
Necessity, torture and the rule of law

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Not every aspect of the debate over regulating states of emergency is especially controversial. There is widespread agreement, for example, that the scope of executive power has grown in recent years, most notably in the United States of America. Constitutional scholars also generally concur that, at least in ordinary times, this trend is undesirable. The debate becomes more heated in the context of emergencies. Even here, however, many commentators accept that officials will sometimes need to do acts that are not permitted under the 'ordinary' law. What they disagree about is how to allow for them.

Various solutions have been advocated. In what follows, I will note just four. The first, and most extreme, possibility is for the legislature to create a legal 'black hole', within which officials have unfettered power to act. At the opposite end of the spectrum is to do nothing, leaving the actions of each official to be governed and judged according to the resources of the ordinary law. Third, somewhere between these options, one might not change the operative law but instead create a mechanism by which a retrospective indemnity or validation, may be conferred upon officials who perform otherwise unlawful actions in an emergency: one version of this proposal is the extra-legal measures (ELM) model advocated by Oren Gross.¹ The fourth alternative is to create a specialist regime of administrative law, operative during a state of emergency, which governs

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¹ O. Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011. See also O. Gross and F. Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), especially pp. 110–72.

actions taken by officials within the scope of the regime; this prospect has been explored by David Dyzenhaus.²

12.1

An advantage of the fourth model is that it does not require us to suspend legal control of officials even during emergencies. In rejecting the Gross model of extra-legal responses to state emergencies, Dyzenhaus suggests that it is possible to give officials, *ex ante*, specific legal resources with which to treat emergencies, so that their responses comply with the rule of law. Legal solutions of this sort can work by creating a quasi-administrative framework within which discretionary power is delegated to officials in a manner that is susceptible of guidance and trammelling by the law: I shall call this a ‘Controlled Delegation’ (CD) model. Actions taken within the terms of the emergency framework would not, then, be taken inside a legal vacuum but may be reviewed judicially.

This solution will not always work. There are at least three types of scenario where the legal resources made available to officials might nonetheless run out. First, the background situation may not constitute a state of ‘emergency’, wherefore the conditions triggering the discretionary framework are not established. Second, the guiding content of the emergency regime may not extend to the particular case at hand. Third, the emergency regime may determine that the contemplated response by officials is illegitimate; indeed, Dyzenhaus suggests that this is systematically true of certain types of response, such as torture – that such actions are ‘unlegalisable’. Optionally, other responses too may be precluded. In each of these scenarios, there may be a need for officials to take urgent action that is not sanctioned *ex ante* by legislation. Where this occurs,³ we must confront again the worry that so concerns Gross and others.

The main advantage of the ELM model for dealing with these cases is strategic, in so far as it turns upon future consequences for the rule of law. Gross urges that his model, which requires acknowledgement that an official’s acts are unlawful, is more likely to resist the (undesirable) seepage

² D. Dyzenhaus, ‘The State of Emergency in Legal Theory’, in V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), p. 65.

³ Importantly, however, the *demesne* of such cases will be smaller than if Dyzenhaus’s proposal is not implemented, a point that generates important benefits for the rule of law. See further the discussion of necessity below, 12.2.

of emergency executive powers into the ‘ordinary’ legal system. Unlike Dyzenhaus’s suggestion, which requires extensive institutional modifications, implementation of the ELM model is fairly straightforward, in that there is no requirement to alter the substantive ordinary law; the model requires only the addition of a complex procedural mechanism to apply in emergencies. Admittedly, its implementation depends on whether a workable distinction can be drawn between the ordinary and the emergency – a distinction rejected by Dyzenhaus⁴ – but, provided the context is sufficiently elaborated, it seems to me at least arguable that some such dichotomy could be stipulated; it may be susceptible of vagueness and potential manipulation, no doubt, but most cases would fall on one side or other of its blurred boundary.

On the other hand, the model has potential disadvantages. *Any* model that depends on the existence of emergency rather than ordinary conditions risks ‘seepage’ at least in situations on or near the borderline. It may not work well in a culture of secrecy;⁵ indeed, it may help to generate such a culture, since, if otherwise unlawful actions have an effective interim permission,⁶ there are likely to be incentives to suppress the future reckoning.⁷ Perhaps even more worryingly, by deferring the adjudication procedure, the ELM model offers officials the hope that they may be exonerated later rather than the certainty of unlawfulness now, thus loosening the stringency of prohibitions. In turn, this may lead to a worsening of respect for the rule of law and for the law’s substantive values; in the nightmare scenario, Dyzenhaus worries, we may end up living in a discretionary world where state officials routinely perpetrate torture, indefinite detention and the like.

I cannot assess the likelihood of these risks here. It is enough for now to observe that, like its strengths, many of these objections are also strategic.

⁴ Who describes it as ‘false’: Dyzenhaus, ‘The State of Emergency’, in *Global Anti-Terrorism Law and Policy*, pp. 69 and 73; see too Gross, ‘Chaos and Rules’, 12.5. Note, however, that the CD model will also require determinations whether a matter is appropriately subject to the delegated regime.

⁵ For discussion of this issue, see S. Chesterman, ‘Deny everything: intelligence activities and the rule of law in times of crisis’ (Chapter 13), this volume, p. 000.

⁶ Strictly, on the ELM model, non-disclosure would mean that the actions are not *entitled* to interim permission. Gross stipulates that the official must ‘openly and publicly acknowledge the nature of their actions’ in order to be eligible for *ex post* ratification: Gross, ‘Chaos and Rules’, p. 1023.

⁷ Which, in any event, may amount to rubber-stamping in a suitably panicked political atmosphere: Dyzenhaus, ‘The State of Emergency’, in *Global Anti-Terrorism Law and Policy*, p. 73.

This should be no surprise, since the arguments share a common perception that something needs to be done in the face of terrorism: we cannot avoid changes to the legal system, but we want to limit the damage. Indeed, while Dyzenhaus clearly would not welcome the prospect, his own proposal is, strictly speaking, compatible with the Gross model.⁸ One might have an ELM mechanism in place to deal with cases not anticipated by the emergency CD regime.

Their models are compatible, in part, because both writers accept that in some emergency situations the resources of the law run out. Faced with the need to perform a prohibited act, the official is on her own. She must φ ,* but cannot. Through no fault of her own, she is caught in a moral disaster. It is a moral disaster because neither option is right: it is wrong to φ , but terrible consequences await if she does not.

Moreover, the disaster seemingly belongs to the state. The reason to φ arises not from the official's personal needs, but out of the interests of the state, interests the official may have a duty to serve.⁹ At the same time, the state is the very source of the prohibition. Yet, rather than assume responsibility for the official's dilemma, the state has abandoned her. At the crucial moment when nuanced guidance is most needed, she is cut off. Thus there are not one but two reasons why the legal system needs to respond. The first and obvious reason is that it is in the state's interests for the official to φ . The second reason, however, arises because the official, qua citizen, needs to be freed from the grip of a moral disaster. The law should place no one, official or otherwise, in an impossible position.¹⁰ When they face the prospect of illegality and prosecution, officials need guidance too.

