Justifying the Distinction between Justifications and Power

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Abstract
In Anglo-American legal systems criminal law justifications apply to both public officials exercising legal power (as when a police officer arrests a suspect) and, in exceptional circumstances (such as self-defense) to individuals infringing interests protected by the criminal law. This paper relies on Hohfeld's distinction between "Powers" and "Claim Rights" and argues that there are two kinds of criminal law justifications. Public officials who arrest a suspect or who sentence a defendant to imprisonment exercise their power to change the legal status of the suspect's or the defendant's right to free movement. By contrast, an individual who kills an aggressor to defend herself or destroys property to save life from an imminent danger (in the case of necessity) has no power to change the status of the aggressor’s right to life or to acquire ownership over the property; the individual rather infringes the (claim) right to life or the (claim) right to ownership over property, and this infringement is justified.

The paper contrasts official power with justifications granted to individuals; it proceeds to develop the contrast between power granted to both officials and individuals, on the one hand, and criminal law justifications applied to both individuals and officials in their official capacity, on the other.

The distinction proposed in the paper between the exercise of power on the one hand and "real" criminal law justifications on the other is useful in dealing with "emergencies" when constitutional constraints make it impossible to grant an official the power to change the legal status of a basic right. In some of these situations a criminal law justification might justify the infringement of such a right. The paper demonstrates the importance of the distinction by analyzing the ruling of the German Constitutional Court concerning the shooting down of a hijacked airplane in circumstances similar to those of September 11.

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Introduction

In Anglo-American legal systems criminal law justifications apply to both public officials exercising legal power (as when a police officer arrests a suspect) and under exceptional circumstances (in self-defense) to individuals infringing legally protected interests. In the common-law, criminal law justifications were rooted in the State's power to enforce justice. As part of the power to prevent crimes, individuals were authorized to use force to defend themselves when no officials were there to exercise their own power. The spirit of the traditional approach of the common-law has recently been revived by Malcolm Thorburn who argues that "all justifications involve the exercise of a legal power" (emphasis added); "legal power" in its "technical sense" set out by Wesley Hohfeld.

This paper argues for an opposite approach; it distinguishes between two kinds of criminal law justifications – those based on the exercise of legal power and those which justify the infringement of interests protected under the criminal law. Hohfeld's distinction between "Powers" and "Claim Rights" helps explain the distinction. Public officials who arrest a suspect or who sentence a defendant to imprisonment or who guard the convict while in prison, exercise their power to change the status of the legal rights of the suspect, defendant and convict. As long as the convict or the suspect is in prison or under arrest, she does not possess the right to free movement. By contrast, an individual who kills an aggressor to defend herself or who destroys property to save a life from an imminent danger (necessity) cannot affect the status of the aggressor's right to life or to acquire ownership over property. That individual infringes the (claim) right to life or the (claim) right to ownership over property, though the infringement is justified.

The First Part elaborates on the distinction between these two kinds of justifications. The main argument is that the justifications based on the exercise of legal power are not "real" criminal law justifications; the reasonable exercise of power is not within the scope of criminal law. The paper analyzes self-defense, defense of others and necessity (lesser evils) as examples of "real"

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4 Id. at 1073 n.1.
5 WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTION AS APPLIED IN JUDICIAL REASONING 50-60 (Walter Wheeler Cook ed., 1919).
criminal law justifications; and, incidentally, discusses other criminal law justifications, mainly consent. First, the paper contrasts official power with justifications granted to individuals. Then, the paper develops the contrast between power granted to both officials and individuals, on the one hand, and criminal law justifications applied to both individuals and officials in their official capacity, on the other.

The Second Part focuses on the importance of distinguishing between the exercise of power and “real” criminal law justifications. This Part elaborates on the implications of granting criminal law justifications and argues that most of these implications do not apply to the exercise of legal power.

The Third Part demonstrates the practical implications of distinguishing between the exercise of power and criminal law justifications. It analyzes the ruling of the German Constitutional Court in the case of shooting down a hijacked airplane in circumstances similar to those of September 11.6 The Court declared unconstitutional a statute authorizing the Minister of Defense to order the shooting down of a hijacked airplane along with its passengers and crew in order to stop it from crashing into a crowded place. The German Court explicitly limited its decision to the constitutionality of the statute; it did not take a stand on how the shooting down of the plane in such circumstances should be assessed by the criminal law.

I. The Distinction between the Exercise of Power and Criminal Law Justifications

Does a judge who exercises her official power and grants search or arrest warrants, or a police officer who carries out the warrants and either searches the house or arrests the suspect, commit a prima facie criminal offense? Yes, would be the answer in Anglo-American legal systems: "they are justified in doing what would otherwise constitute" a criminal offense.7 That being the case, there is no difference between the criminal law justifications granted to officials in executing their tasks8 and justifications granted to an individual

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6 BVerfGE 115, 118 [hereinafter The German Court Ruling]. An official English translation of the judgment is available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html.
7 Thorburn, supra note 3, at 1104.
8 See, e.g., MODEL PENAL CODE art. 3 (General Principles of Justification) (Official Draft and Explanatory Notes 1985), which includes the justification in "execution of public duty", defined in § 3.03 as follows:

(1) … conduct is justifiable when it is required or authorized by:
(a) the law defining the duties or functions of public officers or the assistance to be rendered to such officer in the performance of his duties …
who kills an aggressor to defend herself (self-defense), or destroys another's property to save her life from an imminent danger (necessity). Yet, there are some significant differences between the ways in which we think about the justifications granted to officials in executing their tasks, and those of self-defense or necessity granted to individuals.

The justifications granted to officials enable them "to perform their most basic functions";\(^9\) whereas individuals rely on justifications in extraordinary situations, usually where there is an imminent danger to their interests. We expect that an individual who has sacrificed another's property to save her own life (necessity) or who has killed an aggressor to save her own life (self-defense) will regret the loss of property or the loss of human life.\(^10\) The law may even require her to compensate the property owner or the aggressor's heirs, at least in cases where the aggressor was innocent.\(^11\) Do the same expectations apply to officials while reasonably performing their routine tasks? The justifications of self-defense and necessity are defined, albeit broadly, within criminal codes. Official powers and the way they should be exercised are defined in administrative/constitutional law: "[c]riminal law doctrine does not usually make explicit the interests that public officials must take into consideration when exercising [their] legal powers."\(^12\)

I will argue below that the above differences derive from a substantial difference between the justifications granted to officials while exercising their power and the justifications granted to individuals who kill in self-defense (or to defend others) or who sacrifice property to save life (necessity).

Legal Power
Powers - for example, the power to arrest a suspect - restrict the basic rights of individuals. As such, the grant of official power is subject to constitutional constraints. The power must be granted explicitly by the legislator (the rule of law) for a proper purpose and must be no greater than is necessary (proportionality). The exercise of the power must permit due process procedures. Once the power is constitutional, its exercise changes the status of the individual's right; the right ceases to be legally protected. A judge who

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See also I PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 24(a), at 84-85 [hereinafter ROBINSON, CRIMINAL LAW]. Note that when the term "unlawful" appears within the definition of the offense, another answer might be given, see infra text accompanying note 33.

\(^9\) Thorburn, supra note 3, at 1104.

\(^10\) "Regret" in this context "involves a wish that things had been otherwise, for instance, that one had not had to act as one did … it does not necessarily involve the wish, all things taken together, that one had acted otherwise" (BERNARD WILLIAMS, MORAL LUCK 31 (1981)). For the claim that in situations like self-defense and necessity an "agent-regret" is expected see MARTHA C. NUSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 43 (rev. ed. 2001); JOHN GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 82, 145-46 (2007). But see the response to that view by Mitchell Berman, Justification and Excuse, Law and Morality, 53 DUKE L.J. 1, 9 n.11 (2003).

\(^11\) See discussion infra Part II.

