup>7</sup> Given this corpus, critics of torture often seem dumfounded that anyone could seriously defend it.<sup>8</sup> There are a couple of simple responses, though; in fact, they are so simple that the dumfoundedness is curious.

First, there are completely separate questions as to whether torture is or should be illegal. There have been all sorts of bad laws: those that legalized slavery, those that denied women the right to vote, and those that denied equal rights based on sexual orientation, among others. Ultimately the interesting question is not what the laws are, but rather what they should be. And no matter how many laws oppose torture—or whether those laws are international or domestic—we can always ask whether they get it right, whether they are appropriate for our times, whether they are adequate to protect us, and so on. So, to be clear, let us grant that torture is illegal and instead wonder whether it *should* be, particularly given exceptional cases in which torture would be the lesser of two available evils. Whether such cases mean that we should revisit our laws is a separate issue altogether—Oliver Wendell Holmes famously argued that hard cases make bad law<sup>9</sup>—but a moral case for torture gives us at least a *prima facie* reason to think that it should be legal.<sup>10</sup>

Second, even if torture should be illegal, it hardly follows that there are not cases in which people should torture. Rather, there might be reasons against having some sort of torture policy—for example, fear of abuse—while, at the same time, acknowledging that torture could be justified in individual cases. Those cases might be rare enough that we need not explicitly build them into our policies, but could rather allow for a *post hoc* recognition of the appropriate circumstances, as well as the associative legal exoneration. In sections 3 and 4, I will discuss self-defense and necessity in greater detail, but suffice it to say that they work the same way insofar as those defenses are just that: defenses against violations of the law. Whether torture can avail itself of either is a critical issue,<sup>11</sup> although the present point is simply that (at least some) social policies are defeasible.

The point of these previous two paragraphs is not to defend any substantive position, but rather to locate the issues within the proper dialectical space. And, to reiterate, the illegality of torture is really neither here nor there with regard to our investigation. Rather, what we care about is figuring out how to accommodate justified torture, and there are two possibilities: rework our legal frameworks or else countenance torture within them. What ultimately matters is that we allow torture when it is justified and that we disallow it when it is not. If the legal status of torture prevents a justifiable act of torture from taking place, then something has gone wrong. Maybe that wrong is tolerable given broader policy considerations, but maybe not. Alternatively, paving the way for unjustified torture is no better—and is potentially worse—than not allowing justified torture. Such are the Scylla and Charybdis of torture policy: getting the good torture, but only the good torture.

## I. CIVIL DISOBEDIENCE

While the primary focus in this debate should be on torture warrants and necessity defenses, something should first be said about the possibility of civil disobedience. The idea here would be that we leave torture illegal, and we also fail to provide legal exoneration for (justified) torture.<sup>12</sup> What could be said in favor of such a position? The central thrust has to be that cases of justified torture are extremely rare and that any sort of judicial apparatus which licenses that torture—whether *ex ante* or *ex post*—threatens a proliferation of unjustified torture.<sup>13</sup> The risks of unjustified torture portend more harm than the harms we (might not) avert in exceptional cases, so we are better off shutting it all down. And, not only do we risk unjustified torture, but we also add a cumbersome judicial function—for example, adjudicating justified and unjustified torture—and compromise judicial integrity by threatening judicial complicity in torture.<sup>14</sup> These negative prospects for our judiciaries further attenuate the case for torture, which is already supposed to be quite tenuous indeed.

Granting all of this, what should happen when a case of justifiable torture presents itself? If torture were illegal and if no legal defenses were available to the would-be torturer, then he would torture at his own peril: his act of torture would be legally liable, and legal sanctions could follow conviction. For example, 118 USC §2340A allows up to twenty years of incarceration for non-domestic torture—whether actual or attempted—and for execution or life imprisonment if torture leads to the death of its victim. Imagine now that torture could be used to save many lives and that an individual had the option of either performing that torture (and saving the lives) or else allowing those lives to be lost. What should he do?

Our absolutist friends force the would-be torturer into a precipitous decision between his own freedom and the lives of others: torture and save lives if you like, but then get ready for jail (or execution). There are at least two problems with this offer, one practical and one theoretical. Starting with the practical, it obviously—and on purpose—provides a disincentive to torture. Someone who might otherwise be willing to torture—and save lives—could now be either unwilling or unable to do so, ultimately allowing those lives to be lost. Maybe there are practical gains insofar as unjustified torture would not be as readily administered, but this invocation presupposes that there are not ways to license the justified torture while preventing the unjustified torture. Such a supposition is hardly obvious to me and, in fact, seems false; we shall return to this in section 4.

Second, though, is the theoretical worry: someone is being punished for doing something that is, *ex hypothesi*, morally justified. In other words, someone does something that he has moral license to do, and then he gets sent to prison. To me, this is a very strange proposition. The response is that we punish this person so that other people do not perpetuate unjustified torture, but why not just pun-

ish *those people* if and when such unjustified torture occurs? Consider Seumas Miller, who writes that

[the] law in particular, and social institutions more generally, are blunt instruments. They are designed to deal with recurring situations confronted by numerous institutional actors over relatively long periods of time. Laws abstract away from differences between situations across space and time, and differences between institutional actors across space and time. The law, therefore, consists of a set of generalizations to which the particular situation must be made to fit. . . . By contrast with the law, morality is a sharp instrument. Morality can be, and typically ought to be, made to apply to a given situation in all its particularity. . . . Accordingly, what might be, all things considered, the morally best action for an agent to perform in some one-off, i.e., non-recurring, situation might not be an action that should be made lawful.<sup>15</sup>

Miller's point is that our institutional and moral commitments can come apart: there are negative consequences of institutionalized torture, but it could still be the case that torture is morally justified in particular cases. And then what? Miller thinks that whoever commits torture should be "tried, convicted, and, if found guilty, sentenced for committing the crime of torture."<sup>16</sup>

To this, we still have to ask: *why*? We would be sentencing someone for a justifiable act such that other people are less inclined to commit unjustified acts. The problem with this result was articulated by Robert Nozick—albeit in another context—when he objected to rights-based utilitarianism on the grounds that it allows certain people to bear harms such that others reap benefits. For example, a rights-based utilitarian would be seemingly indifferent to whom we torture to avert some act of terrorism—whether a guilty terrorist or his innocent daughter—so long as the rights calculus came out the same in the end.<sup>17</sup> While the context here is somewhat different, the ultimate problem is the same insofar as someone who has not done anything wrong would be punished such that some other group of people is disincentivized. As a general approach to punishment and responsibility, there is something deeply flawed going on here: we should punish and hold responsible the people who do something wrong rather than the people who do not. For example, take the stock objection to utilitarianism in which we convict and execute an innocent man to appease the mob. The entire reason that this example is supposed to be compelling is because it so radically misallocates the locus of punishment and responsibility. And, in fact, it does no better a job in that regard than a proposal that would send the justified torturer to prison.

