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MORAL JUSTIFICATION, ADMINISTRATIVE POWER AND EMERGENCIES

RE'EM SEGEV¹

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Abstract

Although harming people is generally wrong, it is exceptionally justified as the lesser evil when it is done to prevent sufficiently more serious harm. The two aspects of this moral truth should be reflected in the law. This is not always an easy task and is especially difficult with respect to the powers of the executive branch of government concerning emergencies. In such situations, there may be strong reasons to confer wide powers to the executive branch to perform harmful actions as the lesser evil. However, strong reasons exist to curb and check such powers. However, this problem is especially relevant in the context of the struggle against terrorism, where radical means are often suggested, and sometimes used, to confront what are considered to be, and sometimes are, grave dangers on lesser evil grounds. The paper explores this problem and offers a partial solution.

I. INTRODUCTION

According to every plausible moral theory, performing actions that harm people is generally wrong. According to these same theories, however, actions that harm people may be justified as the lesser evil when committed to prevent a sufficiently more serious harm to other people. The content of this rudimentary idea of lesser

¹Bachelor of Law, *summa cum laude*, 1996, Master of Law, *magna cum laude*, 1998, Doctor of Law, 2002, the Hebrew University of Jerusalem. Post Doctorate Research Fellow, University of California, Berkeley, 2002-2003; Visiting Researcher, Harvard University, 2003-2004.

evil is complex and disputed among different moral theorists.² But the rudimentary idea of lesser evil itself, i.e., the idea that there must be some place for the notion of lesser evil, is no doubt true and is widely accepted. Once a certain threshold has been crossed with respect to the absolute and relative importance of the competing interests, every plausible moral theory would acknowledge the strong justification for harmful actions in the interpersonal sphere. A paradigmatic example is the justification for the destruction of trivial property of one person in order to save the life of another. As Aristotle wrote, "anyone with any sense" would perform such an action.³

The two aspects of this moral truth—that harming people is generally wrong but exceptionally justified for the prevention of sufficiently more severe harms—should in principle be reflected in the law. The law should not necessarily reflect every moral judgment, since some moral judgments could not be significantly furthered by their incorporation into the law. Furthermore, others are simply not important enough to justify their incorporation into the law in light of the cost of legal enforcement.⁴ However, these considerations are either not relevant or not decisive in the context of interpersonal conflicts involving basic interests threatened by serious adverse effects. Therefore, the moral conclusions regarding the content and scope of the notion of lesser evil with respect to such interests are generally directly applicable to the law. Indeed, although there is disagreement regarding the proper limits of law, it is widely agreed that it should at least reflect moral judgments with respect to the protection of important interests of people from harm.⁵ While this idea

²My view regarding the proper content, and accordingly the boundaries, of the concept of lesser evil is elaborated in Re'em Segev, *Well-Being and Fairness* PHIL. STUD. (forthcoming 2006); Re'em Segev, *Well-Being and Fairness in the Distribution of Scarce Health Resources*, 30 J. MED. & PHIL. 231-60 (2005); Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383-460 (2005); Re'em Segev, *The Concept of Lesser Evil: Beyond Deontology, Rights and Utilitarianism* (unpublished manuscript, on file with author); Re'em Segev, *The Significance of Numbers: Intrinsic and Comprehensive or Instrumental and Restricted?* (unpublished manuscript, on file with the author).

³The classic illustration for this kind of action is Aristotle's discussion of the jettison of cargo overboard from a ship caught in a storm in order to save the lives of the sailors. See ARISTOTLE, *NICOMACHEAN ETHICS* 30 (Terence Irwin trans., Hackett 1999).

⁴Notice that a parallel condition might be relevant also in the moral sphere, so that only reasons beyond some threshold of importance should be the basis for moral norms. See SHELLY KAGAN, *THE LIMITS OF MORALITY* 68 (1989). Obviously, however, the threshold in the legal sphere should be higher in light of the additional cost of legal regulation.

A different kind of difference, that I will return to later, concerns the formulation of norms. Typically, there are especially strong reasons for formulating the law in advance in the form of open and relatively clear rules. This might occasionally justify, for example, less precision at the margins for the sake of clarity.

⁵The classic articulation of the position that the prevention of harm to people other than the agent is the only justified aim for the use of coercion, including through the law, is JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

presents various difficult questions regarding its proper content and boundaries,⁶ its hard core seems obviously justified and widely accepted. The main dispute is whether the law should go beyond it.⁷

The idea that the law should reflect moral judgments regarding protecting individuals from harm includes the two aspects of the moral truth just mentioned. Harming people is generally wrong, but it is exceptionally justified for the prevention of sufficiently more severe harms. Thus, the law should generally forbid or otherwise discourage the performance of actions that harm people but permit and encourage such actions when they are justified as the lesser evil. It is not, however, always easy to incorporate this conclusion into the law. One problem concerns the proper limits of the law, since it is difficult to determine which actions are harmful enough to justify invoking the law to try to prevent them. Another problem concerns a central aspect of morality: it is difficult to determine which harmful actions are justified as the lesser evil. While it is widely accepted that the idea of lesser evil, as a rudimentary concept, is valid, this concept is in itself almost empty and does not provide much more guidance than the prescription to "act rightly." The crucial question is thus which substantive conception of lesser evil should be adopted. The answer to this question, however, is disputed among different moral theorists.⁸

This paper does not address these questions in their general form. The main aim of the paper is rather to explore the question of how the law should reflect and elaborate the idea of lesser evil in the administrative sphere, namely, with respect to the powers of the executive branch of the government. In other words, the question addressed in this paper is what kinds of lesser evil powers should be bestowed upon executive authorities. Particularly, should the concept of lesser evil, in its rudimentary and general form, or some general substantive conception of lesser evil be an independent source of executive power? In other words, should executive officeholders then be authorized to act, in their public role,⁹ directly in light of broad and vague principles of lesser evil?¹⁰

⁶For a brief survey of some of the main problems of Mill's Harm Principle, see JOHN GRAY, *Introduction* to JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* xv, xv-xxi (John Gray ed., Oxford Univ.Press 1998).

⁷For discussions of the legitimacy of other grounds for the use of the law, see 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984); 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENCE TO OTHERS* (1985); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986); 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988); H. L. A. HART, *LAW, LIBERTY AND MORALITY* (1963).

⁸The distinction between these two levels of generalization, as reflected in the notions "concept" and "conception," follows H. L. A. HART, *THE CONCEPT OF LAW* 155-56 (1961); JOHN RAWLS, *A THEORY OF JUSTICE* 5-6 (Harvard Univ. Press 1971); and RONALD DWORKIN, *Constitutional Cases*, in *TAKING RIGHTS SERIOUSLY* 131, 134-35 (1977).

⁹In various kinds of situations, public officeholders might not act in their official capacity. Their position is then like that of any other person. It should be noted, however, that the boundaries of an official role are typically blurred. There are clear cases in which a person encounters a situation that either is obviously within his public role or clearly has nothing to do with it. There are, however, also intermediate cases in which there is a connection between the agent's public role and the situation. It might then be difficult to determine whether the agent should be considered as acting in his official capacity or not. Pertinent factors include,

The assumption underlying this paper is that it is generally preferable that executive actions be guided by rules that set relatively detailed standards rather than be carried out in light of unfettered or wide discretion of executive officials. The reason is that rules encourage rational thinking and thus improve the probability of reaching correct decisions. Rule-based decisions typically have several advantages over decisions made with unfettered or wide discretion. First, rules encourage general and methodical thinking that strives to identify and properly respond to the relevant factors. Second, general thinking, in the form of predetermined rules, enables the gathering of empirical data that can be used as the basis for future decisions. It is often impossible or, at least, more difficult to gather such data in the face of a specific decision due to lack of time. Finally, detailed rules enable assessment of actions. The ability to critique action in light of guidelines will improve the chance of making the right decisions in the future. For these reasons, rules reduce the dangers of mistake, arbitrariness and abuse of power.¹¹ Rules for the guidance of executive actions can be set by the legislature, the courts or the executive bodies themselves. However, there are reasons to distinguish between rules set by different branches of the government. I will return to this point in the following sections.

for example, whether the resolution of the situation requires qualifications that are necessary for the performance of the agent's official role, and whether the situation occurs in the time and place in which the agent is required to perform his public duties.