⁸ Their potential for compatible implementation does not imply that they have similar normative bases, as Dyzenhaus makes clear in his contribution to this volume: 'The compulsion of legality', Chapter 2, p. 000.

* The Greek symbol, *phi*, designating some prohibited act. – Ed.

⁹ I cannot develop the point here, but it strikes me that one can have duties that subsist and which one breaches by failing to discharge, notwithstanding that their discharge is impossible or even unjustified. For insightful discussion, see J. Gardner, 'Wrongs and Faults', in A.P. Simester (ed.), *Appraising Strict Liability* (Oxford: Oxford University Press, 2006) p. 51, § 2.

¹⁰ Admittedly, this is not to suggest the official is trapped inside a *legal* contradiction. If φ ing really is prohibited in the circumstances at hand, it follows that she is legally permitted not to φ . The difficulties lie in knowing whether the prohibition extends to these circumstances and, if it does, in the conflict between the law's prohibition and the official's extra-legal mandate to φ .

12.2

There is something in this argument.¹¹ Other things equal, it is better for the law to offer more rather than less detailed guidance to its citizens, official and otherwise. This is a reason to support the CD model. But in my view, the existing debate understates the resources of the ordinary law. In emergency situations, there will sometimes be a need for officials to take urgent action that cannot be sanctioned *ex ante* by legislation; and this may occur even within the more detailed emergency provisions in a CD regime. Yet in these cases, the law does not simply run out. It does not follow that the action, if taken, is necessarily extra-legal. The common law knows a range of general defences, according to which otherwise unlawful acts may be permissible, or at least forgivable, in certain circumstances. In particular, the defence of *necessity* might be thought of as a last resort for legality; as a fall-back, catchall, principle of ordinary law which acknowledges that exceptional situations arise and subjects them to legal review.

By articulating defences such as necessity, the legal system adds the interstitial nuance that its prohibitions require. Yet in order to do so, the law must import supplementary resources from the moral system. This raises the question: does the availability of necessity itself dilute the rule of law, proffering the very evils that Gross wants to avert?¹² Fortunately, the answer is no. Once we dispel certain misconceptions about the defence, a principled account of necessity can be given, in which its existence is both justified and exceptional.

Necessity falls within the class of what may be termed *rationale-based* defences. To take a simple case, suppose that V is a terrorist who is about to detonate an explosive in a crowded shopping mall. D, a police officer, recognises what V is about to do and shoots him dead. D has committed a *prima facie crime*: she has fulfilled both the conduct and mental elements of

¹¹ I emphasise that Dyzenhaus and Gross do not themselves make the argument sketched above. I have sought only to suggest a line of reasoning that they may find congenial.

¹² Such a concern lay behind the rejection of necessity as a justification in Canada: '[t]he Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function.' *Perka v. R* [1985] 13 DLR (4th) 1, 14 (Dickson J.). The same concern did not persuade the English Court of Appeal in *Pommell* [1995] 2 Cr App R 607.

a crime of intentional homicide. The offence definition is satisfied. But the law does not stop there. Even though intentional homicide is prohibited, on this occasion its commission will not lead to D's conviction, because D has a supervening,¹³ rationale-based defence. A defence of this sort denies neither the conduct nor mental element of the prima facie crime; rather, it avers D's responsibility for her action and explains the further reasons why she did it. For the defence to be successful, those reasons must justify or at least excuse what she did. In effect, when D claims a rationale-based defence she asserts: yes, I did the prohibited act, I did it deliberately, and here's *why*.

In the case of the police officer, her claim is one of justification. We might say – and criminal theorists often do say – that her action was a proportionate and necessary response to the emergency situation. More accurately, we can say that D's action was an *appropriate* response and, for that reason, permissible.¹⁴

The refinement may seem like a small move. Actually, however, it is crucial, for reasons so far unrecognised in the literature; reasons that are crucial to the acceptability of justifications within the moral and legal systems. Standard formulations of necessity run along the lines that conduct is justified whenever, after weighing up all the alternatives, ϕ ing is a proportionate or 'lesser' evil than not- ϕ ing.¹⁵ According to the Model Penal Code (MPC):¹⁶ 'Conduct that 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 . . .'

¹³ Cf. A.P. Simester, 'Mistakes in Defence' (1992) 12 *Oxford Journal of Legal Studies* 295 at 295–6: a supervening defence is one that denies neither *actus reus* nor *mens rea* but, rather, seeks to avoid liability by reference to accompanying considerations not contemplated in those elements of the offence definition. Not all supervening defences are rationale-based. Rather than assert and explain D's responsibility, for example, insanity and infancy deny D's moral responsibility for the conduct altogether, thereby taking D out of the realm of moral agents. For discussion of the distinction, see J. Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575.

¹⁴ Specifically, her response was an appropriate act of self-defence, on behalf of herself or others. I return to this below.

¹⁵ Compare C.M.V. Clarkson, 'Necessary Action: A New Defence' [2004] *Criminal Law Review* 81, who would generalise this approach to other rationale-based defences. Some of the discussion in this section is drawn from the reply to Clarkson by W. Chan and A.P. Simester, 'Duress, Necessity: How Many Defences?' (2005) 16 *King's College Law Journal* 121.

¹⁶ S. 3.02(1).

A similar, common law formulation finds favour in the English Court of Appeal:¹⁷

The claim is that [D's] conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified. . . . According to Sir James Stephen there are three necessary requirements for the application of the doctrine of necessity: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided.

These standard accounts suggest an approach in which the reasons for and against ϕ ing are stacked up against each other in order to determine which pile has the greater weight. I can break into a cabin during a snowstorm because saving a life is more important than respecting property rights and firefighters can raze V's house to create a firebreak because losing the village outweighs the evil of losing the one home. In Judith Thomson's famous Trolley Problem,¹⁸ D can throw a switch to divert the trolley because five deaths constitute a proportionately greater harm than just one. And so on.

Now if that really were the right way to think about necessity, the relationship of necessity to the rule of law would present serious difficulties. In particular, a general 'lesser-evils' defence might weaken the rule of law through its capacity for expansive interpretation and application, something that might be used in times of crisis to lend the garb of legitimacy to otherwise extra-legal measures. Even in ordinary times, its availability would risk undermining legislative prohibitions. In effect, the defence would threaten to revise every prima facie offence into an ad hoc exhortation, not to inflict harm save reasonably. Determining what actions were permissible would then become a matter of case-by-case discretion, notwithstanding legislative efforts to lay down general rules.¹⁹

¹⁷ *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 236 and 240 (Brooke L.J.). The reference is to Stephens, *Digest of the Criminal Law*, 4th ed. (London: Macmillan, 1887), pp. 24–5.

¹⁸ D is the driver of a runaway rail trolley that is about to strike and kill five workmen on the track ahead. If he diverts the trolley to a siding, the five will be saved but the trolley will instead strike and kill a lone worker who is on the siding. J.J. Thomson, 'The Trolley Problem' (1985) 94 *Yale Law Journal* 1395. Although the case is commonly described as Thomson's, she herself derives it from P. Foot: 'The Problem of Abortion and the Doctrine of the Double Effect' (1967) *Oxford Review* 5.