That said, isn't a proposal like Miller's exactly what the utilitarian would propose? The entire point of proposals like that is that they lead to better consequences than the alternatives. If this were true, then I would be sympathetic; I simply deny that it is true. Rather, as mentioned above, the focus should be on identifying and punishing the *unjustified* cases of torture rather than resigning the justified torturers to an identical fate. Miller thinks that the law is more blunt

than morality, and this could well be right. However, it hardly follows that the law does not have the wherewithal to be able to distinguish between justified and unjustified torture. For example, the law clearly has the wherewithal to distinguish between justified and unjustified killing; self-defense and necessity defenses are offered in exactly this regard.

And, ultimately, Miller agrees: he acknowledges that necessity might be an appropriate defense for the torturer and also allows that, even if such a defense were inappropriate, “the sentence should be commuted to, say, one day in prison.” He goes on to say that the torturer “should resign or be dismissed from [his] position; public institutions cannot suffer among their ranks those who commit serious crimes.”<sup>18</sup> As we will see in section 4, necessity is an appropriate defense, but even if it were not, the token—as opposed to substantive—punishment sounds right. That said, I still disagree with Miller that resignation should be required for the justified torturer. First, this person simply has not done anything wrong. Second, and as mentioned above, such a disincentive could preclude life-saving torture from taking place. Third, these sorts of torture do not even strike me as crimes, at least not any more than someone killing in self-defense; the entire point is that the actions are justified. At the end of it, the justified torturer should be celebrated for an act of courage or fortitude, in much the same way that we would celebrate a war hero. Politically, this sort of proposal has to be a non-starter, but morally I just cannot embrace any other conclusion.

Civil disobedience has a long history, dating at least to Crito’s failed exhortations upon Socrates to flee the latter’s trial and ultimate execution.<sup>19</sup> And it has noble precedents, such as Rosa Parks’s refusal to obey bus driver James Blake’s order to surrender her bus seat to a white male. The reason that these invocations miss the mark in the torture context has to do with a straightforward conflation between the descriptive and the normative: our question is how the justified torturer *should* be accommodated, rather than how he *is* (not) accommodated under present law. If Socrates should have left his cell or if Ms. Parks should have retained her bus seat are only meaningful issues insofar as their present circumstances pitted morality and law in opposition. Our question is not what the justified torturer should do given the current laws, but rather what sort of legal or judicial framework should be enacted given the possibility or reality of justified torture. For these reasons, I reject the position that the justified torturer should be convicted and punished since he is, *ex hypothesi*, justified in his actions. Let us now consider other possibilities, starting with torture warrants.

## 2. TORTURE WARRANTS

The central idea behind torture warrants is that some judiciary authorizes torture *before* it happens; the torturer tortures with judicial authorization and is therefore not subject to prosecution, at least insofar as the applied torture was reasonably

in line with what was authorized (for example, it was not excessive). Torture warrants have been most recently championed by Alan Dershowitz, though they have an older history. To wit, approximately eighty-one torture warrants were issued in England between the years 1540–1640, for which suspicion of sedition or treason was the most common invocation.<sup>20</sup> Judicially sanctioned torture was much more common throughout continental Europe, but the goal in Europe was predominantly to elicit confessions rather than actionable intelligence; this is a critical difference from the sorts of warrants we will consider in this section.

History notwithstanding, the present discourse certainly centers on the proposal made by Dershowitz. In addition to espousing his ideas in academic works, he has also made them well-known on television and in op-ed pages, thus catapulting the idea into public consciousness. The core idea is quite simple:

[I]t seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an *ad hoc*, off-the-books, and under-the-radar-screen nonsystem. I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects. At the most obvious level, a double check is always more protective than a single check. In every instance in which a warrant is requested, a field officer has already decided that torture is justified and, in the absence of a warrant requirement, would simply proceed with the torture. Requiring that decision to be approved by a judicial officer will result in fewer instances of torture even if the judge rarely turns down a request. Moreover, I believe that most judges would require compelling evidence before they would authorize so extraordinary a departure from our constitutional norms, and law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack.<sup>21</sup>

And we can make the idea simpler yet: torture warrants offer the promise of less overall torture, as well as a transparency that secretive torture betrays. Through this sort of judicial authorization, we introduce a check on unjustified torture while, at the same time—and contra ideas considered in section 1—have access to justified torture. So what are the problems with Dershowitz's proposal?

From the outset, let me say that I am far more sanguine about its prospects than the negative reception conferred in the literature. That said, I will consider the necessity defense in section 4; to my mind, this is the better way to go insofar as it can provide for justified torture without any of the hazards Dershowitz's proposal engenders. In other words, whatever Dershowitz's torture warrants have going for them, we can realize the advantages in some other way—and more economically, whether morally, judicially, or legislatively. Still, some direct engagement with his proposal is owed.

To me, the most important issue is whether warrants would actually lower the overall incidence of (unjustified) torture.<sup>22</sup> According to Dershowitz, his argu-

ment is ultimately a logical one insofar as he thinks that the second check (that is, the judicial one) will necessarily be more restrictive than a single check (say, the field officer's judgment). However, by comparison, consider that a hypothetical Linda is less likely to be a feminist bank teller than she is to be a bank teller simply because her being a bank teller satisfies the latter, but she has to be a feminist *as well* in order to satisfy the former.<sup>23</sup> But herein lies the problem for Dershowitz: while Linda *cannot*—on pain of logic—be more likely to be a feminist bank teller than a bank teller, the second judicial check *could* increase the incidence of (unjustified) torture. In other words, his argument turns out not to be a logical one at all, but rather an empirical one; furthermore, I suspect that it would founder empirically.

Why? Dershowitz writes: "In every instance in which a warrant is requested, a field officer has already decided that torture is justified and, in the absence of a warrant requirement, would simply proceed with the torture. . . . Law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence."<sup>24</sup> But this is almost surely false. If the field officer faced jail time (compare sections 1, 3, or 4), then he would not proceed without some sort of certainty regarding the moral status of torture. Under Dershowitz's proposal, though, the field officer bears *no liability* because the judiciary explicitly abrogates that liability in authorizing the torture. Imagine a field officer, for example, who suspects that torture is permissible in some case, but really is not so sure.

Under the necessity defense, he tortures at his own peril but, on Dershowitz's proposal, why not request the torture warrant? There is no disincentive for the field officer to do so because the decision is transferred to the judiciary. Were torture warrants a possibility, field officers could reason that they might as well put in for the warrant because they have nothing to lose. Of course Dershowitz could tack on some penalties for frivolous applications, but now those have to be adjudicated as well. Regardless, borderline and not-so-borderline (yet short of frivolous) applications will still be submitted; the only way to really fix this is to say that the field officer will be punished if his warrant is not granted. But that is not really any different than allowing for the necessity defense, which effectively says the same thing, although probably with differing punishments. Additionally, there are epistemic problems insofar as judiciaries are not trained to evaluate circumstances of life-threatening catastrophes. So what happens is that a field officer—who is trained in such appraisals—asks for a warrant. The judiciary can either trust the officer's judgment or not. If the judiciary trusts the judgment, then the judiciary renders itself superfluous. On the other hand, the judiciary may choose not to trust the judgment, in which case the judgments are ultimately being made by the judiciary rather than the field officer. Either horn of this dilemma is unpalatable.