\(^12\) Thorburn, supra note 3, at 1105.
convicts a defendant and sentences her to imprisonment, changes the status of her right to free movement. The convict does not have a claim right that the judge should not put her in prison; and as long as the convict is in prison she does not possess the legal right to freedom of movement (within the prison, a convict's right to move freely is protected to the extent that the prison's rules allow it). Even when a police officer arrests a suspect on reasonable grounds, the police officer exercises her power to change the status of the suspect's right to free movement temporarily. The suspect's only claim right is to challenge the arrest before a judge within a specified period. In order to extend that period a judge must exercise the power to cancel the legal protection of the suspect's right to freedom of movement.

Officials who exercise constitutional powers reasonably should not be required to rely on criminal law justifications. Only when such powers are abused should they become a matter for the criminal law. The nature of criminal law justifications explains why.

*Criminal Law Justifications*

Scholars disagree over the question whether criminal law justifications imply conduct that was morally right, conduct that was permissible, or conduct that was non-criminal, regardless of whether it was morally justified or not. Some of those who identify criminal law justifications with morally justified conduct debate the moral theory underlying justifications. Should criminal law justifications be based on utilitarianism - justifying conduct that prevents more harm than it causes, or on practical reasoning - requiring that the reasons for

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14 The Federal Rules of Criminal Procedure states that "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge" (Fed. R. Crim. P. 5(a)). In Riverside County, California v. McLaughlin, 500 U.S. 44 (1991), Justice Sandra Day O'Connor (writing for the majority) limited the "necessary delay" to 48 hours (id. at 63). Some States in the United States shorten the period for bringing an arrested suspect before a magistrate judge (e.g. 12 hours in New-Jersey). See also ROBERT M. REGOLI & JOHN D. HEWITT, EXPLORING CRIMINAL JUSTICE 253-54 (2007).


performing the justified conduct override the reasons for not performing it?\textsuperscript{19} An additional issue is whether a unitary theory can explain all criminal law justifications.\textsuperscript{20}

However, despite all these differences, there is a broad consensus that criminal law justifications negate criminal wrongdoing.\textsuperscript{21} The assumption is that the breach of a criminal prohibition constitutes a prima facie criminal wrong which expresses a "negative evaluation … This prima facie evaluation is subject to rebuttal in cases of justification".\textsuperscript{22} This assumption requires distinguishing between conduct that, while breaching the definition of the offense, is justifiable, and conduct that falls outside the definition of criminal offense. The first is a prima facie criminal wrong and requires justification; the second is acceptable conduct which requires no justification. Such a distinction is reflected in the German structure of criminal offenses, built on three hierarchical tiers: the definition of the offense, wrongdoing negated by justifications and accountability (culpability) negated by excuses.\textsuperscript{23} Interestingly, the distinction between justifications and excuses is better known than the distinction between the definition of the offense and justifications.\textsuperscript{24}

The basic idea behind the distinction between Definition and justifications is that in our social and moral life we sense a difference between conduct that is routine and accepted and conduct that may be right, but it is rendered right only by providing good reasons. It is the difference between punching a ball and punching someone in the nose. There is no need to justify punching a ball …. Punching a person is different; this is conduct that is typically suspect. Yet in some cases it might be rendered

\textit{Accessories, 80 J. CRIM. L. & CRIMINOLOGY 491, 504-17 (1989). See also} Thorburn, supra note 3, at 1086-89, and the references cited infra note 19.

\textsuperscript{19} Fletcher, \textit{The Right Deed, supra note 18; GARDNER, supra note 10, at 92-120; DUFF, supra note 16, at 277-84.}


\textsuperscript{22} Fletcher, \textit{Right and Reasonable, supra note 21, at 960.}


\textsuperscript{24} The distinction between the offense definition and justifications is discussed by Fletcher, \textit{The Right Deed, supra note 18, at 308-10; GARDNER, supra note 10, at 141-53; DUFF, supra note 16, at 216-28; Kenneth Campbell, \textit{Offence and Defence, in CRIMINAL LAW AND JUSTICE: ESSAYS FROM THE W.G. HART WORKSHOP, 1986, 73, 73-86 (I.H. Dennis ed., 1987).}
proper and acceptable - say by self-defense, consent to a boxing match …. It certainly makes sense to ask someone whether he has a good reason for punching a neighbor in the nose. The good reason might be his justification.25

My argument takes the distinction between the definition of the offense and justifications one step further and suggests that the exercise of official power does not breach the offense definition; the exercise of official power falls outside the definition of the offense and needs no criminal law justification.

**Breach of vs. an Exception to the Offense Definition**

To clarify the distinction between the exercise of legal power (which remains outside criminal law’s scope) and the breach of the definition of the offense (which constitutes a prima facie criminal wrong requiring justification) I rely on Judith Thomson’s26 distinction between infringement of a right and violation of a right. According to Thomson, "there are cases in which a right may be infringed without being violated – i.e., cases in which one does a thing another has a right he not do, and yet in which one does not violate a right".27 Thomson’s example is self-defense. She rejects the claim that by virtue of the unlawful attack, the aggressor’s right to life has either been forfeited28 or has ceased to exist.29 Thomson concludes that despite the attack, the aggressor has a right not to be killed. Therefore, by killing an aggressor in order to defend one's life, the defender infringes the right of the aggressor not to be killed. However, she does not violate the aggressor's right because her right to defend herself against an unlawful aggression overrides the aggressor's right not to be killed.30 Within a legal system, Thomson's analysis means that the self-defender who kills the aggressor breaches the definition of murder (or manslaughter) protecting the right to life and commits a prima facie criminal wrong. The self-defender must rely on the criminal law justification of self-defense to justify the wrongdoing.

27 Id. at 41.
29 Thomson, supra note 26, at 36-37.
30 Id. at 42-43.
Unlike the aggressor in Thomson's example, a convict sentenced to imprisonment and a suspect arrested on reasonable grounds do not have a claim right that the judge or the police officer not imprison or arrest them. As long as the convict is in prison or the suspect is under arrest the law does not protect their right to free movement. Therefore, a legal system in which a judge imprisoning a convict or a police-officer arresting a suspect are held to have breached the definition of the offense protecting the right to free movement and to have committed a prima facie criminal wrong (which it is up to criminal law justifications to justify), is incoherent. To resolve this incoherence one would have to distinguish between the justification of a breach of an offense definition and an exception to the definition of the offense.\footnote{See GARDNER, supra note 10, at 152. Scholars debate whether justifications themselves provide an exception to the prohibitory norm. See FLETCHER, RETHINKING supra note 2, at 561 for the view that justifications provide an exception, and NUSSBAUM, supra note 10, at 32; Thomson, supra note 26, at 37-41 (while using the term "specification" rather than "exception") in opposition. In another context Gardner argues that "a justification defence in criminal law falls somewhere between the case of an ordinary justification and an exception to the norm. It is like an ordinary justification in that there is … still something to regret in the fact that one commits the offence; the violation is not just nominal. On the other hand, a justification defence in criminal law is like an exception to the norm in that the mandatory force of the norm is, strictly speaking, in abeyance where the defence applies." (GARDNER, supra note 10, at 148).} Granting a legal power to change the status of an individual's right should function as an exception to the definition of the offense and not as a justification of the breach of the offense definition.\footnote{Compare my distinction and that suggested by SUZANNE UNIACKE (supra note 28) between "weaker and stronger justifications" (id. at 26-29). Weaker justification "arises when an act is normally wrong because (say) it infringes someone else's right, is chosen as the lesser evil" (id. at 26). Stronger justification "invokes a positive right on the part of the agent to act as he or she does, so that someone whose interests are damaged by the act is not thereby wronged." (id. at 27). According to Uniacke, self-defence is a stronger justification. It "is a positive right. The use of lethal force in genuine self-defence against unjust aggression is not a justified infringement of the rule 'Killing is wrong'; rather it is exception to that rule" (id. at 29-30; emphasis added). That self-defence is a positive right which creates an exception to the rule must – according to Uniacke – be based on either the forfeiture or the specification of the aggressor's right to life (id. at 194-230). The right to life "ceases when we become an unjust immediate threat to the life or proportionate interests of another" (id. at 229). In this paper's terms, Uniacke's analysis means that "necessity" (lesser evil) functions as a real criminal law justification; self-defence functions as a power cancelling the legal protection of the aggressor's right to life. In contrast to Uniacke, my view assumes that aggressors do not forfeit their right to life, see supra note 28.} To put it differently, there is a parallel between defining criminal offenses and granting legal powers. Both restrict rights; constitutional considerations should justify both. And when constitutionally justified, the reasonable exercise of the power should remain parallel to the criminal law rather than subject to it.