¹⁹ This possibility is sometimes avoided where the legislature has enumerated the permissible exceptions with sufficient specificity to exclude a justification based on the facts at hand:

Clearly, it is inappropriate for individuals or even courts to substitute their ad hoc judgments of the balance of interests, Robin Hood-like, for the general determination of social priorities that is properly made by parliament.²⁰ But there are two factors that mean necessity, properly understood, does not do this. The first is the circumstance of urgency, a standard feature of ϕ ing in emergency situations. Supervening justificatory defences are available only when an individual is faced with having to violate the law in situations where recourse to legitimate state authorisation is impossible. In such cases, the rule of law is not so much by-passed as unavailable. The individual does not usurp the determinative role of the legal system. Conversely, if the situation is not urgent, so that recourse to lawful authorisation is possible, neither official nor private citizen may take the situation into her own hands.

The second factor is that justifications are not simply a matter of weighing up the strength of various reasons. For a reason to justify committing a prima facie wrong, not only must it possess the requisite strength, but it must also stand in the right relationship to that wrong. In particular, some reasons for committing the wrong may be *excluded*,²¹ under certain or even all circumstances, from consideration. This point implies a key deficiency in the standard common law and MPC analyses, since the possibility of excluded reasons is not addressed by a generic criterion of proportionality or of ‘lesser’ evil. A justification cannot be established merely by piling up the assorted desirable features of an action and balancing them against all the various disadvantages, because the matter is not simply a weighting exercise. Justificatory reasons are a matter of category as well as degree.

cf. MPC, s. 3.02(1)(b)-(c); *Quayle* [2005] EWCA Crim 1415, [2005] 1 WLR 3642 (permissibility of privately using cannabis for pain relief held to be excluded by the comprehensive nature of the legislative scheme). Compare the express provision that the right against torture is non-derogable in the European Convention on Human Rights, Arts. 3 and 15. Inevitably, explicit provision of this sort is not the norm.

²⁰ See, e.g. *Southwark London Borough v. Williams* [1971] Ch 734 at 740 (Edmund Davies L.J.): ‘The law regards with the deepest suspicion any remedies of self help, and permits these remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy.’ The point is that the legal system cannot operate if its authority is optional. Thus the use of vacant council properties, as in Southwark, is best resolved by political decision-making processes, implemented by consistent administration, rather than by ad hoc self-help actions such as squatting.

²¹ I adopt the terminology from Raz, *Practical Reason and Norms*, 2nd ed. (Princeton: Princeton University Press, 1990), § 1.2. I have in mind here the exclusion of reasons over and above those excluded by legislative provision: above, n. 18.

Indeed, these differences of category are built into the very classification of rationale-based defences. The most straightforward type of necessitous action is self-defence, unequivocally a justification, which is available where D acts against V in order to ward off a threat that V himself poses. In these cases the driving normative force behind the defence is D's right to protect herself (or another person) against unlawful attacks, a right grounded, in turn, in the interests that D (or another) has in personal autonomy and physical integrity. That right, which allows for limited self-preference, defeats V's interests and carves a partial liberty out of D's general duty not to cause harm to others. As with all justifications, the extent of the liberty remains dependent on norms of proportionality and its recognition by the legal system is constrained by rule-of-law considerations – in particular, the requirement of urgency.²² Thus the moral and legal character of D's conduct here is distinctively righteous.²³ D acts to preserve a moral and legal entitlement; and her reason for harming V is, in principle, an eligible reason for acting and not one excluded *tout court*. It is no accident that self-defence overlaps with prevention of crime defences. D has a right not to be attacked. In situations where it is impracticable for the state to assert that right on her behalf, she upholds that right by acting in self-defence.

In other cases of justifying necessity, by contrast, D's conduct is not consonant with the legal regime. D wrongs V, but the wrong is morally and legally permitted, as when D enters V's house in order to call an ambulance on behalf of E, a person urgently in need of medical treatment. Here, 'lesser-evils' necessity comes into its own. Its advantage – and its weakness, as well as its challenge to the rule of law – lies in the fact that the defence lacks the narrow, right-defending focus of self-defence. Even though neither D nor E is wronged, D can cite her life-saving reason in order to defeat the duty she owes not to violate V's property rights. But she can do so only because a reason of this sort is not excluded by V's proprietary rights.²⁴ It can be stacked up against the reasons not to damage V's property when determining whether, all things considered, it

²² Hence an objection to *Kelly* [1989] NI 341, where D was held justified in fatally shooting someone believed by D to be a terrorist who, if allowed to escape, would go on to commit terrorist offences at some point in the future. But in the absence of urgency, it should not be open to D to bypass normal state mechanisms for regulating potential wrongdoing by others. For criticism, see Simester and Sullivan, *Criminal Law: Theory and Doctrine*, 3rd ed. (United Kingdom: Hart Publishing, 2007), § 21.2(v).

²³ Distinctively, but not uniquely: compare, e.g. the sibling justification of defence of property.

²⁴ Cf. Raz, above n. 21. In this case, the fact that V has a property right supplies what Raz would call a protected reason: a first-order reason to respect V's property coupled with a

is permissible (i.e. justified) for one to act as does D. This does not mean the wrong goes away: there may, for example, be a duty to pay damages for any loss that V suffers.²⁵ Yet it is a permitted wrong, and we can conclude that D does not act badly all things considered – she does not act badly overall – when she does that wrong. Her reasons for acting are sufficient (eligible and proportionate) to render her conduct morally permissible and, in turn, lawful.

Yet that conclusion is not always open. The reasons not to violate V's person are not like those concerning V's property and exclude a much wider range of counter-considerations. Thus, in the absence of V's consent, it supplies *no reason at all* in favour of removing one of V's kidneys that transplanting the kidney into T's body will save T's life.²⁶ The 'reason' is excluded from consideration; indeed, its exclusion is part and parcel of the very importance of our rights to personal autonomy and integrity – that they are not amenable to this kind of algebra. T's need for the kidney cannot be stacked up against the reasons not to harm V when deciding, all things considered, what to do. Absent some further non-excluded reason, we can conclude that, all things considered, D should not remove V's kidney. Were D to proceed with the operation, she would both wrong V and, in so doing, act badly overall. Her reasons for acting are insufficient (because ineligible) to render her conduct lawful.

There is more to be said about necessity,²⁷ and some of the pay-off will be seen in 12.4. But for present purposes the important point is that

second order, exclusionary reason to disregard certain sorts of reasons for overriding that first-order reason. Hence, self-aggrandisement is excluded as a reason for overriding V's property right, but preservation of life is not.

²⁵ While remaining a civil (tortious) wrong, however, it does cease to be a criminal wrong. Cf. Simester and Sullivan, *Criminal Law: Theory and Doctrine*, § 21.3(ii)(d); Gardner, n. 9 above.