To my thinking, these are sufficient reasons to reject torture warrants. Some others have been given, though, and they deserve some discussion. Ultimately,

though, since I do not defend torture warrants, the other ways that they can go wrong are not of primary interest. Broadly speaking, these other objections can be broken into the following broad categories:<sup>25</sup>

- (1) torture warrants will lead to more torture (or other moral harms);<sup>26</sup>
- (2) torture warrants are pragmatically intractable;<sup>27</sup>
- (3) torture warrants compromise judicial integrity;<sup>28</sup> and
- (4) torture warrants undermine the values of a liberal democracy.<sup>29</sup>

One problem with this list is that its elements are often articulated in a way that does not have anything to do with torture warrants in particular, but rather with torture more generally. (1) could have to do specifically with torture warrants, but the arguments given in support of it tend to be much broader. That said—and as indicated above—torture warrants could lead to more torture, or at least it is not obvious that they would not. So if (1) is framed narrowly enough so as only to attach to torture warrants, then I am sympathetic.

(4) is never developed only against torture warrants; it certainly is not in the references indicated above. And, if the concern has nothing intrinsically to do with torture warrants—but rather with legitimized torture—then I am dubious. Suffice it to say that the values of a liberal democracy mandate the security and protection of its citizenry, particularly against nefarious attacks. Surely there are limits to how far such security and protection can extend, but the moral basis of my position has been established elsewhere.<sup>30</sup>

(2) could be a good objection against torture warrants, depending on how it is developed. In some sense, (2) resonates with my contention that we simply do not need torture warrants since we already have the necessity defense. My objection is not as strong as pragmatic intractability, but rather is the more moderate “more trouble than it is worth.” Law and policy are far from my areas of expertise, although I see no principled reason why we could not just legislate in ways that provide for torture warrants. However, this is where the philosopher’s “in principle” runs against the empirical “in practice,” and I will beg off that engagement. The simple point is that we do not need torture warrants; I do not see what we ultimately gain by having them, and surely it would take some work to get them going in the first place. This is weaker than (2) but is in a similar pragmatic vein.

This notion of judicial integrity, though, is making inroads in the literature, so let us consider it before moving on to the next section. The basic idea has nothing to do with torture in particular, but rather in the more general “role of the judiciary in leading by example and in invalidating or rectifying certain kinds of offensive official action.”<sup>31</sup> To put it another way, the judiciary occupies—in addition to its functional role—a symbolic role which is essential to maintaining a lawful society; this role commits it to opposing “pernicious doctrine” in which the ends justify the means.<sup>32</sup> I do not have any complaint about judicial integrity as an abstract concept, but I also do not think it is terribly useful: what will re-



ally matter is how we understand certain policies in regard to the desiderata that judicial integrity portends.

Turning to torture in particular, Chanterelle Sung writes:

From the outset, judicially sanctioned torture undermines the integrity of the criminal justice system. The problem with judicially sanctioned torture is not only that the torture itself violates the human dignity of the individual suspects, but that the act of judicially sanctioning the torture taints the “purity of [the] courts.” Because torture violates human dignity, having judges issue torture warrants entangles the judiciary in an abuse of human dignity.<sup>33</sup>

This is a bad argument because it runs together all sorts of different issues. First, the sorts of torture that we are considering are, *ex hypothesi*, morally justified. The entire dialectic is meant to query how to pragmatically accommodate justified torture; nobody deigns to accommodate unjustified torture. As Sung makes clear in the rest of her essay, she thinks that torture cannot be justified, which means that she and I have different starting points. Regardless, her contention that judiciaries should not be complicit in unjustified torture is one that we can agree on; it is just beside the point as pertains to our central moral investigation.

Second, *terrorism* is an abuse of human dignity: the terrorist violates the dignity of those he attacks. It is just a straightforward oversimplification of the issue to say that torture violates human dignity and is therefore off the table, whether morally or judicially. Rather, if we care about dignity, then we should care about maximally preserving it; torture might, in exceptional situations, be the lesser of two evils. If (justifiable) torture could be used to save many lives, then the judiciary is put in a situation wherein it must decide whether to sanction the torture of a guilty terrorist or else fail to prevent many deaths.

It is obvious to me what judicial integrity requires in such cases, but, regardless, the issue cannot be that the judiciary would be participating in an immoral act; adjust the details as you like, but, as above, the presupposition is that the torture is justified. Even someone who denies that justified cases of torture have existed can remain silent on the issue of whether torture could be justified were such cases to present themselves. Then the issue becomes whether we should acknowledge the existence of such cases; there is at least some reason to think that we should.<sup>34</sup> But then the question is a substantive one and not one that judicial integrity has anything to do with: we all agree that judiciaries should not authorize unjustified torture and, furthermore, the notion of judicial integrity is a non-starter if it impugns judiciaries from authorizing justified acts.

For these reasons, judicial integrity is not the right way to argue against torture warrants. Rather—and as argued in more detail above—we should just say that torture warrants are more trouble than they are worth: they carry costs, and they do not offer benefits that cannot be realized in other ways. If there were no other way to realize those benefits, then maybe the costs would be worth it; as it

stands, this is not the case. In section 4, I will propose the necessity defense as an attractive alternative, but let us first consider self-defense.

### 3. SELF-DEFENSE

Let us now consider the distinction between a justification and an excuse; this is a distinction well-entrenched in our approach to criminal law. The difference between the two can be expressed as follows: “a justification claim . . . seeks to show that the act was *not wrongful*, an excuse . . . tries to show that the actor is not morally culpable for his wrongful conduct.”<sup>35</sup> Or else consider Michael Moore: “a justification shows that *prima facie* wrongful and unlawful conduct is *not wrongful or unlawful at all*, . . . [B]y contrast, an excuse does not take away our *prima facie* judgment that an act is wrongful and unlawful; rather, it shows that the actor was not culpable in his doing of an admittedly wrongful and unlawful act.”<sup>36</sup>

As I said in that earlier section, one of the principal differences between justification and excuse is that, if someone is justified, then he did not do anything wrong; if he is (merely) excused, then he did something wrong, but it is not his fault. Self-defense and necessity are justifications: when these are adequately established, we acknowledge that the accused did not act wrongly. Excuse, though, goes to incapacity, such as would be manifest through duress or insanity. If the accused kills a family but can establish insanity, then we do not hold him (morally or criminally) liable since it was not his fault. But, in excusing him from legal punishment, we do not say that the killings were justified. Self-defense and necessity are justifications insofar as we invoke them for legal exoneration of justified acts; compare them, for example, to the insanity defense, which does not maintain that the act was justified, only that its perpetrator lacked the relevant mental capacities.

Let us start with self-defense since I propose that we hereafter set it aside. The doctrine of self-defense is most basically that “the use of force on or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose or protecting himself against the use of unlawful force by such other person on the present occasion.”<sup>37</sup> So if someone is being attacked and he kills the attacker before the attacker can kill him, the killing is justified by self-defense. This sort of archetypical case has two obvious features: the person who is killed in self-defense is the one who threatens the unlawful killing, and the person who does the killing is the one who is being attacked (hence the term, *self-defense*). While self-defense is a perfectly reasonable legal justification, it is hard to see how it could have anything to do with torture since neither of these basic features is satisfied. Imagine, for example, that we are trying to justify the torture of a detainee such that myriad lives are saved. The torturer is not threatened, so it cannot be a case of *self-defense*. Second, the detainee is not a threat at all in the most straightforward use of “threat.” He may be complicit in some

threat, he may have contributed to the threat, and so on, but *he* is not a threat; the threat is a bomb waiting to go off somewhere else altogether.