"Unlawful"
The judge and the police officer discussed above might not be treated as breaching the definition of a criminal offense and committing a prima facie criminal wrong. The reason has to do with the specific definition of the relevant offense – false imprisonment - which requires that the imprisonment be
"unlawful". Clearly, when the judge or police office exercise their power to enforce justice, the imprisonment is lawful and the definition of the offense does not apply to lawful imprisonment. However, not all offenses include terms like "unlawful" in their definition, for example murder. Most definitions of murder do not explicitly require that the killing of a human being be "unlawful". Nonetheless, in legal systems in which the death penalty is constitutional, a judge who imposes a death penalty in conformity with the law and with the requirements of due process, as well as the executioner, should not be treated legally as "killers" who have committed a prima facie criminal wrong. Those who oppose the death penalty might treat the judge as a killer and the execution as a moral wrong. But a consistent legal system cannot coherently grant power to cancel the legal protection of the right to life from criminals sentenced to death and yet treat the judge who exercises that power and the executioner as committing a prima facie criminal wrong. Note that the cancellation of the legal protection of the right to life is limited to executing a convict properly sentenced to death. The legal system continues to protect the life of convicts on death row; intentionally killing a convict awaiting her execution would still constitute murder.

For death penalty cases, unlike unlawful imprisonment cases, we need a legal tool to adjust the power to take a convict's life with the criminal law so that execution will not fall under murder. Positive law adopts the notion of justification in the "execution of a public duty". However, the power to impose the death penalty and execution of that power are not significantly different from the power to sentence a convict to prison and the power to hold him in prison. In both cases, the reasonable exercise of the power does not, and should not, function as a justification negating the prima facie criminal wrong. *In terms of substance*, the reasonable exercise of an official power should be classified as "lawful" conduct outside the scope of the criminal law. Whether or not we rely formally on the justification of the "execution of a public duty" depends on whether the term "unlawful" is included in the definition of the offense. "Unlawful" is included in the offense definition in order to distinguish criminal from legitimate conduct. Imprisonment is primarily identified as legitimate conduct within the system of enforcement of justice. Therefore, in order to classify imprisonment as criminal conduct, the definition of the relevant offense must include "unlawful imprisonment". The criminal nature of murder, on the other hand, is obvious: by its very nature the intentional killing of human being is an unlawful conduct.

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33 See MODEL PENAL CODE § 212.3: "a person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty" (emphasize added). In various states, the offense itself is labeled as "unlawful imprisonment", see, e.g., N.Y. C.L.S. PEN. §§135.05-10 (LexisNexis 2009); REV. CODE WASH. (ARCW), § 9A.40.040 (LexisNexis 2009).
34 The term "unlawful" is not included in the definition of murder in the MODEL PENAL CODE § 210.2(1) and in N.Y. C.L.S. PEN. § 125.27 (LexisNexis 2009). However, 18 U.S.C.A. § 1111 (2006), defines murder as "the unlawful killing of a human being with malice aforethought".
35 See Model Penal Code § 3.03.
Justifying the Wrongdoing

The arguments for distinguishing the exercise of power from criminal law justifications elaborated above relied on a broad consensus concerning the function of justifications as negating criminal wrongdoing. The conclusion that the exercise of power does not function as a real criminal law justification might gain even stronger support if one were willing to adopt the approach that a justified action is wrong, even though it is right to perform it. In that view, criminal law justifications justify the wrongdoing: "[A] justification merely defeats the reasons against an action [which are also the reasons for its criminalization] … without canceling or undermining them" (alteration in the original). In discussing the example of killing "a terrorist who is about to detonate a bomb which will certainly kill dozens of people", Gardner states that "the reason not to kill the terrorist is really there and continues to be there and to exert its force throughout, such that killing the terrorist is regrettable - even though this is a case with a stronger conflicting reason such that killing him is justified".

I argued above that it is incoherent to grant power to cancel the legal protection of rights and yet also to hold that officials who have reasonably exercised such powers have breached the definition of a criminal offense designed to protect these rights and have committed a prima facie criminal wrong. The incoherence would be stronger if the reasonable exercise of a constitutional power were labeled "wrong though justified". To resolve the incoherence one could rely on Joseph Raz’s distinction between "a reason overriding another" and "a reason being cancelled by a cancelling condition" (emphasis added). Criminal law justifications provide reasons that override those for criminalization without totally cancelling them; granting a legal power cancels the reasons for criminalization. To clarify this point, take homicide offenses as an example. Both murder and manslaughter are designed to protect the right to life. As long as the legal system does not cancel the legal protection of the right to life, the reasons for protecting the right continue to exist. We have seen that aggressors do not lose their right to life in committing unlawful aggressions; therefore the reason for protecting the life of aggressors "continues to be there". However, the reason for killing an aggressor in self defense overrides the reason against killing her and justifies the wrongdoing involved in the killing. On the other hand, a legal system which validates the death penalty does not protect the right to life of criminals sentenced to death. In such a system granting a power to impose and execute the death penalty cancels the reasons

36 GARDNER, supra note 10, at 77-82; DUFF, supra note 16, at 217-19. See also Campbell, supra note 24, at 83.
37 Id. at 96.
38 Id. at 97.
39 The example is analyzed in depth by Campbell, supra note 24, at 83, and cited by GARDNER, supra note 10, at 145.
40 Id. at 146.
41 JOSEPH RAZ, PRACTICAL REASON AND NORM 27 (2nd ed. 1999).
42 See supra note 28.
43 GARDNER, supra note 10, at 97.
underlying homicide offenses. The prohibitory norm of either murder or manslaughter does not apply to the execution of those sentenced to death.

Refining the Contrast
The contrast between powers granted to officials and criminal law justifications granted to individuals has to be refined. There are cases in which an authority granted to an individual functions as the exercise of a legal power, as well as cases in which criminal law justifications apply to officials in their official capacity.

(1) Individuals' power
The obvious example of individuals exercising power is where individuals are called to assist officials in executing their official task; \footnote{Model Penal Code § 3.03 grants the justification in executing official tasks to both the officials and private individuals who assist them.} \footnote{For the power of an individual to arrest a felon, see D.C. Code § 23-582(b) (LexisNexis 2009); Cal. Pen. Code § 837 (LexisNexis 2009); N.Y. C.L.S. Pen. §240.30 (LexisNexis 2009) which extends the possibility for making a citizens arrest to any offense committed in one's presence.} \footnote{See FLETCHER, RETHINKING, supra note 2, at 698-707; GARDNER, supra note 10, at 144-45; DUFF, supra note 16, at 208-11.} \footnote{But see FLETCHER, RETHINKING, supra note 2, at 698-707, who argues that the woman's lack of consent should not be classified as an element of rape, but rather as a justification. For an opposite view, see GARDNER, supra note 10, at 17-21; DUFF, supra note 16, at 210-11; Campbell, supra note 24, at 82-84.} \footnote{According to MODEL PENAL CODE § 2.11(2) consent to bodily harm is a justification if: "(a) the bodily harm consented to or threatened by the conduct consented to is not serious."} individuals may even be granted an independent "official power" such as the power to arrest a felon. \footnote{For the power of an individual to arrest a felon, see D.C. Code § 23-582(b) (LexisNexis 2009); Cal. Pen. Code § 837 (LexisNexis 2009); N.Y. C.L.S. Pen. §240.30 (LexisNexis 2009) which extends the possibility for making a citizens arrest to any offense committed in one's presence.} My claim, however, is stronger. The power to change the status of rights may be granted to individuals even where it does not derive from official power. To support this, let me discuss the way consent functions within the criminal law.