¹⁰It is important to note one point concerning the meaning of a public authorization in terms of permission, justification, and duty. Contrary to the common view that considers these categories as crucial in the moral sphere, I believe that the only substantive category is that of justification (for reasons explained in Segev, *The Concept of Lesser Evil: Beyond Deontology, Rights and Utilitarianism*, *supra* note 2). This distinction is, however, clearly significant in the legal sphere with respect to the actions of private individuals, due to the two differences between the proper scope of morality and law. Since some moral judgments are either not important enough to justify their incorporation into the law in light of the price of legal enforcement, or could not be significantly furthered by their incorporation into the law, there is a place for legal rules that permits the performance of certain justified actions but do not proscribe their performance. It is therefore important to note that, in my opinion, this distinction has no place, even in the legal sphere, in the administrative realm. A legal authorization of a public official to perform a certain action implies permission, justification, and a duty to perform this action. This is so since the aim of an authorization to perform an action in certain circumstances is that this action would be performed in the stipulated circumstances. Therefore, public officials should be required to execute the relevant legal rules in their sphere of responsibility. This point might be clouded in contexts where the standards of authorization are vague, so that the relevant public officials have wide discretion in their implementation. But the nature, and particularly the width, of administrative discretion are in principle irrelevant in this respect. If a proper employment of the discretion, whether narrow or wide, leads to the conclusion that standards set by the law are met, then this conclusion implies not only permission or justification but also a duty to act accordingly.

¹¹*Cf.* KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE - A PRELIMINARY INQUIRY* 25 (1971) ("[T]he greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance . . ."); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURE FROM LEGAL RULES* 171-77 (1973).

The problem is that it might be difficult to set detailed rules in advance that provide a good solution to the problem at hand. This problem particularly exists with respect to the powers of the executive. For this reason, some level of executive discretion, including significant normative discretion, might be necessary for the performance of various actions that are practically impossible to foresee and establish proper rules for them.¹² This familiar insight sets the stage for several crucial questions concerning the proper nature of executive discretion.¹³ First, what are the areas in which significant discretion should be bestowed upon executive officeholders? Second, what goals warrant that significant executive discretion should be granted for their promotion, despite its cost? Third, what is the proper scope of executive discretion in each context? Fourth, what, if any, should be the legislative, judicial or administrative standards in light of which executive discretion should be exercised in each context?¹⁴ Finally, what is the best way to monitor the exercise of such executive discretion?

The special features of the lesser evil aspect of these general questions are derived from the nature of the concept of lesser evil, which justifies the infliction of harms on individuals in order to prevent more serious harms to others. This aspect of the problem is important since it has wide implications in light of the wide potential of every plausible conception of lesser evil, given the number of contexts where it might apply. Indeed, the importance of this aspect of the above questions was recently emphasized in the context of the struggle against terrorism, where radical means are often suggested, and sometimes used, in order to confront what are considered to be, and sometimes apparently are, grave dangers on lesser evil grounds.¹⁵ Recent examples of measures that were considered and sometimes employed are the indefinite detention of individuals suspected of being involved in

¹²See, e.g., KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 11-52 (3rd ed. 1972); DAVIS, *supra* note 11, at 15-21, 27-51; RICHARD J. PIERCE, *ADMINISTRATIVE LAW* 35-42 (4th ed. 2002).

¹³Cf. DAVIS, *supra* note 12, at 43; KADISH & KADISH, *supra* note 11, at 43.

¹⁴Discretion employed in light of standards is a "weak discretion" in Ronald Dworkin's terminology, but it might nevertheless be a substantial discretion. See RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 8, at 14-45.

¹⁵For a recent exposition of the view that in the struggle against terrorism "thinking about lesser evils is unavoidable," see Michael Ignatieff, *Lesser Evils*, *N.Y. TIMES MAG.*, May 2, 2004, at 46:

Sticking too firmly to the rule of law simply allows terrorists too much leeway to exploit our freedoms. Abandoning the rule of law altogether betrays our most valued institutions. To defeat evil, we may have to traffic in evils: indefinite detention of suspects, coercive interrogations, targeted assassinations, even pre-emptive war. These are evils because each strays from national and international law and because they kill people or deprive them of freedom without due process. They can be justified only because they prevent the greater evil. The question is not whether we should be trafficking in lesser evils but whether we can keep lesser evils under the control of free institutions. If we can't, any victories we gain in the war on terror will be Pyrrhic ones.

See also Anthony Lewis, *Bush and the Lesser Evil*, 51 *N.Y. REV. BOOKS* 9, 9-12 (2004) (book review); see generally MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004).

terrorist activity, without judicial review or disclosure of their identities,¹⁶ and employment of extreme interrogation methods in order to extract information about terrorist organizations and impending terrorist acts.¹⁷

Authorizing the executive branch to act on lesser evil grounds provokes a clash between conflicting rationales. On the one hand, there are strong reasons to give wide and flexible powers to executive officials to act on lesser evil grounds that will enable them to confront various emergencies where harmful actions might be justified as the lesser evil. On the other hand, there are also strong reasons to curb and check the powers of public officials. This is especially true in the context of harmful actions performed on lesser evil grounds. Therefore, incorporating into administrative law the concept of moral justification to perform certain actions should be carefully studied.

There is no easy solution to this clash. This paper emphasizes its existence by presenting the reasons for and against granting wide executive powers to act on lesser evil grounds. It also discusses positions taken by various legal systems in this regard, elaborating particularly on the reliance in Israel on the concept of lesser evil as a basis for the use of force in interrogations in order to prevent acts of terror. Finally, it suggests a way to alleviate the tension between the clashing considerations to a certain extent, based on the idea of powers to act on lesser evil grounds that include guidelines that are intermediate in their level of generality.

Before embarking, two preliminary points in the following section concern the proper place and scope of the concept of lesser evil as a basis for legal authorization of executive officeholders. While the law should no doubt accord some place to a

¹⁶See, e.g., Ronald Dworkin, *What the Court Really Said*, 51 N.Y. REV. BOOKS 26, 26-29 (2004) (book review) (reviewing the three decisions made by the United States Supreme Court on June 28, 2004); Lyle Denniston, *High Court to Hear Detainees' Appeals*, THE BOSTON GLOBE, Nov. 11, 2003, at A2; Linda Greenhouse, *Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A6 (discussing the Supreme Court's approval of the government's refusal to disclose the identities of hundreds of people arrested by the United States government on the ground that "[a] complete list of the names 'would give terrorist organizations a composite picture of the government investigation'"); Linda Greenhouse, *Supreme Court Hears the Case of Guantánamo*, N. Y. TIMES, Apr. 21, 2004 at A1.