Nevertheless, John Yoo's infamous memo posits self-defense as a potential justification for torture. The language offered in defense of this position, however, is quite curious, particularly insofar as it speaks more to necessity than to self-defense. To be sure, self-defense and necessity are closely related—I think of self-defense as a limiting case of necessity—but Yoo actually means to offer self-defense as a *sui generis* option. Or at least it looks like it. That said, he seems to give it all back midway through his discussion:

To be sure, this situation is different from the usual self-defense justification, and indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstance, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization.<sup>38</sup>

Despite this, Yoo still thinks that self-defense could be an appropriate defense to violations of 118 USC §2340A because, according to Moore, the enemy combatant “has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible.”<sup>39</sup> I agree with Moore that such torture would be permissible, but simply deny that it would be on the same basis that self-defense is permissible: this case lacks the two characteristic features delineated above. That said, the torture could still be justified through the necessity defense, which we will consider in the next section.

Yoo concludes his discussion by offering a novel argument in which the *nation*, rather than the torturer, is what is under attack; the torturer is defending the nation, of which he is a part. While this sounds like a stretch, there is actually some relevant case law. *In re Neagle* (1890) exonerated David Neagle—a US marshal and therefore an agent of the US government and the executive branch—for shooting and killing the assailant of Supreme Court Justice Stephen Field on the grounds that Neagle was asserting the executive branch's constitutional authority to protect the US government (since Field was an agent of that government).<sup>40</sup> Yoo goes on to cite various other cases, as well as the US constitution, in support of the thesis that the government can act to protect itself.

While I appreciate the creativity of the argument, there are at least three issues with it. First, it is far from clear how a terrorist is attacking the *nation*: it seems rather that he is attacking various individuals. Revealing is the disanalogy between the terrorism context and *Neagle* insofar as the reasoning in the latter was rendered precisely because Field was a Supreme Court Justice; this is different

from an attack on normal noncombatants. Even if some of the terrorist's targets were federal agents, I am not swayed. For example, do we really think that an attack against an FBI agent is an attack against the United States? I do not have that intuition, and even if I did, it would be further attenuated if the FBI agent were undercover or his presence were incidental to the attack. And, again, there is no inherent reason to think that any federal agent would even be present at the site of a terrorist's attack. Second, the single case to which Yoo appeals for his argument is from 1890: there is no reason to think that this case is selectively chosen, but the evidence is certainly sparse and dated. Third, and most importantly, there is just no reason to turn to this self-defense argument if necessity can provide the appropriate justification; this is especially true if the argument from necessity is more straightforward and less attenuated. So maybe this argument could work and maybe it cannot but, regardless, we do not need it. Let us therefore now move on to consider necessity directly; even some critics of torture acknowledge that this approach bears the most promise.<sup>41</sup>

#### 4. THE NECESSITY DEFENSE

The *Model Penal Code* offers a concise statement on the basis for the necessity defense which, illustratively, comes under the heading of "Justification Generally: Choice of Evils":

1. Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
  - 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 offense charged; and
  - b. Neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
  - c. A legislative purpose to exclude the justification claimed does not otherwise plainly appear.<sup>42</sup>

Before turning to objections, let us go through these conditions individually to see whether we can make plausible the idea that torture can be defended via necessity. (1a) bears particular emphasis from the outset: the harm or evil that some act is meant to prevent must be greater than whatever harm or evil the law proscribing that act is meant to avoid. In the case of ticking time-bomb cases, this condition is certainly satisfied. To wit, there is the torture of a single individual such that many lives are saved, and the moral value of those lives (dramatically) exceeds the moral harm of the torture that is necessary to preserve them.<sup>43</sup> In this sense, the application of the necessity defense is as straightforward as other paradigmatic cases, such as when Jones shoots and kills a gangster before that gangster can execute five innocents. While the Jones's killing might otherwise be met with disapprobation, the circumstances justify it insofar as he chooses the lesser evil.<sup>44</sup>

The point of (1b) is that we should not turn to the necessity defense when a statute already has exceptions explicitly built into it. If, for example, some statute said that  $\phi$  was illegal unless A, then, given A,  $\phi$  is not illegal; there is no reason to appeal to the necessity defense since the statute is not even violated. To see whether (1b) is satisfied, we need to look at the actual statute, which, regarding the criminalization of torture, is 118 USC §2340A. This statute clearly does not provide any exceptions for emergency situations (or any situations), so (1b) is satisfied.

The condition that should give us the most pause is (1c). First, the official commentary of the *Model Penal Code* is quite clear that even serious crimes, such as homicide, are not meant to be excluded under the necessity defense.<sup>45</sup> That said, some jurisdictions have explicitly blocked (for example, Kentucky and Missouri) or limited (for instance, Wisconsin) this defense in the case of homicide;<sup>46</sup> there is case law precedent for this limitation as well.<sup>47</sup> And, returning to torture, CAT specifically rules out torture in exceptional cases: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>48</sup> That said, the exact language of CAT does not bind the United States: the United States was free to interpret CAT and to issue reservations, understandings, and declarations as it deemed necessary, which it did.<sup>49</sup> What ultimately matters in terms of the US obligations under CAT is what the United States legislated in accord with that treaty, namely 118 USC §§2340–2340A. Or, to put it another way, CAT is not US law, 118 USC §§2340–2340A are, and these sections do not plainly exclude appeals to necessity.<sup>50</sup>

As argued above, (1a)-(1c) are all plausibly satisfied for torture in emergency cases. That said, the literature has posed various arguments as to why necessity should nevertheless be unavailable for defense against torture; these arguments merit consideration. While I regret not being able to spend more time on this discussion, I do want to respond at least to some of the more obvious objections. The most pressing of these is probably that the necessity defense may be off the table completely in federal cases since there is no federal statute providing for necessity, and federal courts have remained agnostic as to whether common law—that is, the non-federal cases in which necessity has been used successfully—establishes the legitimacy of appeals to necessity in federal cases.<sup>51</sup> Since the statute that proscribes torture is a federal one, the status of necessity vis-à-vis that statute is therefore unclear.

In *United States v. Oakland Cannabis Buyers' Cooperative* (2001), the Supreme Court specifically said that the status of necessity in federal courts is an “open question”; the Court found that there was no medical necessity exception to the Controlled Substance Act of 1970 (CSA) insofar as Congress found that marijuana had “no currently accepted medical use.”<sup>52</sup> In other words, even if the distribution of medical marijuana prevented a worse evil (viz., patient suffering) than it committed (viz., the violation of the CSA), necessity was unavailable because

of the value judgment that Congress made in its legislation. It bears notice that 118 USC §2340A makes no analogous value judgment in regard to torture; this statute says nothing about whether torture might be advisable in some situations. That said, this case reiterated the Supreme Court's position that necessity is not a well-founded defense in federal cases, regardless of the specific statute against which such a defense would be deployed.