The distinction between consent which negates an element of the offense, and consent as a justification is well-known. \footnote{See FLETCHER, RETHINKING, supra note 2, at 698-707; GARDNER, supra note 10, at 144-45; DUFF, supra note 16, at 208-11.} Consent negates the element of the offense when it turns the conduct into accepted conduct which remains outside the criminal law's scope, as is the case in both theft and rape. The right of ownership over property protected by theft is not infringed when the owner of the property consents that her property be taken away. Similarly, the right to autonomy over one's body, including the liberty to choose with whom and when to have sexual intercourse, protected by the offense of rape, is not infringed by sexual intercourse between consenting adults. \footnote{But see FLETCHER, RETHINKING, supra note 2, at 698-707, who argues that the woman's lack of consent should not be classified as an element of rape, but rather as a justification. For an opposite view, see GARDNER, supra note 10, at 17-21; DUFF, supra note 16, at 210-11; Campbell, supra note 24, at 82-84.} On the other hand, consent functions as a justification when the conduct consented to has caused actual bodily harm. Causing bodily harm, even to a consensual victim, infringes the right to bodily integrity and constitutes a prima facie criminal wrong. However, respect for the autonomy of the consensual victim may require that consent justify the causing of bodily harm up to a certain extent; it cannot permit consent to justify the causing of serious bodily harm.\footnote{According to MODEL PENAL CODE § 2.11(2) consent to bodily harm is a justification if: "(a) the bodily harm consented to or threatened by the conduct consented to is not serious."}
There is, however, an additional way in which consent functions in the criminal law. Consider the example of consensual surgery. A surgeon who after obtaining a patient’s consent successfully operates on that patient. Most surgery causes "serious bodily injury" as defined in the relevant offense. Should we treat the consensual surgery as a prima facie criminal wrong requiring justification? If we do, then consent as a justification precludes justifying the causing of "serious bodily injury" through consensual surgery. Consensual surgery is acceptable conduct which aims to heal, rather than to harm. It remains outside the scope of the criminal law because the consenting patient granted a power to the surgeon to cause her "serious bodily injury" in order to heal her. Unlike the aggressor in Thomson’s example, the patient has forfeited her right to bodily integrity so that the surgeon can heal her. A patient may forfeit her right to bodily integrity even when the surgery is to heal another person, such as when she consents to organ harvesting for a transplant. In both cases, the power that the patient has granted to the surgeon functions in the same way as the power of the police officer to arrest a suspect on reasonable grounds. The exercise of the power changes the status of the rights involved: the right to bodily integrity - in the case of the surgery, the right to freedom of movement - in the case of arrest. The source of the power is, of course, significantly different: it is consent in the case of surgery and constitutional power in the case of arrest. The identity of the agent exercising the power is also different: a professional (a surgeon) in the case of the surgery, a state official in the case of arrest. Note, however, that the state regulates the profession of surgery.

From a formal perspective, and similar to a judge who sentences a convict to prison and a police officer who arrests a suspect on reasonable grounds, the surgeon has not breached the definition of the offense: the offense of aggravated assault which causes a serious bodily injury includes the term “unlawfully”. It is lawful to cause serious bodily injury through consensual surgery. However, in terms of substance, the reason why the legal system treats consensual surgery as lawful conduct stems from the power the consensual patient grants to the surgeon to cause her bodily harm in order to heal her.

(2) Criminal law justifications granted to officials
Assume that a police officer must use lethal force against a suspect who while resisting arrest endangers the life of either the police officer or others. Here the use of force is not explicitly included within the official power to arrest. The state empowers the officer to change the status of the right to free movement by arresting the suspect; the officer does not, and should not, have a power to

See also 2 ROBINSON, CRIMINAL LAW, supra note 8, §66(g), at 307 (1984). For the rationale of limiting the scope of consent as a criminal law justification see Dennis J. Baker, The Moral Limits of Consent as a Defense in the Criminal Law, 12 NEW CRIM. L. REV. 93 (2009).

"See the definition of aggravated assault in MODEL PENAL CODE § 211.1(2) and in CAL. PEN. CODE § 243(d) (LexisNexis 2009).

"Id."
change the status of the suspect's right to life. The suspect, like other aggressors, does not lose her right to life in attempting to resist lawful arrest. By killing the suspect, the police officer infringes the suspect's right to life and thereby breaches the definition of murder (or manslaughter). The police officer has committed a prima facie criminal wrong and she has to turn to a criminal law justification - either self-defense or defense of others - to justify the killing of the suspect.\textsuperscript{51}

II. The Importance of Distinguishing between the Exercise of Legal Power and Criminal Law Justifications

Greek tragedies, Martha Nussbaum explains, dwell upon tragic conflicts where the circumstances "prevent the adequate fulfillment of two valid ethical claims".\textsuperscript{52} The tragedies show that:

[A] good person, finding him or herself in such a situation, will first of all see it as what it is. If he is a good character, he will have brought to the situation a lively imagination and a complex set of responses that will enable him to see the conflict situation as a situation that forces him to act against his character …. …. [E]ven if the agent comes to the dilemma with good general principles, the case does not present itself with labels written on it, indicating its salient features. To pick these out, he must interpret it….

Finally, the good agent will also feel and exhibit the feelings appropriate to a person of good character caught in such a situation … He will show in his emotive behavior, and also genuinely feel, that this is an act deeply repellent to him and to his character … And after the action he will remember, regret, and, where possible, make reparation.\textsuperscript{54}

\textsuperscript{51}MODEL PENAL CODE § 3.03, which defines justification in "execution of public duty" recognizes the distinction between official power and criminal law justifications applied to officials in their official capacity. The section distinguishes between conduct which is “justifiable when it is required or authorized by… the law defining the duties or functions of public officers” (id. § 3.03(1)) and “the use of force in executing public duties” (id. § 3.03(2)). The use of force in executing public duty may only be justified by the criminal law justifications specified in other sections, such as the “use of force in self-protection” (id. § 3.04), the “use of force for the protection of other persons” (id. § 3.05), and the "use of force for the protection of property" (id. § 3.06). Note that the MODEL PENAL CODE distinguishes between the various justifications according to their purposes. There is, therefore, a specific justification for the "use of force in law enforcement" (id. § 3.07).

\textsuperscript{52}NUSSBAUM, supra note 10, at 25.

\textsuperscript{53}Id. at 42.

\textsuperscript{54}Id. at 43.
Criminal law deals with conduct, not character; the defendant's feelings are usually not one of the criminal law's concerns. Nonetheless, as I argue below, the legal system should (and in many contexts does) apply the implications of a "tragic conflict" to real criminal law justifications, albeit with some modifications. Most of the "tragic conflict" implications should not be applied to the exercise of legal power.