¹⁷See, e.g., Anthony Lewis, *Making Torture Legal*, 51 N. Y. REV. BOOKS 4, 4-7 (2004); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A1; Dana Priest, *Justice Dept. Memo Says Torture 'May Be Justified'*, WASH. POST, June 13, 2004, at A03 (including a Justice Department memo from August 2002 that explores the justification for torture in interrogations); Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A01; Dana Priest & Joe Stephens, *Pentagon Approved Tougher Interrogations*, WASH. POST, May 9, 2004, at A01; Michael Hirsh, *New Torture Furor: A Defense Dept. Memo Provides a Legal Roadmap for Prisoner Interrogation*, NEWSWEEK, June 8, 2004, available at <http://msnbc.msn.com/id/5167122/site/newsweek/> (including a Defense Department memo from March 2003 which "explores ways of conducting interrogations in the war on terror that would allow guards to evade future prosecutions for torture"). For a discussion of this phenomenon in Israel, in the context of lesser evil, see Mordechai Kremnitzer & Re'em Segev, *Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?* 34 ISR. L. REV. 509-559 (2000); Mordechai Kremnitzer & Re'em Segev, *Using Force During Investigations by the General Security Service - The Lesser Evil?* 4 MISHPAT UMIMSHAL – (LAW AND GOVERNMENT IN ISRAEL) 667-728 (1998) (in Hebrew).

concept of lesser evil, there are two possible distinctions between the scope of the justification of individuals and of governmental authorities to act on lesser evil grounds.

II. THE SCOPE OF A LEGAL POWER TO ACT ON LESSER EVIL GROUNDS

As previously discussed, the moral concept of the lesser evil should be incorporated into the law. There might be, however, two differences regarding the scope of the moral and the institutional legal conception of lesser evil. These differences concern two questions. First, what should the law be? Second, what is the law in a certain legal system?

The first point concerns the proper scope of a legal conception of lesser evil. Since some harmful actions are justified as the lesser evil, there is a reason to encourage the performance of such actions. This reason could be furthered, with respect to actions of public officials, by empowering them to perform such actions. This conclusion should be, however, qualified in one respect. Namely, there is a potential difference regarding the scope of the justification between individuals and governmental authorities to act on lesser evil grounds. There might be a distinction between, on the one hand, the justification for private individuals to perform certain actions and, on the other hand, the justification for enacting a *law* authorizing public officials to perform the same actions, as well as the *actual performance* of such actions by *public officials*. This distinction is not based on an agent-relative view, which is typically adopted by deontological theories and theories of rights, that determines the justification for actions directly based on the identity of the agent. Rather, this distinction is based on the influence of the identity of the potential agent on the indirect effects of actions that should generally be taken into account when evaluating the justification of actions.

Particularly, actions of governmental officials—including the enactment of legal rules—typically have indirect effects that actions of other individuals lack. Such actions are typically considered by many individuals as an expression of what is proper and legal to do. Therefore, such actions often send a message of legitimating actions of the same or similar kind that might extend to other contexts. This aspect is especially significant with regard to the concept of lesser evil, since it concerns harmful actions that are typically wrong and only exceptionally justified. While the performance of certain harmful actions might be exceptionally justified as the lesser evil in light of their direct effects, a *law* permitting or authorizing the performance of the same actions, as well as the *actual performance* of such actions by *public officials*, might be unjustified due to the negative indirect effects of such governmental actions. The negative indirect effects could be legitimating harmful actions that might extend to contexts where they are unjustified even in terms of their direct effects.¹⁸

¹⁸ In light of these considerations, Sanford Kadish suggests that there are cases where there is a lesser evil justification for the performance of certain actions by private individuals, but not for a law permitting or authorizing such actions. Sanford H. Kadish, *Torture, the State and the Individual*, 23 *ISR. L. REV.* 345, 351-56 (1989). Kadish's claim is that while the use of force in interrogations as a means of extracting information that might help prevent acts of terror and thus save people's lives might be justified by individuals, a law permitting or authorizing such actions is unjustified. *Id.*

The possibility of such a gap between what is justified for individuals on lesser evil grounds and what is justified for the state to legislate certainly exists in light of the special adverse indirect effects governmental actions typically have. This possibility is not, however, a solid basis for a complete rejection of the concept of lesser evil as a foundation for administrative actions. Even taking the indirect adverse effects of legitimizing harmful activities into account, there is no doubt that some actions by governmental authorities are justified on lesser evil grounds. The enactment of laws authorizing executive officeholders to perform certain actions on lesser evil grounds is one such example.

The possibility and the implications of special indirect effects of legal authorization for public officeholders to perform harmful actions as the lesser evil should therefore be explored as part of the answer to the central question of how the law should reflect the idea of lesser evil in the administrative sphere. The considerations discussed in this section should be taken into account in determining the nature and content of administrative powers to act on lesser evil grounds. At issue is the proper level of generality of executive authorization to act on lesser evil grounds. That is, how much discretion should the executive officeholder have to follow the idea of lesser evil in its general and rudimentary form?

The second preliminary point concerns the scope of a concept of lesser evil within an operating legal system. In considering the proper limits and form of a law regarding the concept of lesser evil, one must recognize that the prevailing law might limit the concept of lesser evil in various respects. This implication is the main difference between moral and legal norms. The validity of moral norms is exclusively a function of their proper content; the right action is the one that best reflects all appropriate reasons for actions. But the validity of legal rules, according to every reasonable legal theory and according to every modern legal theory, is not only a function of the answer to the question of what should be their content. Rather, the validity of legal norms is, at least partly, the function of other considerations relating to the actions of political institutions such as parliaments and courts that are considered to have the power to make legal norms. To be sure, according to every plausible legal theory, the answer to the question of what *should* be the law is an important element in the identification of the *prevailing* law, especially with respect to vague legal rules or in contexts that are not governed by legal rules. But this element could not always be decisive, since otherwise the actions of political institutions, that affect the lives of individuals, would be ignored. This point is not disputed among various legal theorists who differ only in the place they assign to institutional actions. Some theorists consider certain institutional actions as both a necessary and a sufficient condition for the legal validity of norms, such as legal positivism¹⁹ and legal realism.²⁰ Other theorists consider institutional action only as

¹⁹See HART, *supra* note 8, at 79-117; H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

²⁰See, e.g., J. W. HARRIS, *LEGAL PHILOSOPHIES* ch. 8 (1980); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl Llewellyn, *Some Realism About Realism-Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

a necessary, but not a sufficient, condition, such as various conceptions of natural law theories²¹ and the theory suggested by Ronald Dworkin.²²

Therefore, the conclusion that a certain action or rule is justified as the lesser evil, while a necessary and sufficient condition for a moral norm, and generally *should* be reflected in law, does not, by itself, entail that there *is* a legal norm that reflects this conclusion. A general or specific conception of lesser evil will be part of the law if two conditions are met. First, there is a legal norm—either a general principle or a specific rule—that grounds the idea of lesser evil, either in a general form or with respect to a particular issue. Second, this norm must not contradict another legal norm that must prevail, according to the rules of the relevant legal system concerning contradictions of norms. The second condition is especially relevant to a general legal norm justified on the basis of lesser evil. Such a general norm might be subject to more specific legal norms in light of the common rule that, when two norms contradict each other, the more specific one prevails.²³ However, since many legal norms that reflect the concept of lesser evil are wide and ambiguous, the conclusions regarding the proper conception of lesser evil remains an important element in the interpretation and completion of the law, as well as in its constitutional scrutiny, in this context.

III. REASONS SUPPORTING WIDE EXECUTIVE POWERS OF LESSER EVIL

There are several reasons for bestowing wide powers upon executive authorities that would enable them to act with unfettered, or at least broad, discretion with respect to the question of which harmful actions are justified as the lesser evil.