Some other cases deserve discussion as well. Going backward in time, *United States v. Bailey* (1980) considered a necessity defense for inmates who escaped from a federal detention facility, therefore violating a federal law.<sup>53</sup> At the trial, they argued that the prison was unsafe due to fires, beating by guards, and inadequate medical attention.<sup>54</sup> The court ruled out the necessity defense because, principally, "[the defendant] must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."<sup>55</sup> In other words, following their escape, the three escapees remained on the lam for anywhere between one to two and one half months before being recaptured: the Supreme Court interpreted this as a continuing crime that was unnecessary to avoid the risks the escapees sought to avert. The ruling left open the possibility that they could have escaped and thereafter surrendered to a safer situation, but this is not what the defendants in fact did. A key point, though, is that the Supreme Court did not rule out the necessity defense in general, but rather said that it was unavailable in this particular case.

There are more cases worth mentioning,<sup>56</sup> but let us just consider one more, *Baender v. Barnett* (1921).<sup>57</sup> In this ruling, "the [Supreme] Court suggested that criminal statutes would be construed with the aid of the common law canons developed to prevent unjust punishments."<sup>58</sup> Surprisingly, the Supreme Court has considered necessity in just three cases since then: *Bailey*, *Oakland Cannabis Buyers' Cooperative*, and *Dixon*.<sup>59</sup> In each of those cases, the Supreme Court refused the necessity defense given the specifics of the case, but at the same time, remained silent as to whether it would be available in other cases. I think there is little reason to think that it would not be available under the right circumstances, and for at least the following three reasons.

First, *Baender v. Barnett* explicitly allows for common law canons to prevent unjust punishments; the invocation of necessity to forestall a conviction of life-saving torture is, to me at least, a straightforward application of this edict. Second, there is no reason to think that either *Bailey* or *Oakland Cannabis Buyers' Cooperative* portends any skepticism regarding the admissibility of the necessity defense in federal court. As the Supreme Court pointed out in *Bailey*, the conditions for necessity were simply not satisfied since the defendants did not turn themselves in after the escape. To be sure, it is perfectly consistent to say that they considered the case on the merits of necessity and found it lacking, but that they would not have allowed necessity even if the conditions were met. If that were true, though, why assess the merits? Why not just say that necessity is off

the table in federal courts? The fact that they considered the case on its merits is at least some evidence that they would be disposed to accept necessity. Similarly, *Oakland Cannabis Buyers' Cooperative* failed to successfully invoke necessity, but for a different reason: the relevant congressional legislation preempted the exception through the legislative language (compare to, “no currently accepted medical use”). The torture statute has no such language in it, so there is no reason to think that the legislation would be immune to the necessity defense. Third, there really is no general reason to think that necessity would be inadmissible in federal court. In other words, just because the Supreme Court has yet to exonerate on those grounds in any particular case says nothing about its willingness to do so if the circumstances were appropriate: the right case just has not yet come forward. If some ticking time-bomb torturer did invoke necessity, I would expect federal courts to honor the defense; were it necessary to commit a lesser evil in order to prevent a greater one, it simply does not make sense to convict. And this is hardly my intuition alone insofar as it is the entire reason that the necessity defense has been codified into our common law.

The preceding paragraphs have considered what I take to be the most interesting issue vis-à-vis necessity, namely whether it is admissible as a defense. However, there are some other interesting arguments in the literature, so let me offer quick discussion of them as well. First, Jordan Paust has also argued that the necessity defense will fail, although for a different reason than the one presented above; it is worth presenting his argument so that we can see why it does not apply to ticking time-bomb cases. In particular, Paust quotes from *Bailey* that “[i]f there was a reasonable, legal alternative to violating the law . . . the defense will fail.”<sup>60</sup> And, furthermore, the defendant must show that “given the imminence of a threat, violation of . . . [a law] was his only reasonable alternative.”<sup>61</sup> Paust is particularly concerned with the ongoing treatment of detainees at Guantánamo Bay; in particular, he is deeply skeptical that any enhanced interrogations are even necessary given that there exist alternate legal avenues that could be pursued. Whether he is right or wrong in this regard is irrelevant when we consider ticking time-bomb cases: those cases are precisely those in which, *ex hypothesi*, torture is the only available option to prevent a greater evil. Therefore, I can remain agnostic on the treatments at Guantánamo Bay without relenting on the applicability of necessity in emergency cases.

A similar argument is deployed by Paola Gaeta, who argues that torture “does not necessarily and ineluctably avert the imminent danger to life and limb, because the suspected terrorist may not have the information, or may not have the right information, or may remain silent.”<sup>62</sup> To put it another way, the torturer does not know that his torture will save lives, so Gaeta therefore thinks that necessity is inappropriate. My response here is simply that she misunderstands the burdens incumbent on the necessity defense. To see why, consider the following language from the *Model Penal Code*: “Conduct which the actor *believes to be necessary*

to avoid a harm or evil to himself or to another is justifiable, provided that . . .”<sup>63</sup> The relative epistemic standard is clearly not knowledge, but rather (reasonable) belief. And there is good reason for this insofar as we can easily imagine cases wherein the less stringent requirement seems actionable.

For example, suppose a terrorist announces that he will detonate himself in a large public square, killing hundreds. He is strapped with explosives, has a verified motive (e.g., seeking revenge after a dishonorable discharge from the military), a history of violence, and so on. A sniper can take him out and does. Afterwards, forensics determines that the explosives were improperly wired and would not have detonated. The sniper did not *know* that the terrorist would detonate the explosives for the simple reason that such a detonation was impossible (that is to say, he could not know a false proposition). Nevertheless, it was reasonable to believe that the terrorist could have killed hundreds—in fact, he was trying to—but we still do not hold the sniper morally culpable; knowledge is simply too high of an epistemic standard. In response to Gaeta, I therefore submit—both on intuition and on the (non-binding) text of the *Model Penal Code*—that reasonable belief is the appropriate epistemic standard. And, furthermore, I contend that this can be reasonably met in ticking time-bomb cases.

In addition to the arguments considered above, there are others. In particular, I considered the necessity defense vis-à-vis Supreme Court rulings, but there are relevant circuit court rulings as well.<sup>64</sup> Also, the engagement between US domestic law and international law is important; even if US law could allow the necessity defense in torture, there is relevant international law that might purport to limit such a defense.<sup>65</sup> A response here takes us too far afield, but let me offer two quick comments. First, as I said above, 118 USC §2240 reflects our understanding of CAT, and the United States did not codify the language preventing exceptions. Our ratification can only be understood in light of our ensuing legislation since that legislation reflects our understanding of the treaty. As a matter of law, I agree that “both treaty-based and customary international law . . . will trump inconsistent common law whether or not there might be such a common law defense to ordinary crime when international law has not been violated.”<sup>66</sup> However, I deny that our common law is inconsistent on this issue: our common law consistently recognizes necessity as an appropriate defense. There have not been successful invocations of necessity regarding torture—or anything else—at the Supreme Court, but this does not mean that the common law foundation for that defense is not well-founded.