The Implications of Granting Justifications

The legal system should acknowledge that the justifications it grants - self-defense, defense of others and "necessity" - involve conflicts of rights. The defendant is "forced" to infringe rights in order to save others. The circumstances surrounding a "necessity" require her to sacrifice another person's property to save life; the unlawful aggression forces her to kill the aggressor to save life. The message that the legal system should convey in applying criminal law justifications is a complicated message. On the one hand, it should convey that in the circumstances, the sacrifice of rights is justified because it is morally the right thing to do, or because the sacrifice is morally permissible, or at least because it does not cross the threshold of criminality (depending on the theory underlying criminal law justifications, pointed out in Part I). On the other hand, it should convey that it is regrettable that another person suffers an infringement of her rights. The legal system conveys that message by providing that the infringement of rights constitutes a prima facie criminal wrong (according to the prevailing view) or a real wrong (according to Gardner) which requires justification. Another way of acknowledging the rights of the infringed - a more practical way - would be to impose a legal duty to compensate those whose rights have been sacrificed. Indeed, in tort law, trespassing on another person's land or destroying another person's property to save rights of a higher value may be justified by "necessity", but nonetheless it usually entails the obligation to pay compensation for the damage caused. Being justified implies that the owner of either the land or the property is not

55 See supra text accompanying notes 15-20.
56 See supra text accompanying notes 21-22.
57 See supra text accompanying notes 36-38.
58 See, in this spirit, RAZ, supra note 41, 202-03 n.6. According to Raz, "[A] reason which is … overridden is somehow still there, it somehow survives. This feeling is explained by the fact that generally, but not always, if a reason is overridden … one has a reason to compensate." See also MODEL PENAL CODE § 3.01(2) which explicitly states that:
   "(2) The fact that a conduct is justifiable under this Article does not abolish or impair any remedy for such conduct which is available in any civil action"
59 "There is … a privilege to use or destroy things of another … in order to prevent serious and disproportionate harm to one's own interests or the interests of others – subject to a liability to pay for the use or value of the things destroyed …." (Warren A. Seavey, Principles of Torts, 56 HARV. L. REV. 72, 96-97 (1942)). See also DAN B. DOBBS, THE LAW OF TORTS § 107, at 248-49 (2000); RESTATEMENT (SECOND) OF TORTS § 197 (1956); FLETCHER, BASIC CONCEPTS, supra note 23, at 138-39; John A. Cohan, Private and Public Necessity and the Violation of Property Rights, 83 N. DAK. L. REV. 1095, 651, 660-64 (2007). Alternatively, compensation could be based on restitution. See W.V.H. ROGERS, WINIFIELD AND JOWORY.on TORT 1096 (17th ed. 2006) who emphasizes that the .RESTATEMENT OF RESTITUTION § 122 "applies the rule also where A harms B's property in order to preserve C or C's property" (id. n.47). See also GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 312 (1999).
legally entitled to resist the trespass or the destruction of the property; she is only entitled to be compensated for the damages caused to her. However when a culpable aggressor is killed in circumstances of self-defense or defense of others, no compensation is due to the aggressor's heirs. Denying compensation in these circumstances arguably rests on the doctrine of *ex turpi causa non oritur actio* ("from an illegal cause there can be no lawsuit").

Circumstances - natural events such as a fire or a sudden storm in the case of "necessity", or unlawful aggression, in the case of self-defense and the defense of others - determine when the sacrifice of rights in order to save other rights is justified. The definitions of criminal law justifications - necessity, self-defense and defense of others - provide only a framework for cases in which the sacrifice of rights might be justified. Within that framework, the actor has to justify her specific conduct. To justify her conduct, not only should the actor be aware of the factual circumstances, but she should also be required to consider, before acting, whether the specific circumstances justify the sacrifice of rights. The actor is required “to know what sorts of things are worse than others”. She "always ought to make a fresh judgment, attuned to the specific circumstances, whether performing it here and now is appropriate”.

In Part I, I have argued that real criminal law justifications should apply to officials in their official capacity as well as to individuals. The implications elaborated above should therefore apply to officials who, while executing their official power, are forced to sacrifice other people's rights; such as the official who has to destroy private property in order to stop a fire ("necessity"); or the police officer who has to kill an aggressor who attacks her while resisting lawful arrest (self-defense); or the police officer who kills an insane aggressor to stop her from killing the people around her (defense of others). In such situations, the legal system should acknowledge that individuals suffered an infringement of their rights. The system should impose a duty to compensate for the damage involved in the sacrifice of such rights (the duty would not apply to killing a culpable aggressor to defend either oneself or others). An

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60 See Dobbs, supra note 59, at 523-24. That doctrine enables solving the puzzle pointed out by Thomson, supra note 26, at 41: The fact that in cases of necessity (although Thomson does not label them as such) there is a duty to compensate supports Thomson's claim that the right of ownership over one's property sacrificed to save life has been infringed (though not violated). In cases of self-defense the aggressor's right not to be killed has also been infringed. Nonetheless, in such cases Thomson does not suppose that if "Victim kills Aggressor … then Victim must pay compensation to Aggressor's heirs …." Only when "you are an 'innocent threat' to my life … and I can save my life only by killing you, and therefore killing you, I think I do owe compensation, for I take your life to save mine".

61 See Fletcher, *The Right Deed*, supra note 18, at 253; J. C. Smith, JUSTIFICATIONS AND EXCUSES IN THE CRIMINAL LAW 28-44 (1989); Comment, *The Impact of the Model Penal Code on Statutory Reform*, 75 Col. L. Rev. 914, 917-18 (1975); Duff, supra note 16, at 277-84. For an opposite view - justifications should be granted whenever the conduct prevented greater harm than the harm caused, even where the actor had not been aware that she was preventing greater harm, see Robinson, *Competing Theories*, supra note 18.


official who must sacrifice individual rights has to take "personal responsibility". The official should not rely solely on the legislator’s abstract definition of justification. Rather she should deliberate before acting and determine whether the infringement of individual rights in the concrete circumstances is indeed justifiable.

The Exercise of Legal Power

Granting the legal power to change the status of basic rights requires a strong justification and is subject to various constitutional constraints. As I showed in Part I, once the power is constitutional, its reasonable exercise should not constitute a prima facie criminal wrong; but should rather remain outside the criminal law’s scope. In addition, as a rule, no legal duty to compensate those whose rights have been changed as a result of the reasonable exercise of legal power should be imposed.64 There is no legal duty to compensate a convict who has lost her right to free movement while in prison,65 nor there is a legal duty to compensate a suspect who has been temporarily arrested on reasonable grounds, even if the suspect is later found to be "not guilty".66, 67