²⁶ Compare Judith Thomson's discussion of the surgeon example in 'The Trolley Problem' (1985) 94 *Yale Law Journal* 1395 at 1396. This way of expressing the matter is pragmatic. Strictly speaking, a reason exists but has no practical force, since it should not be acted upon.

²⁷ It may be tempting to read these examples as showing no more than that the exclusion of reasons is a matter of hierarchy, so that necessity is available only where the interest saved is of a higher order than the victim's. Not so, as the Trolley Problem illustrates. Notwithstanding that the interests at stake are of similar order, diverting the trolley to save five at the expense of one (P) is permissible, even though it would be impermissible for a surgeon to harvest V's organs in order to make life-saving transplants into five other patients. Compare, too, the famous case of *Dudley v. Stephens* (1884) 14 QBD 273, where survivors of a shipwreck, adrift in the South Atlantic, killed and consumed the youngest and weakest member of their party. Had they not done so, they would probably have died; but they were convicted of murder and their claim of necessity was – rightly – refused.

These examples illustrate a further wrinkle to the necessity defence, one that I cannot explore here. They show that the exclusion of reasons is itself contextual. It turns in part

the defence, if properly understood and applied, is no malleable tool with which to negotiate the rule of law. To the contrary: it offers a mechanism by which the conduct of officials falls to be normatively regulated, by the courts, *within* the legal system. In this it differs fundamentally from the ELM model, which, depending on the ratifying procedure, would gift the ratifier with a prerogative of arbitrary mercy.

12.3

Not all rationale-based defences are justifications. In cases where D both commits a prima facie wrong and, all things considered, acts badly, normally the secondary possibility will arise that D has a rationale-based *excuse*.²⁸ Suppose, for example, that D attacks and seriously injures V because T threatens otherwise to kill her. Notwithstanding that it was impermissible for D to act as she did, in the sense that there were insufficient valid reasons for her conduct, we may be reluctant to fault D. Our reluctance is because, although D's reason for acting was (objectively speaking) inadequate, we can quite understand that it was good enough for D. She feared for her life. Any reasonable person might have been impelled by such a fear; where this is so, we cannot make the inference of culpability that would normally entitle us to blame D for her actions. In such cases, we may allow an excuse. For the sake of clarity, I shall call this excuse *duress*.

Even though one may say in duress cases that, like necessity and self-defence, the individual acts under great pressure, the role of the pressure differs. In duress, the pressure directly explains D's motivation. D is right to fear for her life: her only mistake is to treat that as a reason for injuring V.²⁹ But that mistake merely discloses an imperfect virtue – a limitation – not a fault. We do not count, among the qualities reasonably expected

on the relationship of the reasons, excluded and excluding, within an agent's practical deliberation. Sometimes reasons are excluded *as ends*, without always being excluded in other roles. In the trolley example, it matters crucially that the harm to P is a concomitant or side effect of the driver's intended action. By contrast, the harm to V is directly intended by the surgeon as a means to an end. In *Dudley v. Stephens* the victim's death was similarly intended as a means to an (excluded) end and was, as such, unjustified. For further discussion of the importance of this distinction to justifications, see A.P. Simester, 'Why Distinguish Intention from Foresight', in A.P. Simester and A.T.H. Smith (eds.), *Harm and Culpability* (Oxford: Clarendon Press, 1996), pp. 71–102.

²⁸ Rationale-based excuses are a subset of the defences that are commonly described as excuses. See n. 13 above.

²⁹ That is to say, her only – and understandable – mistake is to treat the reason as non-excluded; since, but for its exclusion, it would have sufficed to justify her action.

of D, the levels of self-control and altruism that would be needed for D to refrain from acting. In this sense, it is apt to describe the defence as a ‘concession to human frailty’.³⁰ It reflects an imperfection characteristic of humans in general and not one peculiar to D.

In necessity, the importance of the emergency situation is different. Like all justifications, it is a concession to the rule of law. It explains, as I said earlier, why D is not usurping the proper role of the state. One cannot raze V’s house in order to create a firebreak, and thereby preserve the village, without official authority unless the fire is at hand.³¹ Thus necessity is like self-defence rather than an excuse, in that D’s motivation constitutes, objectively speaking, a legitimate and not excluded reason for acting.

Why does this matter to officials? In the public context, the divide between justification and excuse is crucial. Dyzenhaus crosses that divide when he contemplates that officials who act outside the law may sometimes claim a rationale-based excuse.³² But the line is not for crossing. Except for epistemic mistake (a quite different type of case), it is not open for the state or any individual acting qua official to claim an excuse. Official action constituting a *prima facie* crime can only be justified. If the action is justified, it is permissible – i.e. lawful. There is good reason to do it. Otherwise, the action is unlawful. For the state, there is no middle ground. Individual persons may be excused for acting unlawfully, on the grounds that their impermissible choice was blameless.³³ But excuses, which reflect profoundly human characteristics, are simply inapplicable to artificial actors such as the state. The pressure to which an excused person bows is personal. Thus official torture is inexcusable, although – conceptually speaking – torture by individuals *in extremis* might not be.

This may seem counter-intuitive. Surely one can be excused when acting on behalf of others? It is uncontroversial law that duress can sometimes

³⁰ E.g. *Howe* [1987] 1 AC 417 at 432–5.

³¹ Cf. *Shayler* [2001] 1 WLR 2206. D, a civil servant employed in MI5, was held to be in breach of the Official Secrets Act 1989 (UK) after he shared secret information with a newspaper, notwithstanding that he believed the actions of MI5’s threatened rather than enhanced public security. D was not attempting to avert some crystallised, imminent catastrophe – there was no forthcoming incident his actions were intended to avert, merely a fear that the covert operations of MI5 threatened public security generally.

³² Dyzenhaus, ‘The State of Emergency’, in *Global Anti-Terrorism Law and Policy*, p. 84.

³³ There is no reason, of course, why those persons cannot themselves be officials. They cannot be excused qua officials and their official actions would remain unlawful, but from the perspective of the criminal law they are charged as individuals and, as such, are entitled to claim the same range of excuses as anyone else; provided, as with any excuse, it applies to them personally – as to which, see below in the text.

be levied through a third party, as when T's threat is directed at D's child. In such cases, it seems entirely understandable for D to be moved by concern for his family into committing the wrong that T demands. Yet if D may claim an excuse, then perhaps the state may, analogously, succeed to an excuse when acting on behalf of those threatened by a predicted attack? If it would be excusable for D to μ , why can't the state μ in D's place?