The first reason concerns a common feature of rules in general and rules of law in particular. Classical writers like Aristotle and Thomas Aquinas as well as modern writers have identified that rules are inherently imperfect. It is impossible, or at least impractical, to identify in advance proper normative decisions regarding all kinds of situations that require special normative arrangement.²⁴ Particularly, it might be at

²¹See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 1-50, 260-91 (1980); LON L. FULLER, *THE MORALITY OF LAW* 33-99 (1964); Lon Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958);

²²See RONALD DWORKIN, *LAW'S EMPIRE* ch. 7 (1986); RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 8, at 14-45.

²³This idea is reflected in various qualifications for legal principles or rules of lesser evil. See, for example, the qualifications suggested by the American Law Institute to a general criminal defense of lesser evil. See MODEL PENAL CODE § 3.02(1)(b) (Proposed Official Draft 1985) ("[N]either the [Model Penal] Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved."); § 3.02(1)(c) ("[A] legislative purpose to exclude the justification claimed does not otherwise plainly appear."). Compare to the qualification for the lesser evil ("justifying necessity") defense in the German penal law, according to which the defense does not apply when the law determines a special way of protecting the relevant interest. See Klaus Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal - Some Remarks*, 30 *ISR. L. REV.* 171, 182 (1996).

²⁴Aristotle and Thomas Aquinas both write that rules of law are often general and refer explicitly only to typical situations, rather than to exceptional circumstances or emergencies. Therefore, they suggest, it might be required to complete the explicit law in such exceptional circumstances, in light of its aim. See 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* 235 (Fathers

least practically impossible to refer to all kinds of exceptional circumstances where there might be justification for the performance of harmful actions on lesser evil grounds.²⁵ In light of this difficulty, the only way to enable the performance of such justifiable actions is to set wide executive powers to act on lesser evil grounds. This difficulty might even entail granting sweeping power to all public officeholder to perform any action that is, in their opinion, in accordance with general principles of lesser evil.

The imperfection of rules is a familiar problem. Still, it should not be exaggerated. In one respect, this problem is more serious for private individuals than public officials and particularly executive officials. The difference between public officials and other individuals, in this respect, stems from the fundamental distinction between the liberty of individuals and the power of governmental authorities. Generally, individuals possess the liberty to engage in any kind of activity unless there is a good ground for limiting this liberty, such as to prevent harm to others. On the other hand, government bodies should have the power to act only when there is a good reason to perform certain actions. This idea is embodied in one aspect of the Principle of Legality, which states that public officials are permitted to perform only actions that the law authorizes them to perform.

One aspect of this distinction between the scope of individual liberty and governmental power is not relevant to the justification to perform actions as the lesser evil. This distinction implies that action that there is neither reason to forbid nor to encourage should be allowed for individuals, but should not be included in the power of government authorities. This point is not applicable to actions performed on lesser evil grounds, since there is both a good reason to forbid such actions—the harm they cause—and a good reason to encourage their performance—the prevention of more severe harm.

Another aspect of the distinction between individual liberty and governmental power is, however, relevant to the notion of lesser evil. An individual who is not acting in an official capacity has the liberty to act in countless contexts. This individual might, hypothetically, encounter an enormous variety of possible emergencies in which harmful action might be justified. For this reason, the law, especially the criminal law, often includes defenses that consist of general standards of justification, which exempt harmful actions performed by individuals on the basis of the lesser evil. Examples are explicit lesser evil defenses that include only very

of the English Dominican Province trans., Daniel J. Sullivan rev., Encyc. Britannica 1952); ARISTOTLE, *supra* note 3, at 1137b. For modern discussion of this problem see ALAN DONAGAN, *THE THEORY OF MORALITY* 73-74 (1977); H. L. A. HART *THE CONCEPT OF LAW* 124-36 (2nd ed. 1994); KADISH & KADISH, *supra* note 11, at 177-78. For this problem in the administrative sphere see especially DAVIS, *supra* note 12, at 23, 30; DAVIS, *supra* note 11, at 37-39.

²⁵For this problem in related contexts, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 790 (1978); LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 48-49 (1987); George C. Christie, *Lawful Departures from Legal Rules: 'Jury Nullification' and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1307 (1974).

general and vague conditions,²⁶ or even more open-ended defenses, like the common law or statutory defenses of necessity and duress.²⁷

On the other hand, the problem of identifying possible situations in advance where executive officials might be justified in performing harmful actions is somewhat less difficult than the parallel problem with respect to individuals. There is a fundamental distinction between the liberty of individuals and the power of executive authorities. In light of the Principle of Legality, every public official is permitted to act only in a certain domain prescribed to him by law. Moreover, the point of setting up an executive body and entrusting it with powers is that its officials will perform certain actions in certain kinds of situations. Therefore, the kinds of actions that executive officials might be justified in performing in their official capacity are typically prescribed by law, either in legislation or in bylaws or in administrative guidelines. Furthermore, the experience acquired through the continuous operation of executive authorities, each in its domain of responsibility, can often help in identifying the kinds of conflicts that might arise in various domains. This would also help in formulating legal rules of authorization with regard to the kinds of actions that executive officials should perform in these situations on lesser evil grounds.

For these reasons, it seems that most emergencies that might arise, within the domain of operation of each executive authority, could be anticipated and thus specifically regulated in law. Indeed, it seems that the law often prescribes specific rules that give detailed content to the general idea of lesser evil in various contexts. For example, Glanville Williams explains that in England,

²⁶An example is the lesser evil defense suggested by the American Law Institute. See MODEL PENAL CODE § 3.02(1)(a) (Proposed Official Draft 1985) ("Conduct which the actor believes to be necessary to avoid harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged."). This defense was the model for many lesser evil defenses in the United States. See Peter D. W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975). For another example of a lesser evil defense, see 28 AMERICAN SERIES OF FOREIGN PENAL CODES, PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY § 34 (Sweet & Maxwell 1987) (1975). ("[W]hoever commits an act in order to avert an imminent and otherwise unavoidable danger to the life, limb, liberty, honor, property or other legal interest of himself or of another does not act unlawfully if, taking into consideration all the conflicting interests, in particular the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest which he harms. This rule applies only if the act is an appropriate means to avert the danger."). See also LARS BO LANGSTED, ET AL., CRIMINAL LAW IN DENMARK (1998) (quoting Penal Code of Denmark § 13) ("The offence committed through the act of necessity must be such that it can be regarded as only of relatively minor importance.").

²⁷The clearest defense in this respect is the necessity defense, since it does not involve considerations of responsibility, either of the people whose interests are involved in the conflict, as in the paradigm case of self-defense against an unjustified and culpable aggressor, or of people who are the source of the initial danger, as in the cases covered by the defense of duress. For a survey of the range of situations in which the lesser evil aspect of the defense of necessity was relied upon, see Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 290-91 (1974).

firemen, the police and ambulances are expressly exempted from speed limits, and the regulations allow them to treat the red light merely as a 'Give Way' sign if observance of the signal 'would be likely to hinder the use of that vehicle for the purposes for which it is being used on that occasion.'²⁸

Williams notes that before this law was enacted, a court “denied (obiter) that necessity could justify the driver of a fire-engine in crossing against the lights, even to save life.” He expresses the following view:

This is understandable, since the question of a fire-engine crossing against the lights is not one of unforeseen emergency but of proper practice on the part of the fire service; if an exemption were though proper, it was to be expected that the legislature would make it—as it afterwards did.²⁹

At this point we should also note the possibility of administrative, rather than legislative or judicial, rules set by executive officials themselves for the guidance of subordinates. In light of the inevitability of substantial executive discretion, administrative guidelines are important since they determine the way executive bodies function in many domains. Like rules in general, administrative guidelines have important advantages over employing unfettered discretion in specific occasions. Such guidelines decrease the dangers of mistake, arbitrariness and abuse of power.³⁰ In the context of the idea of lesser evil, there are areas where it is difficult to set legislative or judicial guidelines regarding the kinds of executive actions that might be justified on lesser evil grounds. Here, it might be more practical for each executive body to set administrative guidelines concerning its area of responsibility. It might be easier to translate the experience acquired by executive authorities—at least at the first stage—to administrative guidelines, compared to legislative or judicial guidelines. This option is easier due to the complexity and time involved in the processes of legislation and adjudication. Additionally, administrative guidelines are more flexible than the more rigid legislative or judicial decisions. Therefore, one way that an executive body can carry out its duty to prepare for various situations that may arise in its area of responsibility is to set administrative guidelines concerning the actions that officials should perform in conflicts on lesser evil grounds. These guidelines should be developed in light of the experience and expertise the executive body has acquired over time in this domain. It should be remembered, however, that administrative guidelines are not equivalent to legislative or to judicial guidelines in several respects that are discussed in the next section.