Second, my principal concern is with what the laws should be, rather than what they are; I already made this point in the introductory paragraphs of this article. If international law were to inveigh against the necessity defense—or even if the Supreme Court were to wholesale disallow it—then we could still meaningfully ask whether there were differences between how the necessity defense *is* treated and how it *ought* to be treated with regard to torture. The fundamental kernel of



wisdom underlying the necessity defense is simply that lesser evils are preferable to greater ones; how could anyone possibly argue against such a self-evident proposition? I doubt anyone would, which is why the necessity defense is so firmly entrenched in our criminal law. Rather, where it gets interesting is whether torture could ever be the lesser evil, particularly given worries about its efficacy, institutional requirements, nefarious spread, and so on.<sup>67</sup> These issues have been treated elsewhere, so I will not have more to say about them here. That said, I certainly think that torture could be the lesser evil in some particular cases, and therefore think that the necessity would be an appropriate defense.

Before concluding, let me return to torture warrants and indicate why the necessity defense is preferable. Remember that one of my arguments against torture warrants was that they could lead to frivolous applications; intelligence officers would have nothing to lose by applying for such a warrant, and once such a warrant was issued, the officers would have reasonably wide latitude in their applications of torture. This is not to deny that there could be penalties for frivolous applications, or that the conditions and modes of torture could not be highly circumscribed; rather, the point is that these are some of the pragmatic obstacles assailing torture warrants. Necessity, on the other hand, has neither of these problems. To wit, anyone who tortures stands to be convicted unless he can clearly establish that he chose the lesser of two evils. If the lesser evil argument cannot be clearly established, then the torturer is criminally liable for torture and stands to go to jail, or even to be executed if the torture victim expires under torture. Given the risks, would-be torturers will have to choose between caution and potential conviction; I expect caution to come out on top.

Interestingly, the lesser evil argument does not seem to require the least possible evil; nothing in the text of the *Model Penal Code*, for example, says anything about being required to choose  $E_1$  over  $E_2$  when either will avert  $E_3$  and  $E_3 > E_2 > E_1$ . If a greater torture averts a terrible evil wherein a lesser torture would have done the same job—and assuming that the torturer would have reasonably believed the lesser torture to be sufficient—we at least find him morally liable. If we look to cases like *Bailey*, the necessity defense has been interpreted in line with this moral intuition: escaping and not surrendering was worse than the possible option of escaping and surrendering, so necessity was not established. The upshot with regard to torture is that excessive torture might not be protected by necessity, as it should not be.

Therefore necessity offers two straightforward advantages over torture warrants. First, it puts the onus on the torturer with regard to the merits of torture, rather than facilitating an *ex ante* pass from the judiciary. Second, it limits the zeal with which the would-be torturer would pursue torture insofar as overzealous torture would still be criminally liable.<sup>68</sup> While I take these to be appropriate safeguards on the practice of torture, note that they may result in justifiable torture not being deployed insofar as the justified torturer could be unwilling to risk criminal

prosecution. It would be regrettable if self-interest trumped moral responsibility, but it is probably preferable to have some personal disincentive to torture rather than the *ex ante* authorization that torture warrants offer. Maybe justifiable torture would be occasionally foregone, but unjustified torture would be substantially more limited; this is a safeguard that even I would be willing to accept.

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## NOTES

I thank an anonymous reviewer for helpful comments on an earlier draft of this article.

1. For example, consider Jeremy Bentham:

Suppose an occasion, to arise, in which a suspicion is entertained, as strong as that which would be received as a sufficient ground for arrest and commitment as for felony—a suspicion that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced, should refuse to do so? To say nothing of wisdom, could any pretense be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon [one hundred] innocent persons to the same fate? (Twining and Twining 1973, p. 347)

Jeremy Bentham. London University, University College of London Manuscripts Room, Bentham MSS Box 74.b (May 27, 1804), fol. 429. Quoted in W. L. Twining and P. E. Twining, “Bentham on Torture,” *Northern Ireland Legal Quarterly*, vol. 24 (1973), pp. 307–356.

2. See Jean Lartéguy, *Les Centurions*, trans. Xan Fielding (New York: Avon, 1961). See also Anthony Quinton, “Views,” *The Listener* (December 2, 1971), pp. 757–758. See also Henry Shue, “Torture,” *Philosophy and Public Affairs*, vol. 7, no. 2 (1978), pp. 124–143; p. 141. See also Michael Levin, “The Case for Torture,” *Newsweek* (June 7, 1982), p. 7.

3. For more discussion, see Fritz Allhoff, *Terrorism, Ticking Time-Bombs and Torture* (Chicago: University of Chicago, in press), esp. chap. 6.

4. “Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment”, available at <http://www.hrweb.org/legal/cat.html>. CAT has a somewhat complicated legislative history, thus making it unclear how to date it. The General Assembly of the United Nations adopted CAT in 1975. It was then opened for ratification by signatory countries in 1985; CAT entered into force in 1987 once it was ratified by the

twentieth country, Canada. Therefore, 1975 and 1987 are both commonly listed as dates, depending on what the date is meant to represent.

5. “Third Geneva Convention” is available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>.

6. “Universal Declaration of Human Rights” is available at <http://www.un.org/en/documents/udhr/> (accessed February 8, 2010).

7. “Declaration of Tokyo” is available at <http://www.cirp.org/library/ethics/tokyo/>.

8. See, for example, David Luban, “The Torture Lawyers of Washington,” in *Legal Ethics and Human Dignity*, ed. David Luban (Cambridge, Eng.: Cambridge University Press, 2007), pp. 162–205. See also see Marcy Strauss, “Torture,” *New York Law School Law Review*, vol. 48, nos.1–2 (2003/2004), pp. 201–274, esp. §II.

9. The full quote was actually this: “Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distort the judgment.” *Northern Securities Co v. United States*, 193 U.S. 197 (1904) (Holmes, dissenting), p. 400.

10. It bears notice that *none* of the proposals to be evaluated in this article entails the wholesale legalization of torture; the proposals considered in section 1 and section 3 leave torture illegal, while torture warrants (section 2) offer a highly circumscribed route to authorized torture.

11. CAT explicitly precludes torture in §2.2: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.” United Nations Treaty Collection, IV.9. Available at <http://www2.ohchr.org/english/> (accessed May 16, 2009). More will be said about this issue in section 3.

12. See, for example, Seumas Miller, “Is Torture Ever Morally Justifiable?,” *International Journal of Applied Philosophy*, vol. 19, no. 2 (2005), pp. 179–192. See also Oren Gross, “The Prohibition on Torture and the Limits of the Law,” in *Torture: A Collection*, ed. Sanford Levinson (Oxford, Eng.: Oxford University Press, 2004), pp. 229–253.

13. See, for example, David Luban, “Liberalism, Torture, and the Ticking Bomb,” *Virginia Law Review*, vol. 91, no. 6 (2005), pp. 1425–1461. See also Miller, “Is Torture Ever Morally Justifiable?”