I think there are two responses to this argument. First, the analogy to third-party threats does not refute the point that a rationale-based excuse like duress must apply personally to D. Duress is not vicarious: what counts is the effective pressure that the threat exerts *on* D. Thus, in the example, it is of central importance that the threat is to D's child. The excused father acts neither impersonally nor impartially, but because the threat directly engages his own, most cherished values. He intervenes not from sympathetic concern for the child's predicament, but out of personally experienced fear. Recognising this aspect of duress helps us to make sense of the common law restriction that the threat must be directed against either the defendant himself or someone close to him.³⁴ Each and every life is valuable and, as human life, valuable equally. Without more, a stranger cannot adjudicate between them. But we can quite understand, indeed hope, that a father does not think that way. A father who sacrifices another's interests to save the life of his child may be a wrongdoer. Yet in doing wrong he exhibits a very human quality, a quality of being a good father.³⁵

The first response, then, involves a claim about the manner in which duress is experienced. It implies that agents can only be excused personally. Vicarious motivation will not do. There is, however, a limitation to this response. While the same logic excludes vicarious excuses for other artificial actors, such as corporations, it does not exclude the attribution of an excuse in tandem with the *prima facie* offence under doctrines of

³⁴ *Hasan* [2005] UKHL 22, [2005] 2 AC 467. Make sense of, but not necessarily justify. One can imagine scenarios in which a person's concern for the welfare of others is sufficient, depending on the nature of threat, to lead that person into compliance even though the threat is against a stranger. (Cf. Horder, 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) 11 *Canadian Journal of Law and Jurisprudence* 143 at 163.) The exclusion of such cases would have to be justified, if at all, by reference to institutional concerns.

³⁵ The example illustrates a more general point: that even one who acts blamelessly may be damaged, morally speaking, by the position in which he finds himself. Similarly, a state threatened with terrorist attacks cannot hope to escape morally unscathed, no matter what its response.

identification.³⁶ There the logic is different: the corporation is imputed with a package comprising some designated (senior) individual's conduct and culpability. At least at international law, analogous doctrines of identification are required to recognise the state as an agent, and in principle such doctrines could also impute excuses. More generally, there seems no reason to exclude the possibility of excuses within any legal system where the state is itself a subject.³⁷

The second reply is, therefore, specific to domestic law. Besides being artificial, the state is a special type of actor. The relationship of a state to its citizens is nothing like that of father to children or indeed any form of inter-human relation, because the state is a purely instrumental creation without personal values. Moreover, in accordance with the state's claim to authority, that relationship is constituted by rules, including those rules which grant powers to the state and its officials. The requirement of lawfulness binds the state to act according to those rules. This is a central requirement of the rule of law. Part of the very point of being an official is impersonality. It is not open for the state or its officials to prefer the interests of one person to another, since the state is not entitled to be closer to one person than another. It is equidistant, impartial to all.

Yet, for all that, doubt may persist. Surely, one may ask, the state is entitled to be moved by the plight of its citizens? Consider, for example, the controversial case of Wolfgang Daschner, vice-president of Frankfurt am Main police. Daschner led investigations into the kidnap of 11-year-old Jakob von Metzler, son of a prominent banker. The kidnapper, Mangus Gaefgen, was arrested after collecting the ransom payment but refused to disclose Metzler's whereabouts despite lengthy questioning. Hoping to save the boy, Daschner eventually instructed that Gaefgen should be threatened with torture, at which point Gaefgen confessed that Metzler was already dead and revealed the location of his body. Daschner was subsequently found guilty of coercion. Yet the charge was a misdemeanour – more serious charges were not pressed – and the conviction suspended,³⁸

³⁶ As to which see Simester and Sullivan, *Criminal Law: Theory and Doctrine*, § 8.2(iii).

³⁷ Such as international law or, conceptually, inter-planetary law. I am grateful to Eleanor Wong for convincing me of this point.

³⁸ This may need explanation to common lawyers unfamiliar with the German penal system (and I am grateful to Antje du Bois-Pedain for her help with this). Although found guilty, Daschner was not sentenced but rather 'warned' that a fine of €10,800 would be imposed should he reoffend within one year. Under German law, the effect is that the finding of guilty does not count as a criminal conviction. This disposition of a criminal case is highly unusual and should be distinguished from a 'suspended sentence', in which execution of the sentence is merely held pending. A trial court can only dispose of a case with a 'warning' instead of punishment if (1) the court expects that the defendant will not reoffend; (2) special

reflecting the considerable support that his case attracted. It seems that many regarded Daschner as akin to Gross's moral hero, one who chose to disobey the law for the sake of a moral imperative.

Perhaps this is a borderline case. I do not deny that it has a complex moral pull. But it is a mistake to think the pull is *excusatory*. 'Moral heroes' are not excused. They are heroes because, despite the impediments, they do what is morally right.³⁹ If there is hesitation over the assessment of Daschner's case, it is because of uncertainty about whether his conduct was *justified*: morally speaking, might it have been permissible? Or did he act for an excluded reason, like so many – perhaps all – putative reasons for threatening or perpetrating torture?

I shall say something further about this last question in 12.4. For the moment, what counts is that an uncertain justification is not in itself a ground to find an excuse. Whether someone is justified in perpetrating a wrong is an all or nothing question. If, all things considered, there is sufficient reason to ϕ , one crosses the threshold into permissible action; otherwise, one remains outside, consigned to the world of acting badly. Determining that question may involve borderline judgements about the balance and eligibility of reasons,⁴⁰ but the conclusion is discrete: between the competing reasons, it is winner takes all. Unlike excuses, justification does not come in degrees. If justified, the actor needs no excuse; but if unjustified, whatever reasons there were in favour of ϕ ing are defeated and have nothing more to offer. Thus the possibility of justification supplies no direct foundation for excuse.⁴¹ The case for each must be built separately.⁴²

12.4

On the other hand, is torture ever justifiable? I take this question to be at the heart of the inquiry whether, morally speaking, torture is ever legalisable.

circumstances of the case exceptionally make the imposition of punishment unnecessary; and (3) non-imposition of punishment in the case does not undermine the rule of law.

³⁹ Especially, where the impediments make it permissible or, at least, excusable *not* to do so.

⁴⁰ This is one reason why, in determining whether an actor was justified, the law does not require her to weigh the reasons with 'jeweller's scales': *Reed v. Wastie* [1972] Crim LR 221 (DC).

⁴¹ This is not to deny that the *underlying* reasons in favour of an action can – whether or not defeated – be pertinent to an excuse, in so far as it is understandable why D treated those reasons as sufficient. By not requiring 'jeweller's scales' (*Reed v. Wastie, Ibid.*), the law neatly sidesteps having to consider an excuse of borderline moral error; instead piggybacking such cases on the relevant justification.

⁴² Indeed, in law, there is no reason why the two cannot overlap.

It is a central question, but not necessarily decisive, because there are also practical and institutional arguments to consider. For instance, there is a risk that officials might stretch the boundaries of legal torture, exploiting its selective permission to brutalise and abuse the powerless.⁴³ Moreover, torturing people in the name of the state may be thought to betray the very nature of law. As Jeremy Waldron puts it, law is not savage:⁴⁴ its rule may be mandatory, but not brute. At the core of any decent legal system is a commitment to respect the dignity of those it governs, and not to trample all over them – to treat them as reasoning human beings rather than drones. To license torture would violate that commitment, corrupting the entire legal system and bridging the divide between rule of law and rule by power.