It thus seems that the difficulty in identifying in advance all types of harmful actions that might be justified in exceptional circumstances as the lesser evil is less serious for executive bodies as compared to individuals. Nevertheless, it is implausible to deny that this difficulty might exist for executive bodies and at times

²⁸ GLANVILLE L. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 608-09 (2d ed.1983) (footnotes omitted).

²⁹ *Id.* (footnotes omitted).

³⁰ The importance of administrative rules or guidelines in general is emphasized in DAVIS, *supra* note 12, at 44-46, and DAVIS, *supra* note 11, at 55-70.

be significant.³¹ Therefore, wide executive powers to act on general lesser evil considerations might be the only way to enable executive officials to perform certain justified actions that might prevent morally unjustified harms to individuals. The importance of such wide powers depends on the absolute and relative importance of the interests that might be at stake. Such powers might be very important if they could save important interests at the price of relatively trivial interest, for example, when it is possible to save a person's life by harming another person's trivial property.

In light of the inherent imperfection of rules there are strong additional reasons to empower executive officials to perform actions in their area of responsibility that they consider justified as the lesser evil. Specifically, executive officials are typically in a relatively good position, in comparison to other individuals, to protect important interests successfully. One characteristic that puts executive officeholders in an especially good position to confront emergencies in their sphere of responsibility is that they have the skills and resources necessary to resolve emergencies successfully. Executive officers can therefore typically save the endanger interests at the lowest cost.

A different reason why public officials, including executives, are typically in a better position to resolve emergencies successfully is that they are more likely to be impartial compared to the individuals involved in the conflict. There are two reasons for this assumption. First, public officials, as trustees of the public, are expected to be impartial, and it might be assumed that at least some officials internalize this special requirement to a significant extent. Second, public officials are probably less likely to be personally involved in the situations they encounter in their official capacity compared to other individuals. Their interests as individuals would typically not be affected by the way the conflict is resolved. Unlike executive officials who are required to seek out and attend situations where their duties oblige them to act, it might be assumed that other individuals who will have the opportunity and inclination to act in these kind of situations would often be those who have a personal interest in their resolution, rather than an official one. The concern for unjustified special personal preference is thus less substantial with respect to public, including executive, officials.

A different kind of reason for bestowing wide powers upon executive bodies to act on lesser evil considerations concerns the public trust in the government. As already noted, the fundamental reason for granting wide powers is that it will enable executive authorities to perform actions that are considered to be justified as the lesser evil and thus will prevent unnecessary harm. Another reason is that if governmental authorities do not perform actions that are widely considered justified as the lesser evil, especially within their area of responsibility, this might adversely affect the public trust in the relevant authority and perhaps in the government in general. This result might happen even if the reason for the authority's failure to act is the absence of power to perform the action at hand, since many people might consider this an overly formalistic insistence on technical rules of authorization.

Finally, even when it is possible in advance to identify situations where harmful actions by executive authorities might be justified, there could be reasons not to

³¹For what seems to me an exaggerated claim that the idea of lesser evil has no place in the public sphere since executive powers are defined by specific laws, see Jerome E. Bickenbach, *The Defence of Necessity*, 13 CAN. J. PHIL. 79, 84 (1983).

reflect all these conclusions explicitly in the law. One reason might be that vagueness regarding the executive authorities' power might have advantages in certain contexts. This vagueness could be achieved by the allocation of wide or general powers. Such claims are often made when discussing the powers of authorities that are responsible for security. One context where this occurs is combating terrorism.³² It should be noted, however, that this reason also tends to be exaggerated. It is important to be cautious and aware of the tendency of institutions, including governmental institutions, to overstate considerations of secrecy, especially in the context of national security.

In conclusion, there are reasons to bestow wide powers upon executive authorities to perform harmful actions on lesser evil grounds. Although some of these reasons tend to be overstated, they nevertheless present a strong case for granting public, and particularly executive, officials wide powers of lesser evil. This is particularly true at times where an omission on the part of the relevant authority might have serious adverse consequences. Again, such claims are sometimes made with respect to executive authorities responsible for national security.

IV. REASONS AGAINST WIDE EXECUTIVE POWERS OF LESSER EVIL

In many respects, the allocation of general and vague executive powers to act on lesser evil grounds has come at a price. The reasons against bestowing wide powers upon executive authorities to act with unfettered or wide discretion in emergencies are mostly second order reasons. They are concerned with the way decisions are made regarding the implementation of the concept of lesser evil and particularly the identity of the decision-maker. A decision regarding when performing harmful actions as the lesser evil is justified, and who should perform such actions when they are justified, is necessary. After all, not making a decision in this context has significant implications, namely, allowing harm that can and should be avoided, to take place. Thus, not making a decision is, in this important sense, a decision. The questions are thus how to make this decision and particularly who should make the decision. These are important questions in many contexts. They are especially significant with respect to the implementation of the notion of lesser evil. While it is widely agreed that the rudimentary concept of lesser evil is valid, there is substantial disagreement concerning the question of which substantive conception of lesser evil should be adopted. Moreover, even if some general conception of lesser evil is adopted, its interpretation and implementation require substantial discretion, due to the wide potential of any such conception.

As emphasized earlier, detailed rules are generally preferable over unfettered discretion in the context of executive action. Yet it is difficult to set detailed guidelines with respect to the notion of lesser evil. This section will concentrate on the second order considerations as they relate to the identity of the decision-maker, in light of the democratic conception of government and the division of work it implies, and to the related problems of mistake, inequality, abuse of power and the special indirect effects of governmental powers. These considerations point to several reasons against allowing executive officials to directly implement the rudimentary concept of lesser evil, or even some general conception of lesser evil.

³²For examples of wide executive powers in the context of national security, see discussion *infra* Section V.

The first reason is embodied in a central aspect of the democratic conception of government and the Rule of Law Principle it entails. These ideas reflect the following division of power among the different branches of government: major normative decisions in the public sphere should be made by the elected legislature, the formal aspect of the democratic conception, and subject to constitutional review, the substantive aspect of the democratic conception. The task of interpreting and completing legislative products should be entrusted to the courts, while the executive should implement the decisions made by the legislative and judicial branches. Obviously, the lines dividing the branches are blurred. Substantial executive discretion is a necessary part of the common conception of the modern state and a very significant part in practice. Nevertheless, there is tension between the democratic conception and entrusting the executive with the discretion to use wide powers on central normative issues, unfettered by legislative or judicial guidelines. Even if wide and unfettered executive powers are inevitable, they dilute the concept of democracy and the rule of law. This is true not only when the executive is not subject to any guidelines, but also when its officials implement guidelines that allow wide normative discretion with respect to central issues. Some guidelines accord such discretion explicitly, while others require such discretion in their implementation due to ambiguity.³³ Thus, there is a difference between legislative and judicial rules and administrative guidelines set by executive officials.