64 According to RAZ, supra note 41, at 202-03 n.6, "a reason which has been cancelled has been cancelled completely and is no longer a reason". Therefore, there is "no ... reason to compensate" (id.). See supra text accompanying note 41 which argues that granting a legal power cancels the reasons underlying the definition of the offense and as such no compensation is due. Similarly, under 28 U.S.C.A. § 2680(a) (2006) (exceptions to the liability of the United States), the United States is not liable for "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation ...." See also DOBBS, supra note 59, § 262, at 697-98.
65 Several states in the United States enacted statutes granting limited compensation for wrongly convicted prisoners who were released (usually based on DNA tests); In 2007, though, most of those wrongfully incarcerated received no compensation (see Adele Bernhard, Symposium: A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why, 18 B.U. PUB. INT. L.J. 403 (2009); Jonathan L. Entin, Being the Government Means (Almost) Never Having to Say You're Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment, 38 AKRON L. REV. 139, 161 (2005)).
66 As to exceptions to the government liability, supra note 64, the United States shall not be held liable and shall not award compensations, but for situations of abuse of power, such as "false imprisonment, false arrest, abuse of process or malicious prosecution" (28 U.S.C.A. § 2680(h) (2006)). Note that we are discussing compensation for the reasonable exercises of power, parallel to the compensations for justified infringement of rights. Some legal systems go further and deny compensation even for the negligent exercise of the power. See DOBBS, supra note 59, at 702-04. according to him "When federal courts use the discretionary immunity to protect all governmental decisions involving costs and benefits or allocation of resources, their logic would foreclose all possibility of governmental liability for negligence" (id. at 704). The English legal system explicitly denies compensation for negligently exercising legal power. See Brook v. Commissioner of Police of the Metropolis, [2005] 1 W.L.R. 1495, which held that, "It was, of course, desirable that police officers should treat victims and witnesses properly and with respect. But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far". See also CHERIE BOOTH QC & DAN SQUIRES, THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES § 10.90, at 589-90 (2006).
67 In exceptional cases, compensation is among the conditions for the exercise of the legal power, as the compensation for the injuries caused to one's land by the official process of planning. Here the legal system acknowledges the infringement of the right to ownership over one's land, and the exercise of the official planning power functions, in fact, as a criminal law justifications. However, the state does not compensate all injuries a planning process causes. Non-compensation rests on a "social duty": community life requires sacrifices from landowners for the benefit of the public at large. Such a sacrifice is justified if "the type of injury belongs to the group of ordinary harms that are widely spread throughout society" (Daphna Lewinsohn-Zamir, Compensation for Injuries to Land Caused by
Officials who rely on criminal law justifications are required to deliberate whether the specific circumstances justify the infringement of rights. By contrast, not all officials are required to engage in such deliberations each time they exercise their official powers. Whether or not they are required to justify their conduct depends on the nature of the power and the discretion granted within that power. Often, there is a distinction between those who are empowered to change the status of an individual’s rights and those who implement such changes. A judge, who has discretion to sentence a convict to imprisonment, has to justify the concrete decision to sentence the specific convict to imprisonment. The prison guard, on the other hand, who implements the sentence and keeps the convict in prison, does not have to deliberate as to the justification of holding the specific convict in prison. Even a judge is not always required to consider whether imprisonment is the appropriate punishment in an actual case, as for example where the offense carries a mandatory punishment of a fixed prison term. When the penalty is not mandatory, legal systems tend to structure judicial discretion in enacting sentencing guidelines.

By contrast, the sacrifice of rights under criminal law justifications – even where needed in order to enable officials to execute their duty - should not be structured by concrete guidelines. The unique nature of the situation should determine whether the sacrifice of the actual right is justified. Officials who find themselves in situations of conflict of rights should make their own decision whether the circumstances justify sacrificing one right in order to save another and must carry out their own decision (the official may carry out her decision through instructing another to assist her; in that case she should be regarded as the one who carries out the decision).

Planning Authorities: Towards a Comprehensive Theory, 46 U. TORONTO L.J. 47, 89 (1996)). The “social duty” rationale justifies granting a power to land planning officials to limit the legal right of ownership over one’s land, rather than infringing that right.

In this spirit see Thorburn, supra note 3, at 1105: “there is a clear division of labor between those officials who exercise legal powers (such as a judge or a justice of the peace who grants search or arrest warrants) and those who carry out the justified conduct (such as the police officers who are armed with such warrants).”


Note that even with regard to official power, the official may sometimes decide to exercise the power to change individual’s rights and carry out the decision herself, for example a police officer arresting a suspect on reasonable grounds.
Role Distance

Meir Dan-Cohen’s concept of “role distance” helps to clarify further the importance of distinguishing between official power and real criminal law justifications.

According to Dan-Cohen, public officials may maintain a “role distance”, which "diminishes [their] personal responsibility as well as their vulnerability" (alteration in original). Dan-Cohen compares a self-defender and an executioner:

By interposing a justification defense, the self-defender concedes his responsibility for the killing. It is precisely because of his responsibility that the self-defender must demonstrate that the killing was justified. …. [T]he executioner … may deny being a killer altogether. He may attempt to avoid his personal responsibility for the killing.

The executioner will achieve that goal through "role distance".

For Dan-Cohen the notion of “role distance” exemplifies the dynamic relationship between the law and the self. “By recognizing official duty as barring responsibility, the law codifies a specific conception of the self.” As such, “[t]he self can assume a detached and instrumental attitude toward a particular role and can perform it in an alienated fashion.”

I suggest that the question whether or not officials can maintain “role-distance” should be influenced by this paper's distinction between the exercise of official power and criminal law justifications applied to officials. Empowering officials, especially where the power is not subject to discretion, may enhance the likelihood of “role distance”, while criminal law justifications applied to official will always prevent "role distance". This guarantees that even in her official capacity the official will take personal responsibility and make her own decision about whether the circumstances justify the sacrifice of individual's rights.

III. The Practical Implications of Distinguishing between the Exercise of Power and Criminal Law Justifications

The distinction between the exercise of power and criminal law justifications is useful in dealing with "emergencies" when constitutional constraints prevent granting an official power to cancel the legal protection of a basic right. In

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72 Id. at 256.
73 Id. at 234.
74 Id. at 235.
75 Id. at 234.
exceptional situations criminal law justification may justify the infringement of such a right. Indeed, while ruling on whether torture is ever permissible in the war against terror, the Israeli Supreme Court concluded that the use of force in interrogating terrorist suspects is illegal due to the lack of constitutional power. Nonetheless, in the case of criminal proceedings against an individual interrogator who used preventive force in a ticking bomb scenario, the individual interrogator "may find refuge under the 'necessity' defence's wings (so to speak) provided this defence's conditions are met by the circumstances of the case." This paper's distinction between the exercise of official power and criminal law justifications granted to officials provides the theoretical basis for the Israeli ruling (I am not taking a stand on whether the criminal law justification of "necessity" should indeed justify the infringement of human dignity and autonomy involved in torture).

Below I demonstrate how the distinction between the exercise of a legal power and criminal law justifications might be useful in solving the dilemma involved in shooting down a hijacked airplane in situations like those of September 11; dilemma dealt with by the German Constitutional Court.

Shooting Down a Hijacked Airplane - The German Court Ruling
The German Bundestag enacted a statute authorizing the Minister of the Federal Defence to order shooting down an airplane "where it must be assumed under the circumstances that the aircraft is intended to be used against human lives, and where this is the only means to avert the imminent danger". The Bundestag was responding to the September 11 tragedy and a pilot’s threat to crash a plane into a skyscraper in Frankfurt, Germany. The German Federal Constitutional Court ruled that the section that authorized shooting down a hijacked airplane along with its passengers and crew, violates both the inviolable right to human dignity laid down in the German Basic Law and the right to life, and is therefore unconstitutional.

77 See Miriam Gur-Arye, Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience, in TORTURE: A COLLECTION 183 (Sanford Levinson ed., 2004) [hereinafter Gur-Arye, War against Terror] where I analyze the Israeli Supreme Court ruling on torture in the spirit of this paper’s approach but do not elaborate on the theoretical basis for distinguishing between official power and criminal law justifications.
78 See supra note 6.
79 The Aviation Security Act, 2005, § 14(3). For its English translation see the German Court Ruling, supra note 6.
80 According to the opening Article of the German Basic Law of 1949 "Human dignity shall be inviolable", see http://www.iuscomp.org/gla/statutes/GG.htm.
81 Id. art. 2.2, sent. 1: "everyone has the right to life and to physical integrity".
82 The German Court based its ruling on constitutional considerations under the German Basic Law; the Court did not discuss the law of war.
Influenced by a deontological approach, the German Court stressed that by ordering the shooting down of a hijacked airplane the State treats the passengers and crew as "mere objects", "being used as means to save others", and violates their human dignity:

Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.  

The Court was not swayed by the duty to protect "those against whose lives the aircraft is abused as a weapon". The passengers and crew are also entitled to have their lives protected by the State. When the state official orders the airplane shot down "[n]ot only are they denied this protection …, the state itself even encroaches on the lives of these defenceless people".

In its ruling the Court emphasized its concern with the constitutionality of granting statutory authority to order and to carry out the shooting down the hijacked airplane; it did not determine how the shooting down of the airplane under such circumstances should be assessed by the criminal law.