These kinds of argument supply reasons for thinking that torture should be prohibited absolutely, without possibility of derogation. But they have been well made by others and I shall not pursue them here. Instead, my concern is with the question whether torture may sometimes be morally permissible and with the intersection of torture and justification. My remarks in this section are intended only to sketch the structural issues and not to enter the debate in detail. I want to highlight what I think is a mistaken approach and to suggest another direction for the debate.

The mistake is made when writers view the justification of torture through the lens of necessity and it is compounded when they apply a metric of lesser evils. Since torture is abhorrent, something pretty extreme is required to justify it and, in practice, such cases may be unlikely. But implicit in this way of thinking is that, in principle, it is just a matter of finding a sufficiently serious case. Unless evils are treated as infinite, the moral prohibition is not, indeed cannot be, absolute: ‘The use of torture is so profound a violation of a human right that almost nothing can redeem it – almost, because one can not rule out a case in which the lives of

⁴³ See, e.g. O. Gross, ‘Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience’ (2004) 88 *Minnesota Law Review* 1481, § I; S.F. Kreimer, ‘Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror’ (2003) 6 *University of Pennsylvania Journal of Constitutional Law* 278 at 322.

⁴⁴ J. Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681 at 1726–7: ‘People may fear and be deterred by legal sanctions; they may dread lawsuits; they may even on occasion be forced by legal means or legally empowered officials to do things or go places against their will. But even when this happens, they will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated.’

many innocent persons will surely be saved by its use against a single person.⁴⁵

The difficulty with this analysis is that, provided the stakes are high enough, potentially anything goes.⁴⁶ For those who advocate official torture, an extreme case can be generated as a kind of high water mark. Once a single case is accepted on the weight of numbers, algebra can take over. Indeed, there is no principled ground to limit official torture to the infliction of harmless but unbearable pain.⁴⁷ Why not mutilate the suspect – or the suspect’s family – to get her to talk? (If that’s worse, its justification merely requires that more lives depend on it.) The conclusion of this approach is that, at the very point when its bite is most needed, the ‘right’ not to be tortured loses its teeth. It becomes a right not to be tortured *until we really need to*. Anyone who subscribes to the simple view of necessity as a ‘lesser evils’ defence necessarily buys into this analysis. The game is lost: not so much because they have underestimated the evil of torture, but because they have misunderstood its justification.

The better view is that torture can never be justified by necessity. But it does not follow that torture can never be justified.

An analogy may be helpful to the more familiar context of homicide. In *Dudley and Stephens* it was said that, though their lives were at stake, three shipwrecked mariners were not entitled to kill and eat the cabin boy. Rightly, necessity did not justify his murder. But perhaps we can generate a high water mark? Would it make a difference if a hundred or a thousand lives depended on the homicide? No. Dudley had no unexcluded reason in the circumstances to kill Parker, because the need to save his life or the lives of the others was incapable of generating one. Multiply the numbers and you still get zero. So it is with torture. For a parallel example, imagine the state is confronted with an ultimatum. A credible threat is received from terrorists that, unless V – a randomly selected, innocent person who happens to be of a different religion – is tortured publicly, the terrorists

⁴⁵ S.H. Kadish, ‘Torture, the State and the Individual’ (1989) 23 *Israel Law Review* 345 at 346. In a footnote, Kadish seeks to safeguard his position by suggesting that the imbalance in the weighting of evils must be ‘extremely great’.

⁴⁶ This point is made by Kreimer, above n. 43 at 306.

⁴⁷ Alan Dershowitz advocates judicial torture warrants with such a restriction: *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), ch. 4. He does, however, recognise the ad hoc nature of the limitation at p. 146. Dershowitz’s argument rests on values of transparency and accountability, given his prediction that officials will practise torture even if prohibited. I cannot address that argument here.

will detonate a bomb and thereby kill a thousand people. On these facts, it seems to me that the state is not morally entitled to torture V.⁴⁸ The threat cannot justify torture because the putative reason it generates is excluded.

Yet that leaves a puzzle. If it makes no difference when excluded reasons are multiplied, why do some cases seem more difficult, more borderline, than others? An excluded-reasons analysis seemingly admits of no middle ground and therefore of no hard cases. And if there are genuinely hard cases for the justification of torture, that would seem a reason for doubting the validity of an excluded-reasons analysis.

Part of the explanation is that the question, whether a particular reason for ϕ ing is excluded, may itself be borderline. Once a given reason is excluded, multiplying the numbers makes no difference; but are we always convinced of its exclusion? That depends, in part, on how important the underlying interests are and on why we value them. In the case of torture, our interests as human beings in dignity and integrity are profound and it seems to me that they exclude general reasons of necessity pretty clearly. Others may think the matter a closer call, which would help to explain why they perceive at least some cases as hard. But in my view, the truly borderline cases, where the putative justification is perhaps not excluded, lie elsewhere. Their appeal arises because they go beyond a claim of necessity.

Consider again the case of Wolfgang Daschner. Even though only one life is at stake, it seems a more plausible case for justification than many multi-person hypotheticals. Daschner's case, like some of the standard terrorist examples, involves a key feature that differentiates them from the Ultimatum case. They involve torturing the would-be wrongdoers themselves – those responsible for planting the bomb, hijacking the plane, abducting the child, etc. – in order to forestall their wrong.

This additional ingredient starts to reorient the justification away from necessity and toward self-defence. We can see this, too, in the analogy to homicide. *Dudley v. Stephens* illustrates the exclusionary rule that, just as the surgeon may not harvest a patient's kidneys, one may not take V's life in order to preserve the life of others. Yet, notwithstanding the interdiction, one may do that very thing when acting in self-defence. *One may do so when V is the source of the threat.* This is a crucial difference between self-defence and necessity, the additional feature that prevents self-defence

⁴⁸ This conclusion holds, it seems to me, without the need to invoke whatever reasons may exist not to bow to terrorist threats generally.

from collapsing into the general, residual justification of necessity. In self-defence, one responds to a threat from V by attacking V, the source of that threat.⁴⁹ In necessity, one responds to a threat by attacking *someone else*.

The possibility of self-defence shows that even fundamental rights can have limits. V's right to life does not exclude self-protection as a reason for action, even lethal action, on behalf of those whose lives V threatens. But the response must be addressed to V. Otherwise, one is on the wrong side of Thomas Nagel's distinction between fighting 'clean' and fighting 'dirty': 'To fight dirty is to direct one's hostility or aggression not at its proper object, but at a peripheral target which may be more vulnerable, and through which the proper object can be attacked indirectly.'⁵⁰ V is 'the proper target' because V is responsible for the threat. One cannot target a peripheral victim, T, because T's right to life excludes that move. Vis-à-vis T, the justification is one of necessity and excluded.⁵¹

Although I cannot pursue the possibility here, perhaps that conclusion can be generalised for all fundamental rights. It may be that directly intended violations of a fundamental right can *never* be justified; and this is part of what it means for a right to be fundamental. (If that is correct, the corollary is that necessity is always unavailable in such cases, because necessity is the residual defence of a justified wrong.) But fundamental does not mean exhaustive. Sometimes the underlying interest is not absolutely protected by the right, so that harm to the interest is not always a wrong. Unlike necessity, the core justifications (like self-defence, prevention of crime, lawful arrest and punishment) operate to justify *harmful* actions by showing that the action was not a wrong at all. They deny that V's right was breached.⁵²

For the action not to be a wrong, however, the harm must be inflicted in response to an event *for which V is responsible*. This is why it is objectionable, for instance, to punish (or torture) innocent persons, such as

⁴⁹ I assume here that the threat is an unjust or unjustified one. For lengthy exploration of this type of condition, see S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994).