These ideas are incompatible with empowering executive bodies to act directly in light of the rudimentary concept of lesser evil, or even some general conception of lesser evil. This fact is due to the wide normative discretion required for the implementation of such concepts as they relate to justifying harm to the individual interests. In this respect, there is an important difference between the liberty accorded to private individuals to act in light of the concept of lesser evil, and the corresponding power of public, especially executive officials. Private individuals, it might be assumed, would encounter emergencies and take advantage of such liberty only rarely. Executive officials, on the other hand, are required not only to prepare for various kinds of situations where they have the power to act, but also to seek out such situations and to execute their authority. Entrusting executives with wide powers of lesser evil thus involves extensive executive discretion. This discretion could be put into practice in a huge variety of situations and could significantly affect many individuals. In light of the democratic conception described above, such discretion should be employed by the legislative and judicial branches of government rather than by executive authorities.

There is a related second order reason against bestowing wide and unfettered executive powers of lesser evil. This reason concerns the danger of mistake in the interpretation and implementation of the idea of lesser evil. This danger is of course general in nature. It applies to every individual and to every governmental officeholder who employs his discretion with respect to the concept of lesser evil. But there are grounds for assuming that the danger of mistake is more serious, in this context, with respect to the executive branch of government.

Before considering this difference, it is important to note that the danger of mistake in applying the concept of lesser evil is generally substantial for several

³³For examples of delegation of powers accompanied by such ambiguous standards for its employment that its practical import is unguided delegation, see DAVIS, *supra* note 12, at 27.

reasons. One aspect is normative. As previously noted, the proper conception of lesser evil is both controversial and difficult to determine. The rudimentary concept of lesser evil, i.e., the basic idea that it is sometimes justified to harm one person in order to prevent a more serious harm to another, is in itself indeterminate. In fact, it is almost empty. Therefore, it is important to look for principles that will give content to this basic idea. However, even assuming that we have such principles, that they are correct, and that they are incorporated into the law, such principles will be necessarily general due to the wide potential of every plausible conception of lesser evil in terms of the number and variety of contexts where they might apply. When normative standards are of such a high level of generalization, there is a substantial possibility of normative mistakes in their implementation.

An additional source of mistakes is factual. Implementing standards of lesser evil requires not only a normative inquiry, but also a factual assessment of the existing circumstances and expected consequences of various possible actions in light of normative standards. This assessment might be especially difficult and prone to mistakes in emergencies due to the necessity for immediate decision and action. Thus, emergencies do not allow decision-makers time to attempt to ascertain all the pertinent facts.

Mistakes in this context could be of two kinds. First, certain harmful actions might be considered justified and/or legal as the lesser evil when, in fact, they are neither justified nor legal. Second, certain actions might be considered unjustified and/or illegal, though they are, in fact, both justified and legal. Of course, correct or mistaken conclusions about justifiability and legality need not go hand in hand, but this complexity is not important here. Both kinds of mistakes might have grave implications. The first might lead people to perform wrongful and/or illegal harms. The second might lead people not to perform justified and/or legal actions, thereby allowing unnecessary harms.

Whether the difference between causing harm as a consequence of the first mistake or allowing harm as a consequence of the second mistake is morally significant is a controversial question.³⁴ I believe that it is not morally significant in itself.³⁵ Even if it is assumed, however, that this difference is morally significant in general, its significance fades, if not altogether vanishes, when the agent is a person who has a special duty to act in the context at hand. Public officials are a paradigmatic example of people who have such a duty with respect to the actions they have the power to perform in their area of responsibility.

³⁴For the view that the distinction between causing harm and allowing harm is morally significant, see CHARLES FRIED, *RIGHT AND WRONG* 20 (1978); 2 F. M. KAMM, *MORALITY, MORTALITY: RIGHTS, DUTIES AND STATUS* chs. 1-6 (1996); Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 *OXFORD REV.* 5, 10-13 (1967); Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 *ETHICS* 250-79 (1993); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 *PHIL. REV.* 287-312 (1989). For the view that this distinction is not morally significant in itself, see JOHN HARRIS, *THE VALUE OF LIFE* 28-47 (1985); KAGAN, *supra* note 4, at ch. 3.

³⁵However, there are many contingent differences between positive and negative duties or between acts and omissions in terms of the typical burden they impose. I explain this position in Segev, *The Concept of Lesser Evil: Beyond Deontology, Rights and Utilitarianism*, *supra* note 2.

The substantial danger of mistake in following the idea of lesser evil is of course general. With respect to executive officials, mistakes are especially serious in several dimensions. First, mistakes of public officials in every branch of the government are more significant than mistakes of individual who are not acting in an official capacity. One reason for this result is that public authorities' power is far more substantial than the power most individuals possess. Therefore, a public officials' mistake typically has more severe consequences than a parallel mistake made by an individual.

Public officials' mistakes are also more serious than an individual's mistake because an official mistake is more likely to repeat itself. That is, the mistake will often compound itself in the same as well as in other areas where the relevant authority functions, and, to a lesser extent, in the areas of operation of other public authorities. In comparison, an individual's mistake in the interpretation or implementation of the concept of lesser evil is more likely to be isolated.

A third consideration previously mentioned is that since actions of public officials are considered by many individuals to be an expression of the law, such actions influence the behavior of other individuals.³⁶ Thus, mistakes of governmental authorities in the interpretation and implementation of the concept of lesser evil are more likely to lead to similar mistakes than parallel mistakes of individuals.

Finally, a person executing a public duty is acting on behalf of, and as trustee of, the individuals in the relevant jurisdiction. Therefore, public officials have a special duty to employ their discretion in accordance with certain standards, such as proper inquiry into the relevant facts and taking account of all pertinent considerations. On occasions when a mistake is due to a failure to meet these standards it is thus also a breach of the special duty of public officials to observe these standards.

These considerations point to ways in which public officials' mistakes in general are more serious than mistakes of other individuals. Still, public officials must make such decisions since they have powers that private individuals lack. In other words, not making such decisions in the public sphere might have significant adverse consequences. The question is thus which public officials should interpret the idea of lesser evil in this respect, namely, which governmental branch is most prone to mistake in this regard. It seems that the danger of mistake is generally more substantial with respect to the executive branch of government compared to the legislative and the judicial branches. While legislatures and judges are not infallible, there is a special danger with respect to the officials of the executive branch that does not apply to the other branches of the government. Since each executive authority is entrusted with a specific task, there is a danger that its officials' perspective will be more limited than that of the legislature and judiciary. In particular, executive officials will typically consider themselves and will be considered by many others as mainly responsible for the specific task with which they are entrusted. Executives thus tend to accord excessive weight to the promotion of this task while underestimating the importance of other considerations. This is especially true when other considerations clash with the promotion of the executive's task.³⁷

³⁶See *supra* Section II.

³⁷For example, it was recently claimed that: "Liberal democracies consistently overreact to terrorist threats, as if their survival were in jeopardy The historical record suggests, disturbingly, that majorities care less about deprivation from liberty than harm minorities than

Thus, while administrative guidelines in general are an important tool that might reduce the risk of mistake, they are still exposed to this danger.