14. For a general discussion of judicial integrity, see Robert Bloom, “Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases,” *Journal of Criminal Law and Criminology*, vol. 84 (1993), pp. 462–501. For a discussion of judicial integrity in regard to torture, see Chanterelle Sung, “Torturing the Ticking-Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism,” *Boston College Third World Law Journal*, vol. 23 (2003), pp. 193–212. See also Vishal Garg, “Unwarranted and Unnecessary: An Argument against Judicially Sanctioned Torture” (unpublished).

Judicial integrity will be discussed more in subsequent sections, but let me just register from the outset a dim view about how such integrity could be undermined by participating in, *ex hypothesi*, justified torture; it seems to me that such integrity *requires* that participation. Regardless, more on this to come.

15. Miller, "Is Torture Ever Morally Justifiable?," p. 188.
16. *Ibid.*, p. 190.
17. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 28–33.
18. Miller, "Is Torture Ever Morally Justifiable?," p. 190.
19. Plato, "Crito" in *Five Dialogues*, trans. G. M. A. Grube (Indianapolis, IN: Hackett), pp. 43a–54e.
20. John Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Régime* (1976; repr., Chicago: University of Chicago Press, 2006), pp. 81–128.
21. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002), pp. 158–159; see, more broadly, pp. 158–160. See also Dershowitz, "Tortured Reasoning," in *Torture: A Collection*, ed. Sanford Levinson (Oxford, Eng.: Oxford University Press, 2004), pp. 258–280. See also Dershowitz, "The Torture Warrant: A Response to Professor Strauss," *New York Law School Law Review*, vol. 48, nos. 1–2 (2003/2004), pp. 275–294.
22. For more extended discussion than I will provide here, see J. Jeremy Wisnewski, "Unwarranted Torture Warrants: A Critique of the Dershowitz Proposal," *Journal of Social Philosophy*, vol. 39, no. 2 (2008), pp. 308–321.
23. This famous example—as well as a common failure to reason through it properly—owes to Amos Tversky and Daniel Kahneman, "Extensional versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment," *Psychological Review*, vol. 90, no. 4 (1983), pp. 293–315.
24. Dershowitz, *Why Terrorism Works*, p. 158.
25. This list is roughly adapted from Wisnewski, "Unwarranted Torture Warrants," p. 308.
26. John Kleinig, "Ticking Bombs and Torture Warrants," *Deakin Law Review*, vol. 10, no. 2 (2006), pp. 614–627. See also Uwe Steinoff, "Torture—The Case for Dirty Hands and against Alan Dershowitz," *Journal of Applied Philosophy*, vol. 23, no. 3 (2006), pp. 337–353. See also Andrew Fiala, "A Critique of Exceptions: Torture, Terrorism, and the Lesser Evil Argument," *International Journal of Applied Philosophy*, vol. 20, no. 1 (2006), pp. 127–142.
27. For example, time constraints, judges' differing evidential standards, etc. I thank Jeremy Wisnewski for discussion in this regard.
28. Sung, "Torturing the Ticking-Bomb Terrorist." See also Garg, "Unwarranted and Unnecessary."
29. Luban, "The Torture Lawyers." See also Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism, and the State: A Refutation of the Ticking Time-Bomb Argument," *Journal of Applied Philosophy*, vol. 23, no. 3 (2006), pp. 355–373.
30. See Allhoff, *Terrorism, Ticking Time-Bombs*, esp. chap. 6. See also Allhoff, "Terrorism and Torture," *International Journal of Applied Philosophy*, vol. 17, no. 1 (2003), pp. 105–118; and Allhoff, "A Defense of Torture: Separation of Cases, Ticking Time-

Bombs, and Moral Justification,” *International Journal of Applied Philosophy*, vol. 19, no. 2 (2005), pp. 243–264.

31. Sung, “Torturing the Ticking-Bomb Terrorist,” p. 207. See also Bloom, “Judicial Integrity,” p. 466.

32. Garg, “Unwarranted and Unnecessary,” p. 5. See also *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, dissenting).

33. Sung, “Torturing the Ticking-Bomb Terrorist,” p. 207. Internal quote to *Casey v. United States*, 276 U.S. 413 (1928) (Brandeis, dissenting) (other internal references elided).

34. See, for example, Allhoff, *Terrorism, Ticking Time-Bombs*, §7.6.

35. Joshua Dressler, *Understanding Criminal Law*, 3rd edition (New York: Lexis, 2001), p. 558. Quoted in Douglas Husak, “On the Supposed Priority of Justification to Excuse,” *Law and Philosophy*, vol. 24 (2005), pp. 557–594; p. 558 (emphasis added).

36. Michael Moore, *Placing Blame* (Oxford, Eng.: Clarendon, 1997), p. 674. Quoted in Husak, “On the Supposed Priority,” p. 559.

37. American Law Institute, *Model Penal Code*, §3.04 (1962). The *Model Penal Code* is not the code of any particular jurisdiction, although many jurisdictions have codified its precepts. We should presumably amend the *Model Penal Code* statement with a qualification that no other reasonable alternative be available to the agent.

38. John Yoo, “Memorandum for William J. Hynes II, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States” (Washington DC: US Department of Justice, 2003), p. 79.

39. Michael S. Moore, “Torture and the Balance of Evils,” *Israel Law Review*, vol. 23 (1989), pp. 280–344; p. 323. Quoted in Yoo “Memorandum for William J. Hynes II,” p. 79.

40. *In re Neagle*, 135 U.S. 1 (1890).

41. See, for example, Luban “The Torture Lawyers,” p. 179: “Looked at dispassionately, necessity offers the strongest defense of torture on normative grounds. The necessity defense justifies otherwise criminal conduct undertaken to prevent a greater evil, and in extreme cases it is at least thinkable that torture might be the lesser evil.” Luban nevertheless strongly opposes torture.

Note also that, since a 1999 High Court of Justice ruling, the necessity defense has formed the basis of Israel’s torture policy; unfortunately, extended discussion in this regard would take us too far afield. For the Court’s ruling, see H CJ 5100/94 (1999), *Public Committee against Torture in Israel et al. v. Government of Israel et al.* One point worth making is that torture has almost assuredly been under-prosecuted in Israel. For example, The Public Committee Against Torture in Israel alleges: “Since 2001, over 600 complaints of torture have been submitted to the law enforcement agencies in Israel by victims of torture. Not a single one of these complaints has developed into a criminal investigation—the first step in the process of indictment, conviction, and the meting out of justice.” The Public Committee Against Torture in Israel (PCATI), “Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel” (2009), p. 15, [www.stoptorture.org.il/files/Accountability\\_Denied\\_Eng.pdf](http://www.stoptorture.org.il/files/Accountability_Denied_Eng.pdf).

To be clear, I do not think that torture should be under-prosecuted; Israeli practices presumably fall short in this regard. (Some skepticism is due to PCATT's predictably negative findings, particularly given the group's obvious political design. For example, no mention is made as to how many of the complaints were frivolous; this could well be a significant percentage.) There is no reason to think that Israel's failure to prosecute would transfer to other law enforcement or judicial jurisdictions, or else that there is anything inherent to situations of necessity that would limit prosecution. In other words, however Israel has implemented the necessity defense vis-à-vis torture is neither here nor there with regard to how the defense could or should be implemented elsewhere. This does not deny that we can learn from Israel's experience or that correctives thereof could be part of our own.