⁵⁰ T. Nagel, 'War and Massacre' (1972) 1 *Philosophy and Public Affairs* 123 at 134. Nagel uses the example (at 138) of distracting and thereby capturing, an enemy throwing hand grenades at you by machine-gunning his nearby wife and children.

⁵¹ I think this point helps significantly in the explanation of Jonathan Bennett's Terror Bomber example: 'Morality and Consequences' in McMurrin (ed.), *The Tanner Lectures on Human Values* (Cambridge: Cambridge University Press, 1980), pp. 45 and 95.

⁵² For the avoidance of doubt, this is not a claim that any of V's rights are forfeited. V would be wronged, for instance, when attacked by someone unaware of the threat V posed. See, e.g. Simester, above n. 27.

the family members of a defector or a suicide bomber, in order to deter wrongdoing. It is punishing ‘dirty’. Conversely, it is part of the appeal of Wolfgang Daschner’s case that the policeman’s threat to torture Gaefgen is made in order to prevent wrongdoing *by Gaefgen himself*; to uphold the child’s right to life against the unjust threat that Gaefgen has posed.

Even armed with these distinctions, however, two kinds of difficulty remain. Between them, they contrive to leave even the more plausible cases for torture on a moral borderline. The first is a problem of collective responsibility. Typically, the kinds of cases that motivate Alan Dershowitz and other proponents of official torture differ slightly from Daschner’s.⁵³ Officials have, say, captured one member (V) of a terrorist group while the remaining members, having eluded arrest, are now embarked on the group’s mission to destroy an occupied building. Is it permissible for the officials to use a degree of torture in order to identify and then evacuate the target? The putative justification looks somewhat like self-defence, in that the officials are seeking to prevent a wrong; but its application to V requires us to broaden the scope of V’s responsibility, extending it beyond threats that V has personally authored. V is certainly not an innocent third party. Doubtless he is a complicitous wrongdoer and a co-conspirator. But he does not seem to be doing the very wrong that the officials seek to prevent.

Collective responsibility is a natural source of borderline cases. However, it is not specific to torture. A similar issue arises in other contexts, such as homicide. For instance, any proposal that the bombing of Hiroshima was a justified act of self-defence involves, implicitly, a claim that the citizens of that city were responsible for the aggressive actions of their Government. Whether that claim is plausible (and it has been rejected in international law), the broadening of responsibility doctrines beyond direct authorship is clearly problematic for justification in general.

Fortunately, this complex issue is not raised, at least, by Herr Daschner. He has in his hands the very perpetrator.⁵⁴ Why, then, do we hesitate even over this case? The reason, I think, is uncertainty whether there is *any* non-excluded reason for perpetrating torture, even self-defence. Perhaps torture is unjustifiable, *tout court*. Perhaps, at the last, the analogy between homicide and torture runs out? While self-defence may not be an excluded reason for homicide, perhaps it is an excluded reason for torture?

⁵³ See, e.g. Alan Dershowitz, above n. 47, pp. 143–4.

⁵⁴ I leave aside the obvious difficulty that one might be mistaken about a suspect’s identity or responsibility for the threat or that the information gained may not be reliable.

I cannot resolve these questions here. Again, my remarks are directed primarily at the structure of the debate. Homicide and torture are certainly disanalogous in some respects. Homicide is a harm-based wrong – what criminal lawyers sometimes call a result crime. At root, homicide is wrong because it involves bringing about the deaths of other people and not because of the manner in which it is done. Torture, however, is a conduct-wrong, a wrong independently of any harmful consequences it may generate. Even supposing that it is possible to inflict non-injurious torture,⁵⁵ doing so is not just a wrong; it is *the very* wrong of torture, notwithstanding that no harm may result. It is a wrong primarily because of how the torturer treats other people.

Torture dehumanises. It is just about as radical an attack on human dignity as can be mounted.⁵⁶ By contrast, it seems to me possible to *harm* another person without violating their right to dignity. This is part of the point of requiring that self-defence be directed at the source of the threat: one thereby acknowledges the victim as a responsible, autonomous human being. When D takes action against V in justified self-defence, D responds to and addresses V's conduct. D's action recognises V as the author of a wrong⁵⁷ and thus it treats V with the respect due to an autonomous agent in V's position. In this sense, one person can harm another person respectfully, without denying their shared humanity. But that is not what torture does. Quite the opposite. Whatever the motivation, torture aims to degrade. Its purpose is to reduce V to something less than fully human, to 'break' V into a person who cannot make rational or reflective choices. This is, I think, what makes torture problematic even in hypotheticals where the victim is the very source of the threat. In a sense, its aim is not to restrict the exercise of agency but to attack agency itself. Justifications like

⁵⁵ Cf. the kind of torture advocated by Alan Dershowitz's hypothetical FBI agent, involving the infliction of pain *simpliciter* without risk to health: above n. 47, p. 144. Even if non-injurious torture was possible, however, there remains the risk of psychological harm.

⁵⁶ One might think that homicide also dehumanises its victims and there is a literal sense in which that is true. But it is a different sense. The value attacked in homicide – life – is a *precondition* of those values, such as human dignity, which are bound up with how that life is lived. It does not incorporate them. Hence to attack the one is not necessarily to attack the latter. This is why we can make sense of some arguments for voluntary euthanasia, e.g. that there are things worse than death, and that there is a right to 'death with dignity'. Such claims may be controversial, but they do not seem incoherent.

⁵⁷ For this reason, self-defence against the insane may seem a borderline case, in so far as insane aggressors are not morally responsible for their actions. The point here, though, is that in such cases one still *treats* the victim as a responsible agent, i.e. respectfully and without violating the victim's claim to human dignity.

self-defence operate as a kind of mediator in human interaction. They enable us to negotiate the mutual enterprise of human coexistence, an enterprise in which V participates. They help construct the dialogue of conflict and reconciliation, the give and take of human interaction. But torturing someone does not seem to fit within any *shared* human enterprise. There is no social dialogue in torture, no give and take. It thrusts the victim outside the realm of human experience, outside the human community. As such, it is a wrong seemingly beyond the characteristic range of self-defence. Even the strongest cases seem irredeemably borderline.

12.5

But what of the argument that, as Dyzenhaus suggests, the rule of law may sometimes be sacrificed for the sake of the rule of law?⁵⁸ Or, more generally, that it may be legitimate to suspend a constitution in order to preserve the constitutional order?⁵⁹ Surely we can breach the rule of law to save it? And if the state's very existence is under threat, do we really have to worry about the niceties of constitutional rights? Reasoning of this sort suggests the possibility of content-neutral justifications: *any* action is permissible, provided it is taken for the sake of the constitutional order. This is the logic of the black hole model.