[I]t is absolutely inconceivable under the applicability of Article 1.1 of the Basic Law [granting an inviolability protection human dignity] to intentionally kill persons such as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorization ... It need not be decided here how a shooting down that is performed

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83 The German Court Ruling, supra note 6, at para. 122. For an opposite view, according to which "the passengers' lives are not being targeted as a means of thwarting the hijackers. Rather, the hijackers are being targeted, and it is tragic that they cannot be effectively targeted without the passengers also losing their lives", see John Kleinig & Ziporah Kasachkoff, Civil Emergencies and the Claims of Innocence, in SHOOTING TO KILL: THE LAW GOVERNING THE USE OF LETHAL FORCE IN CONTEXT (Simon Bronit, Hilary Charlesworth & Gerry Simpson eds., forthcoming 2010). See also Tatjana Hörnle, Hijacked Airplanes: May They Be Shot Down?, 10 NEW CRIM. L. REV. 582, 606-07 (2007); Eyal Zamir & Barak Medina, Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law, 96 CAL. L. REV. 325, 375-76 (2008).
84 The German Court Ruling, supra note 6, at para. 135.
85 Id. at para. 137.
all the same, and an order relating to it, would have to be assessed under criminal law.\textsuperscript{86}

The Ruling of the German Constitutional Court has generated wide discussion.\textsuperscript{87} I do not intend to participate in that discussion directly. My aim is rather to suggest a reading of the German Court's ruling in the light of this paper's distinction between the exercise of official power and criminal law justifications.

\textbf{The Ruling in Light of the Distinction between Power and Justifications}
The German ruling implies that the state should not grant any official power to change the status of the right to life of the passengers and crew. It suggests that the State has a duty to protect the life of all its citizens as well as to stop unlawful attacks. And all its citizens include the passengers and crew. When protecting the lives of those on the ground requires the shooting down of the airplane along with its passengers and crew, the State ought not to ignore the passengers’ and crew’s right to life. Infringing that right constitutes a prima facie criminal wrong. Whether the infringement is nonetheless justified should be evaluated through criminal law justifications.

Evaluating the shooting down of the airplane through criminal law justifications does not necessarily imply that the necessity justification will be granted. The absolutist deontology expressed by the German ruling, which does not allow the intentional killing of the innocent, might prevent justifying the killing of passengers and crew to stop the airplane from crashing into a crowded place through the criminal law justification of necessity. However, a careful reading of the German ruling leaves room to assume that its commitment to absolute deontology is limited to granting official powers - the State ought never to empower its officials to kill innocent people: "it is absolutely inconceivable … to intentionally kill persons such as the crew and the passengers of a hijacked plane, … on the basis of a statutory authorization"
(emphasis added). Still, the Court explicitly decided not to decide how the shooting down of the hijacked airplane with its passengers and crew “would have to be assessed under criminal law”. The arguments advanced in this paper may further permit justifying the sacrifice of the life of passengers and crew to stop the airplane from crashing into a crowded place through the criminal law justification of necessity.

By granting the criminal law justification of necessity, the legal system acknowledges the passengers’ and crew’s claim right to life. Shooting down the hijacked airplane infringes on those rights. The legal system conveys the message that although it was justified to shoot down a hijacked airplane in order to stop it from crashing into a crowded place, it is nonetheless regrettable that the passengers and crew had to suffer the infringement of their right to life. Practically, the legal system should impose a duty to compensate the heirs of the passengers and crew. The criminal law justification of necessity further prevents State officials from maintaining "role distance". An individual official, who either orders the shooting down of the hijacked plane or shoots down such an airplane personally, accepts personal responsibility. She must show that before either issuing the order or shooting down the plane she deliberated about the circumstances; researched the probability of the plane crashing into a crowded building; weighed the probability of the crew and passengers’ death, and the alternatives; and concluded that shooting down of the hijacked airplane with passengers and crew on-board was a regrettable necessity to prevent an even greater tragedy and as such was justified.

**Additional Issues**

My reading of the German court ruling in light of the distinction between official empowerment and real criminal law justifications also affects its position on related issues

(1) *Mistakes*

The German court mentioned the danger of a mistaken appreciation of the situation:

> [I]t cannot be expected that at the moment in which ... a decision concerning an operation ... is taken, there is always a complete picture of the factual situation and that the factual situation can always be assessed correctly. One also cannot rule out the possibility that the course of events will be such that it is no longer required to carry out the operation ...

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The mere danger of mistake is not unique to the hijacked airplane case. By their very nature, situations of "necessity" involve risks of mistakes, as do those of self-defense and defense of others. A quick reaction to an imminent danger

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88 The German Court Ruling, *supra* note 6, at para. 128.
89 Id.
90 Id. at para. 123.
is inevitable. As a result innocent people might be killed, for example when the "defender" mistakenly believes that she is being unlawfully attacked. To avoid rash decisions in the face of imminent dangers, one can adopt the view that the mistaken belief in the existence of justificatory circumstances ought to be reasonable.\textsuperscript{91}

The standard of reasonableness of the mistake requires the official to evaluate carefully whether the plane will crash into a crowded place. Of course gathering information is, by its very nature, imperfect. However, when the official cannot maintain "role-distance" (as suggested in this paper) it is more likely that her decision will reflect her best efforts to assess probability in the light of all the facts. Further, neither the official issuing the order nor the one executing it are able to maintain "role distance". The personal responsibility of both guarantees that a change that could occur between the time of the order and its execution will be taken into account so that the plane will not be shot down when "it is no longer required to carry out the operation".\textsuperscript{92} If, despite her reasonable efforts, the official who either ordered the shooting down or shot down the plane made a mistake, the shooting down of the airplane would be considered wrong, though the official might be criminally excused.\textsuperscript{93}

\textbf{(2) Only hijackers on board}

The German court distinguished between the use of armed force against an aircraft with passengers and crew on board and "the direct use of armed force … aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon of a crime against the lives of people on the ground".\textsuperscript{94} According to the Court, the duty of the State to protect the lives of those on the

\textsuperscript{91} For such a view, see Fletcher, \textit{Right and the Reasonable}, supra note 21, at 971-80. For a varying view, "some unreasonable mistakes as to justification" should be excused, see ROBINSON, CRIMINAL LAW, supra note 8, at 410; DUFF, supra note 16, at 293. Note LEVERICK, supra note 28, at 161-63 (2006), according to whom, "The majority of common law jurisdictions take the approach that only a reasonable mistake about the existence of an attack should be permitted to ground an acquittal … By contrast, in English law, where a defendant acts in 'self-defence' under the genuine but mistaken belief that she is being attacked, she is entitled to an acquittal …. even if her mistake is an unreasonable one … A similar approach is taken in the US Model Penal Code, where § 3.04 contains no requirement that the belief of the defendant in the need to use defensive force be reasonable. … This proposal has largely been ignored by US states, the more common approach to mistake about an attack simply being to require reasonableness of belief in relation to all offences". See also 10A UNIFORM LAWS ANNOTATED – MODEL PENAL CODE § 3.04, n. 3 (2001); Kyron Huigens, \textit{The Continuity of Justification Defences,} 2009 U. ILL. L. REV. 627, 656-58; Robinson & Darley, \textit{Testing Competing Theories of Justification,} 76 N.C.L. REV. 1095, 1103 (1998); Francisco Munoz Conde, \textit{Putative Self-Defense: A Borderline Case Between Justification and Excuse,} 11 NEW CRIM. L. REV. 590, 610 (2008). Also note Leverick’s idea about distinguishing between private individual and official claiming putative justifications: for an individual, an honest mistake suffices; an official should rely on putative justifications only on a basis of a reasonable mistake (LEVERICK, supra note 28, at 168).

\textsuperscript{92} The German Court Ruling, supra note 6, at para. 123.