Still, general guidelines might be useful in one important respect. The danger that officials will tend to give excessive weight to the promotion of their immediate task is especially substantial in real or apparent emergencies. In such cases, guidelines could play a role in reducing the danger of an excessive reaction. Of course, in emergencies there will be a tendency to ignore general guidelines or consider them inapplicable and thus deviate from them. In addition, emergencies would no doubt also influence the decisions of non-executive officials such as legislators and judges.³⁸

A related reason against allowing executive authorities to interpret and implement the general idea of lesser evil is the danger of incoherence, and even contradiction, between decisions of various authorities. Even if one does not accept the view that coherence is the basis for the political legitimacy of the law,³⁹ incoherence is undesirable since it leads to inequality. Aside from any independent moral significance,⁴⁰ inequality typically has various adverse consequences. This is especially true if inequality is the result of government actions. The dangers of incoherence and inequality are obviously general ones. Yet they seem especially significant with respect to the executive branch, compared to the other branches of government. The pertinent difference between the legislative branch and the executive branch, in this respect, is that legislative products are more general than administrative decisions, which are made by various executive authorities or officials in a specific area of responsibility. Therefore, executive decisions are more prone to

they do about their own security. This historical tendency to value majority interests over individual rights has weakened liberal democracies." IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR*, *supra* note 15, at ix. It seems that this danger is especially acute with respect to the executive branch of the government.

³⁸For a discussion of the use of torture in interrogations, see Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1042-43, 1072 (2004) ("Security services can panic in the face of horrific tragedy. With rumors flying about, amid immense pressures to produce results, there will be overwhelming temptations to use indecent forms of interrogation. This is the last place to expect carefully nuanced responses . . . judges are no more immune from panic than the rest of us. To offset the rush toward torture in an emergency, they would be obliged to make their hearings especially deliberate and thoughtful. But if they slow the judicial proceedings down to deliberate speed, the ticking time bomb will explode before the torture warrant can issue. Serious deliberation is simply incompatible with the panic that follows a terrorist attack.").

³⁹*See, e.g.*, DWORKIN, *LAW'S EMPIRE*, *supra* note 22, at 225-75.

⁴⁰For the view that equality is not morally significant in itself, *see* HARRY G. FRANKFURT, *Equality as a Moral Ideal*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS* 134-35 (1988) ("What is important from the point of view of morality is not that everyone should have the same but that each should have enough. If everyone would have enough, it would be of no moral consequence whether some had more than others."); H. L. A. Hart, *Between Utility and Rights*, 79 *COLUM. L. REV.* 828, 845 (1979) ("The evil is the denial of liberty or respect; not equal liberty or equal respect: and what is deplorable is the ill-treatment of the victims and not the relational matter of the unfairness of their treatment compared with others.").

incoherence and inequality. There are two pertinent differences, in this respect, between the judiciary and the executive. First, though precedent is significant both normatively and practically in the administrative sphere, the normative force and actual effect of precedent is stronger in courts' decisions. Second, judiciary decisions are made by a substantially smaller number of judges than executive decisions, which are made by a huge number of officials and are therefore more prone to the danger of incoherence and inequality. Administrative guidelines do not address the problem of incoherence between different executive bodies since they are typically set by each executive body separately. This danger may be mitigated, however, by the fact that administrative guidelines are often advanced publicly and thereby expose the policy of different bodies to comparison, and thus to critical assessment based on this comparison.

The importance of monitoring executive powers as a way of preventing mistakes and abuse of power and thus unjustified harms to individuals is an additional consideration against allowing executive authorities to apply directly the rudimentary concept of lesser evil. Due to the extensive normative and even more extensive actual powers of executive authorities, including the actual power of executive officials to conceal many of their actions, it is both important and difficult to effectively check the powers of executive authorities. Monitoring executive actions can be done by inquiring into the substantive justification for each action. But this kind of inquiry is often difficult, especially since it is often hard to ascertain all the relevant considerations and facts independently without reliance on the acting authority. Detailed rules that guide the executive body in the relevant area are a particularly useful tool for monitoring executive actions. When such rules exist, it is possible to examine the compatibility between the rules and the executive actions.⁴¹ It is more difficult to monitor wide and unguided powers effectively. Therefore, this is another reason for more detailed powers, rather than powers to act in light of general and vague principles. This consideration is particularly pertinent with respect to the power to interpret and implement the notion of lesser evil, due to the indeterminate nature of this rudimentary notion, its wide potential and the inherent harm its implementation involves. Administrative guidelines can set standards that will encourage scrutiny. But administrative guidelines might be less effective than legislative and judicial guidelines due to their more elastic and informal nature.

Finally, the last second order reason against bestowing wide authority upon executive authorities to interpret and implement the idea of lesser evil in their area of responsibility concerns the special indirect effects that governmental actions typically carry, in terms of the legitimizing similar actions in other contexts.⁴² As previously noted, the performance of certain harmful actions might be justified as the lesser evil in terms of their direct effects, while the enactment of laws permitting or authorizing the same actions, as well as the actual performance of such actions by public officeholders, might have the indirect negative consequence of encouraging similar actions in situations where they are unjustified, even in terms of their direct effects. This consideration should be taken into account in determining the nature of executive powers to act on lesser evil grounds. Particularly, this consideration provides an additional reason against wide and unfettered executive powers of lesser

⁴¹*Cf.* DAVIS, *supra* note 11, at 66.

⁴²*See supra* Section II.

evil, since the severity of the above danger is dependent on the breadth of the power. There is a difference in terms of the message conveyed by a power to perform a certain action in detailed circumstances and the message conveyed by a wide power to perform any action that is considered to be the lesser evil. The message conveyed by the second kind of power is obviously much more exposed to the danger of mistaken interpretation.

At this point, two aspects of Sanford Kadish's analysis of this issue seem problematic. The first aspect concerns the nature and extent of this danger, and the other concerns its implications. Kadish's analysis reflects the assumption that there is a substantive distinction between the enactment of laws permitting or authorizing the performance of certain actions and the actual performance of such actions by public officials. Kadish assumes that the danger of conveying a false message of legitimizing the performance of similar actions in other contexts is present only with respect to the enactment of law, but not with respect to the actual performance of such actions by public officials. Therefore, he concludes that there might be situations where it is unjustified to enact laws permitting lesser evil actions, even though the performance of such actions is justified by individuals and by public officials.⁴³ He argues that the use of force in interrogations to extract information that could prevent acts of terror is one such example.

This position raises two difficulties. First, the sharp line between enacting laws that permit or authorize certain actions and the actual performance of such actions by public officials, in terms of their legitimizing effects, seems too sweeping. Though a general and explicit law has special declaratory meaning, the performance of actions by executive officials, even without an explicit legal authorization, might also convey a strong message of legitimizing similar actions. This possibility is especially strong when such actions are supported by other governmental authorities that do not enact an explicit prohibition on the performance of such actions in the future or set forth criminal or disciplinary sanctions against the public official who performed harmful actions without authorization.⁴⁴ Second, the difficulty of Kadish's position is that entrusting wide discretion to public officials to act on lesser evil grounds with no limitation or guidance in the law is contrary to the considerations discussed in this section against such discretion.⁴⁵

The above considerations emphasize the importance of both the nature and the level of generality of rules empowering executive actions of lesser evil. The existence of an authorizing rule does not, by itself, reflect these considerations. Wide authorization rules that do not provide real guidance with regard to their content frustrate most of the reasons underlying the requirement for authorization. In light of these reasons, authorization rules are meaningful only if they go beyond a certain

⁴³Kadish, *supra* note 18, at 355.

⁴⁴The possibility of such legitimation by the legal system is mentioned by Kadish in this context and extensively explored by him elsewhere. *See id.*; KADISH & KADISH, *supra* note 11.