It seems to me that this move is too coarse-grained. Justification is always a bilateral relation, between action and need. The emergency powers debate is not a single-faceted dispute about the extent of the emergency: it is a debate about permitting wrongs. Whether emergency action is legitimate thus depends both on the content of the action and on the nature of the need. That does not mean a black hole is unjustified. But it does mean that its content calls, specifically, for justification. Neither can one appeal to our interest in the rule of law to justify any violation of the rule of law. It depends on *which* rule-of-law violation is being perpetrated and which rule-of-law interest is thereby advanced. Consequently, the association needs to be unpicked between derogation from a fundamental right, such as that interdicting torture and violation of the rule of law. The debate requires greater specificity.

⁵⁸ Dyzenhaus, Chapter 2, p. 000: 'In a democracy, the rule of law should only be sacrificed for the sake of the rule of law and that condition imposes its own constraints on the sacrifice.'

⁵⁹ See, e.g. C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), p. 298.

It may be helpful here to distinguish delegation from remaindering. When powers are *delegated* to officials, the officials are given a discretion to change the normative position of others. But the exercise of that discretion is not unfettered. The delegation is subject to authoritative guidance and may be reviewed in terms of that guidance. (Hence the CD model contemplated by Dyzenhaus involves a form of delegation.) By contrast, when power is *remaindered*, the officials receive an unfettered discretion. Within the scope of the remaindered power, they can do what they like. This time, the law really has run out. It has made its way to the edge of a black hole.

The objection to black holes is often framed in terms of the rule of law, which is rightly thought to be threatened when powers to set the legal rights, duties and liberties of individuals are remaindered to officials and not regulated by law. But even this objection needs to be refined, because not every aspect of the rule of law need be infringed. For example, bearing in mind that the perimeters of the 'black hole' must themselves be defined by the legal system, suppose that those boundary conditions are clearly specified in advance and require some defined conduct by individuals before they are deemed to have entered its domain. Then there would at least be prospectivity: individuals have an opportunity to avoid falling within its scope and cannot complain about lack of notice when they deliberately jump.⁶⁰

More pertinently, black holes are significantly different from indefinite detention, another candidate for rule-of-law objections. The legal situation in a black hole is in one sense clearly delineated: the official is legally permitted to do things that otherwise would be unlawful. Inside a black hole, *the law* has determined that its denizens have no legal rights. Further, the conditions of entry into and exit from a black hole may be clearly specified by law and not at the discretion of the officials. The objection is to the content of the regime, not the perimeter. By contrast, the objection to indefinite detention lies at the perimeter.

Indefinite detention need not deprive an individual of all rights, but only of freedom. Torture and other mistreatment can remain illegal. Moreover, the quarantine of infectious citizens and detention of enemy soldiers seems, on occasion, to be justified. The real problem, then, is not the content of the applicable legal regime but the specification of its boundaries.

⁶⁰ A further worry would arise here if the criteria were linked not to the particular conduct of a person caught within the black hole, but to conduct by others that triggers a state of emergency.

A permissible detention has originating and terminating conditions (e.g. based on the ongoing health risk) that are intrinsically bound to the reasons why that detention is justified and which are not at the discretion of the officials who administer it. By contrast, where the terminating conditions of indefinite detention are at the unregulated discretion of officials, such an institution is unjustified (because its rationale does not shape its boundaries) and may be unlegalisable.⁶¹ Yet this particular concern need not apply to black holes. Neither does it affect official torture warrants, provided they are closely and carefully regulated. All these things are problematic. But not in the same way.

One should certainly object to black holes. The core of the objection needs no ‘rule-of-law’ label. It is simple and direct. Suppose that D’s φ ing would violate a fundamental moral right held by V. If it would be unjustified to φ , it follows that D should not φ . Moreover, *the State should not permit D to φ* . When it does, the state becomes complicit in D’s wrong. If it is wrong to torture people, it is wrong to empower people to torture.

Let us call this the permission objection. It is general in nature and applies to any legislative attempt to derogate from fundamental rights. One might think that it can also be generalised – collapsed – into a legality objection, that officials are permitted to act untrammelled, unregulated by law: that law has abdicated its regulatory role and arbitrary power reigns. But that would be a conflation, not a generalisation. The objections are different. To see this, consider a narrower, more tightly focused scenario, in which there is a partial ‘black hole’. Suppose that qualifying inmates are relocated to a defined region, in which they are subject to rules specifying that they may be freely assaulted or tortured by designated officials, provided they do not suffer grievous bodily harm. The region is otherwise governed by ordinary law – they may not be raped, killed or subjected to any other generally proscribed wrong. Within this region the law has not abandoned the oversight of state officials. Yet the regime is profoundly wrong, because its inmates lack certain fundamental rights. It contravenes the permission objection.

A full-scale black hole precisely comprises the comprehensive set of partial black holes. It does not so much say ‘anything goes’, as ‘*everything* goes’. Thought of in this way, it is not clear that the legality objection adds much of importance to the collection of permission objections that a black

⁶¹ As Dyzenhaus suggests: Chapter 2, n. 39.

hole generates. It seems secondary in nature. This is not to say that the ability to plan a life is unimportant, even in a regime where fundamental wrongs are permitted. But it is not the core value. Moreover, it is not entirely violated. Even a black hole has legal boundaries which the official must observe. Provided those boundaries are clearly articulated, one can arrange not to become an inmate.

Nonetheless, it seems to me that there is something special about black holes or at least black holes of this sort. They are, I think, inconsistent with democracy. Among the fundamental requirements of a democratic legal system, apart from its public character, is the principle that those it governs have the opportunity to participate in the law-making process as equals.⁶² The rules and the rule-making process are the same for all.

I will outline rather than defend the point here. Apart from certain categorical exceptions, such as children,⁶³ the members of a modern democracy are – and have a right to be – treated as having equal standing in the community. We no longer segregate citizens into distinct legal and political classes (women, serfs, slaves, etc.), but recognise that everyone is equal before the law.⁶⁴ This means both that each person has an equal right to participate in the democratic process and, conversely, that the law does not discriminate between individuals. Individuals thereby have a shared responsibility for the law: they are both its authors, through representatives answerable to them, and the joint subjects of its governance. In turn, laws are and should be, rules of general application, that govern everyone – or, as a minimum, everyone falling within the relevant class affected by the rationale behind the rule. It is, in short, a constitutional principle of any democracy that everyone is equal before the law. A black hole utterly violates this principle. Those within its grasp have a different status from the rest of us.

⁶² Formulated in this way, the democracy objection applies only to nation's citizens and not to aliens, who do not participate in the collective activity of self-government. Nonetheless, the core objection stated in the previous paragraph would remain applicable.

⁶³ Even then, the distinction is drawn contextually and not for all purposes; and members of such categories are to be treated even-handedly within the category.

⁶⁴ This can, of course, itself be analysed as an aspect of the rule of law. See, e.g. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959), p. 193.