\textsuperscript{93} Fletcher, \textit{Right and Reasonable}, supra note 21, at 971-973, 978-980 and ROBINSON, CRIMINAL LAW, supra note 8, §181(d)(5), at 379-380, §184(b)(1), at 399-402, argue that a mistaken belief in the existence of justificatory circumstances turns the putative justification into an excuse. In contrast Duff classifies the putative justification as a "warranted" conduct, see DUFF, supra note 16, at 275-77.

\textsuperscript{94} The German Court Ruling, supra note 6, at para. 138.
ground against an unlawful attack allows the state to authorize the use of armed force against aircrafts with solely hijackers on board.95

Clearly there is a difference between killing innocent passengers and crew and killing the hijackers. This difference should be expressed within the criminal law justifications rather than through official empowerment. The hijackers, like other aggressors, do not lose their right to life by virtue of the hijacking, and therefore no legal power to take their life should be granted. As opposed to the shooting of the airplane with crew and passengers on it, which may be justified under "necessity", the shooting down of the airplane with only hijackers on it is justified under the stronger and wider justification of defense of others. However, in both cases, the right to life has been infringed. To justify such an infringement, the official should take personal responsibility and demonstrate that the shooting down of the airplane was justified either by the necessity circumstances or by the circumstances giving rise to defense of others.

IV. Instead of Conclusion

To conclude, let me emphasize the differences between solving the dilemma involved in the shooting down of the hijacked airplane along with its passengers and crew in the light of this paper's distinction between the exercise of legal power and criminal law justifications, on the one hand, and alternative possible solutions to, on the other.

Excuse

One possible solution is to grant a criminal law excuse to an official who either orders the shooting down of the hijacked plane or shoots it down herself.96 The relevant excuse is "necessity as an excuse", recognized by the German criminal code, which distinguishes between "necessity as an excuse" and "necessity as a justification".97 Applying "necessity as an excuse" implies that it was

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95 Id. at 139.
96 See Möller, supra note 87, at 461-62 for that view.
97 The German Criminal Code, 1975, § 35 defines necessity as an excuse:

"Whoever commits an unlawful act in order to prevent a present danger to the life, limb or liberty to himself, a relative or a close person, acts without guilt. However, this does not apply if under the circumstances, and in particular if he has brought about the danger or has a special legal obligation, the perpetrator should be expected to cope with the danger."

The German Criminal Code, 1975, § 34 defines necessity as a justification:

"Whoever in a present and otherwise not preventable danger to life, limb, liberty or any legal interest acts to prevent the damage to be inflicted on himself or another person, does not act unlawfully if the balance of the conflicting interests, in particular the legal interests involved and the intensity of the imminent danger, shows that the defended interest is entitled to prevail over the one which is infringed. This is admissible, however, only on so far as the act is an adequate means for preventing the danger."
criminally wrong to sacrifice the life of the innocent passengers and crew in order to save the lives of those on the ground. Nonetheless, it would be unfair to attribute criminal blame to the individual official who was motivated by the desire to save life and by the need to stop the airplane from crashing into a crowded place.

Elsewhere I explain why, as a matter of policy, excuses like necessity should not be granted to state officials in their capacity as officials. The main argument rests on the wrongful nature of the excused conduct. Thus, in a legal system committed to an absolutist deontology, the sacrifice of innocent passengers to prevent the airplane from crashing into a crowded place is criminally wrong. In such a system, state officials should be required to overcome the pressure to shoot the airplane down as part of the requirement that they avoid committing criminal wrongs while carrying out their official duty.

The conclusion that necessity as an excuse should not apply to state officials in their official capacity can be based on the personal nature of excuses. Under the German criminal code, necessity, like other excuses, is a personal defense; it is granted only when the actor’s own life or bodily integrity, or that of a close relative of his, is in imminent and severe danger. The assumption is that, due to the pressure stemming from the imminent danger and in view of the instinct for self-preservation, it would be unfair to require an individual not to protect her own life or that of a close relative even when the sacrifice of that another person’s life is criminally wrong. Third parties, whose own life or bodily integrity are not endangered, could and should be required to avoid sacrificing other people's rights when the sacrifice constitutes a criminal wrong.

Criminal law justifications, including justificatory necessity, on the other hand, are available to both the actor and third parties whose rights have not been endangered. Granting necessity as a justification to the official who shoots down the airplane (as suggested in this paper) recognizes the infringement on the innocent passengers’ and crew’s right to life as regrettable. Yet the infringement is justified because it is necessary to save the life of those on the ground.

Dirty Hands
Another possible solution is to treat the ordering and the shooting down of the airplane with its passengers and crew as a case of "dirty hands". The "dirty hands" scenario involves political leaders who dirty their hands - commit a moral wrong - in extreme circumstances. That wrong turns out to be the right thing to do. In the hijacked plane scenario the official ordering the shooting down of a hijacked airplane dirties her hands, kills the innocent passengers and crew, and commits a moral wrong. Nonetheless, under the circumstances, stopping the airplane from attacking the people on the ground and saving the life of more innocent people was the right thing to do.

There are two main differences between treating the shooting down of the hijacked airplane as a case of dirty hands and the solution suggested in this paper.

In the "dirty hands" scenario, ordering and shooting down the airplane constitute a criminal wrong. Ideally we should punish the actor "for the bad he has done" (killing the innocent passengers and crew) and at the same time should "honor him for the good he has done" (saving the innocent people on the ground). In practice, the official would probably not be punished because "[m]oral rules are not usually enforced against the ... actor ... [who] acts in an official capacity".

The above structure of dirty hands has been criticized for involving "a contradiction or paradox. The advocate of dirty hands says in effect that it is sometimes right to do what is wrong, and this seems tantamount to saying that some act is both wrong and not wrong". This paper's approach avoids such a paradox. The sacrifice of the life of passengers and crew as a result of ordering and shooting down the airplane constitutes only a prima facie wrong. The need to save more innocent lives, the criminal law justification of necessity, negates that wrong. Even the view that shooting down the airplane is a "justified wrong" (according to Gardner for example) is free from paradox. Here saving the lives of those on the ground justifies the wrong of sacrificing the passengers and crew.

The second difference between the "dirty hands" scenario and this paper's approach relates to the official role. In the dirty hands scenario the role of the "political leader" is significant. If the political leader does not commit the wrong and "remains innocent … he not only fails to do the right … he may also

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102 Kleinig & Kasachkoff, supra note 83, at 19-24 suggest this.
104 Walzer, supra note 103, at 179.
105 Id. (alteration in original).
106 Coady, supra note 103, § 3, where he analyzes and attempts to solve that paradox.
107 See supra notes 36-38 and accompanying text.
108 Coady, supra note 103, § 4, at 9.
fail to measure up to the duties of his office”. In the plane scenario, a State official who has ordered the shooting down of the hijacked plan may argue that:

[T]he responsibility of his office made it morally obligatory that he view his actions, at least to a large extent, through the lens of his role. And this perspective … required of him that he ordered the shooting down of the plane and, in consequence, his bringing about the death of innocent passengers – citizens, no less, for whom he was responsible …. [T]his means that, as a consequence of his decision to accept the responsibilities of his office he incurred the risk of tarnishing his soul.

According to the approach suggested in this paper, the official role might be significant only in the exercise of legal power. But criminal law justifications apply to both individuals and state officials in their official capacity. Like individuals, a state official who uses force to execute her official task must rely on criminal law justifications to justify the use of such force. Therefore, a state official who shoots down a hijacked airplane is not different from a private pilot, who while flying his private plane happens to overhear the hijackers’ plan and shoots the plane down.

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109 Walzer, supra note 103, at 165.
110 Kleing & Kasachkoff, supra note 83, at 15.
111 Hörnle, supra note 83, at 585-600 analyzes such a scenario to find that a private pilot who has shot down the airplane will be granted an excuse; the shooting down of the airplane by a state official is justified (id. at 600-04).