42. *Model Penal Code*, §3.02. For more discussion than I will provide here, see George C. Christie, "The Defense of Necessity Considered from the Legal and Moral Points of View," *Duke Law Journal*, vol. 48, no. 5 (1999), pp. 975–1042. For cases, see Wayne R. LaFare, *Modern Criminal Law: Cases, Comments, and Questions*, 4th edition (St. Paul, MN: Thomson/West, 2006). See also note 47 below. Different jurisdictions have implemented the *Model Penal Code* language in different ways. See, for example, *United States v. Schoon*, 971 F2d 193, 195–197 (9th Cir. 2002), *United States v. Patton*, 451 F3d 615, 638 (10th Cir. 2006), and *People v. Bordowitz*, 115 Misc 2d 128, 132–133 (NY City Crim. Ct. 1991). Cases referenced in Stephen S. Schwartz, "Is There a Common Law Necessity Defense in Federal Criminal Law?," *University of Chicago Law Review*, vol. 75, no. 3 (2008), pp. 1259–1293; n3.

43. For more discussion, see Allhoff, *Terrorism, Ticking Time-Bombs*, esp. chap. 6.

44. For the sake of argument, I will assume that killing the gangster is always at least *prima facie* wrong (that is to say, whether he is preparing to execute innocents or not). If the reader has a different intuition, then substitute some more complicated example, such as Bernard Williams's Jim and the Indians case. In this case, Jim is offered the opportunity to kill one innocent such that the other nineteen are let go; if Jim declines, all twenty will be killed. Should Jim accept this ill-fated bargain, he could presumably avail himself of the necessity defense since he chose the lesser of two evils. See Bernard Williams, "A Critique of Utilitarianism," in *Utilitarianism: For and Against*, ed. J. J. C. Smart and Bernard Williams (Cambridge, Eng.: Cambridge University Press, 1973), pp. 75–150; p. 99.

Other paradigmatic cases include the destruction of property to save a life. So, for example, Joel Feinberg imagines a case wherein a backpacker is stranded by a blizzard; the backpacker stays alive by forcing his way into a cabin, consuming food he finds there, and burning furniture for warmth. Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy and Public Affairs*, vol. 7, no. 2 (1978), pp. 93–123; p. 102. Similarly, Jules Coleman proposes a diabetic who loses his insulin in an accident and must break into the house of another diabetic to obtain life-saving insulin. Jules L. Coleman, *Risks and Wrongs* (Oxford, Eng.: Oxford University Press, 1992), p. 282. Both cases are referenced in Christie, "The Defense of Necessity," p. 977.

To take an actual case, consider *Montana v. Leprowse*, 2009 MT 387 (2009) in which Lisa Marie Leprowse successfully defended herself against charges of drunk driving by establishing a physical threat from which she fled. The necessity defense worked in this case because the evil posed by her intoxicated flight was judged to be less than the evil she risked by not fleeing.

45. *Model Penal Code*, §3.02, comment 3 (Tentative Draft No. 8, 1958). See also *Model Penal Code*, §3.02, comment 3: “It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense.” Referenced in Christie, “The Defense of Necessity,” n286.

46. *Ky Rev Stat Ann*, §503.030 states that “no justification can exist under this section for an intentional homicide.” *Mo Ann Stat*, §563.026 allows necessity in circumstances “other than a class A felony or murder.” *Wis Stat Ann*, §939.47 provides that necessity can reduce a charge of first-degree homicide to second-degree homicide. Referenced in Christie, “The Defense of Necessity,” n279–281. See also John Alan Cohan, “Homicide by Necessity,” *Chapman Law Review*, vol. 10 (2006), pp. 119–186.

47. Interestingly, many of these cases pertain to survival cannibalism among castaways. For the landmark, see *R v. Dudley and Stephens*, 14 QBD 273 DC (1884). See also *United States v. Holmes* F. Cas 360 (ED Pa 1842); note that Holmes was able to receive some consideration vis-à-vis necessity insofar as he was convicted of manslaughter rather than first-degree murder. The ill-recorded Saint Christopher case—dating to the early seventeenth century—recognized necessity but nevertheless did not have a significant impact on *R v. Dudley and Stephens*. See A. W. Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (Chicago: University of Chicago Press, 1984), pp. 122–123.

48. “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” §2.2. Available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (January 27, 2010).

49. United Nations Treaty Collection, IV.9.

50. Unlike homicide, note that torture is a federal crime; individual states cannot block or limit the necessity defense in regard to torture since the unqualified federal statute supersedes state law.

51. I first came across this issue in Luban, “The Torture Lawyers,” n60; I thank Professor Luban for subsequent discussion thereof. As he pointed out, note that the situation is different in Israel where there is a statute creating the necessity defense; this defense can be used against charges of torture. For discussion of the Israeli approach, see Adam Raviv, “Torture and Justification: Defending the Indefensible,” *George Mason Law Review*, vol. 13, no. 1 (2004), pp. 135–181; pp. 157–159.

52. *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483 (2001).

53. *United States v. Bailey*, 444 U.S. 394 (1980).

54. For more discussion, see [No Author], “The Necessity Defense to Prison Escape after *United States v. Bailey*,” *Virginia Law Review*, vol. 65, no. 2 (1979), pp. 359–376; pp. 367–371.

55. *United States v. Bailey*, p. 427.

56. For example, consider *Dixon v. United States*, 548 U.S. 1 (2006). This case considered duress, which is not sharply distinguished from necessity in some rulings. The court ruled that the possession of a firearm by a felon was not “incompatible” with a duress offense, even if such possession violated federal law. *Ibid.*, pp. 13–14 and n6. See also Schwartz, “Is There a Common Law?,” p. 1268.

57. *Baender v. Barnett*, 255 U.S. 224 (1921).
58. Schwartz, "Is There a Common Law?," p. 1266.
59. For discussion of *Dixon*, see note 56 above.
60. *United States v. Bailey*, p. 410. Quoted in Jordan Paust, "The Complicity of Dick Cheney: No 'Necessity' Defense," *Jurist* (May 18, 2009). Available at <http://jurist.law.pitt.edu/forumy/2009/05/complicity-of-dick-cheney-no-necessity.php>.
61. *United States v. Bailey*, p. 411. Quoted in Paust, "The Complicity of Dick Cheney."
62. Paola Gaeta, "May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?," *Journal of International Criminal Justice*, vol. 2 (2004), pp. 785–794; p. 785. See also George Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails," *Dialog: A Journal of Theology*, vol. 47, no. 3 (2008), pp. 228–239.
63. *Model Penal Code*, §3.02 (emphasis added).
64. See, for example, Schwartz, "Is There a Common Law?," pp. 1268–1273.
65. Paust, "The Complicity of Dick Cheney."
66. *Ibid.*
67. For more discussion, see Allhoff, *Terrorism, Ticking Time-Bombs*, §§7.1–7.4.
68. See also Raviv, "Torture and Justification."