⁴⁵It should be noted, however, that Kadish assumes that in the context he discusses—the use of force in interrogations in order to extract information that might help prevent acts of terror—this discretion would lead to the performance of actions on lesser evil grounds only rarely. *See* Kadish, *supra* note 18, at 355. In the next section, I note that this assumption might be misguided in light of the evidence that coercive interrogational means were used in Israel for many years without legal authorization.

level of specification with respect to the identity of the authorized officials, the authority's triggering conditions, and the kind of authorized action. These reasons support as much specification as possible in all of the above respects.

The considerations discussed in this section point to several important differences between allowing a general liberty of individuals to act on lesser evil grounds and wide executive powers of this kind. Though general defenses of lesser evil might be indispensable for private individuals, these differences might justify a different approach in the public sphere. Wide and unfettered executive powers to interpret and implement the idea of lesser evil in its rudimentary and general form bestow enormous discretion upon public officials due to the extensive potential reach of the notion of lesser evil. Therefore, such powers are contrary to the considerations mentioned in this section. These considerations support the view that the notion of lesser evil in the administrative sphere should take the form of specific rules of authorization. Such rules should include the contexts and conditions in which public officials are authorized to perform lesser evil actions and should instruct officials regarding the nature of such actions. Administrative guidelines can perform this task to a certain extent, but as previously discussed, there are several differences between administrative guidelines and external—legislative or judicial—rules.

V. THE IMPLEMENTATION OF THE CONCEPT OF LESSER EVIL

The proper relation between the concept of lesser evil and executive powers thus requires the resolution of the tension between the considerations for and against wide executive powers to interpret and to implement the idea that harm might be justified as the lesser evil. This section addresses how this tension is reflected in the nature of executive powers to act on lesser evil grounds of several legal systems. In particular, it will examine the arguments made in Israel concerning the use of force in interrogations in order to prevent acts of terror.

The broadest and most vague legal source for executive powers of lesser evil are general criminal and tortious defenses that exempt individuals who perform harmful actions in extraordinary circumstances. These defenses are sometimes thought to reflect considerations of lesser evil. Examples of such defenses include, in addition to explicit lesser evil defenses, self-defense, defense of others and the defenses of necessity and duress.⁴⁶ Reliance on such defenses as a basis for executive power reflects a view emphasizing the reasons in favor of granting executive bodies wide powers to act on lesser evil grounds, while ignoring or at least significantly downplaying the reasons against such powers. This is so since these defenses include only very general and vague conditions, such as reasonableness or proportionality, and are relevant in many kinds of situations without clear limitations on the nature of the actions they encompass. In fact, these defenses do not even clearly reflect one rationale, particularly a lesser evil rationale. As previously noted, though, these defenses are sometimes invoked as a basis for exempting individuals who performed harmful actions as the lesser evil. The reliance on these defenses does not contribute much to the elucidation of the nature of actions that are justified on lesser evil ground in specific situations beyond what is implied by concept of lesser evil itself. But as previously discussed, this notion in itself is almost empty of any substantive content. Reliance on such general defenses as a basis for executive

⁴⁶See *supra* Section III.

actions merely pays lip service to the Legality Principle while ignoring its substantive grounds.

Some legal systems draw a general distinction between the acts of private individuals and public officials that are based on lesser evil grounds. While individuals have the liberty to follow general principles of lesser evil directly, a more restricted approach is taken with respect to the powers of executive officeholders.⁴⁷ Particularly, it was suggested that general principles of lesser evil in various legal systems constitute only a necessary condition for actions of public officials based on lesser evil grounds. It is claimed that the emphasis of various legal systems in the public sphere is on procedural rules that constrain the powers of executive officials to act on lesser evil grounds as opposed to the general principles that apply to private individuals.⁴⁸

Similarly, it has been suggested that in England the criminal defense of necessity is not a basis for governmental powers:

The courts are not supposed to extend governmental powers merely by reference to the necessities of government. If the Government wants powers, it must obtain them from Parliament; and when it has obtained them, it must keep within them, not stretch them under the plea of necessity. Th[is] principle is not regarded as impeding the grant of powers at common law for certain recognized purposes, such as the preservation of peace and the saving of life.⁴⁹

In Germany, the distinction between the private and the public sphere with respect to lesser evil actions is reflected in the doubt that exists regarding whether the criminal defense of necessity, which is explicitly based on the concept of lesser evil, also applies in the public sphere.⁵⁰ In Denmark, there is a distinction between the general self-defense, which applies to individuals, and a special self-defense, which applies only with respect to the actions of public officials.⁵¹

In Israel, the relationship between executive powers and general principles of lesser evil, as reflected in general criminal defenses, was debated in a specific context. The question was whether the notion of lesser evil, as reflected in the criminal defense of necessity, could provide moral justification and legal ground for the employment of special interrogation measures, including force, in order to extract information that might enable security authorities to thwart impending acts of terror. A national commission of inquiry explored whether special interrogation measures are morally justifiable and legal in light of the concept of lesser evil and the criminal defense of necessity. The commission concluded such measures were morally and

⁴⁷Public officials, including executive officials, typically have a general criminal defense of executing their authority. This defense requires specific authorization and is derived from the administrative rules of authority and cannot add to them. *See, e.g.*, PAUL H. ROBINSON, *CRIMINAL LAW* 424 (1997).

⁴⁸FLETCHER, *supra* note 25, at 771-73.

⁴⁹WILLIAMS, *supra* note 28, at 610.

⁵⁰*See* Bernsmann, *supra* note 23, at 184.

⁵¹*See* LANGSTED ET AL., *supra* note 26, at 65.

legally permissible.⁵² Subsequently, this view was adopted by the Government's legal representatives who defended the practice of employing special interrogation means in various circumstances. Ultimately, this position was endorsed by the Israeli Supreme Court, although only implicitly and without a significant analysis. In a series of judgments, the Court did not ban interrogation measures and suggested that they might be legal, based on the criminal defense of necessity.⁵³

A few years ago, the Supreme Court introduced a variation of this position in a comprehensive judgment. The judgment was comprised of two statements that did not resolve the issue definitively. The Court declared that governmental interrogators are not authorized to use special means of interrogations, and force in particular, since the "residual power" of the government, which allows it to perform "any action that is not explicitly entrusted to a specific executive authority," does not include the use of such means. However, the Court continued to adhere to the position that the *criminal defense* of necessity might be applicable to governmental officials who use exceptional interrogation measures to extract information that might help prevent acts of terror "in the appropriate circumstances."⁵⁴

This position is ambiguous in several respects. It is plausible to assume that every legal system, including Israeli law, incorporates some conception of lesser evil. This conception should be subject to special, contrary rules regarding what constitutes the lesser evil in specific circumstances.⁵⁵ It is unclear whether Israeli law includes a specific rule that forbids public officials from employing exceptional interrogation measures, and force in particular, even when such measures are considered necessary in order to extract information regarding impending acts of terror.⁵⁶ But even assuming that Israeli law does include a general conception of lesser evil and does not include a specific rule regarding the legality of the use of force in interrogation in these circumstances, the Court interpreted the relevant aspect of the general notion of lesser evil. Thus, the Court had to decide whether the general notion of lesser evil

⁵²REPORT OF THE COMM'N OF INQUIRY IN THE MATTERS OF INVESTIGATION METHODS OF THE GENERAL SEC. SERV. REGARDING HOSTILE TERRORIST ACTIVITY (1987) (in Hebrew). An English translation of excerpts from this report could be found at 23 ISR. L. REV. 146-88 (1989).

⁵³For a survey and analysis of the judgments that were given by the Supreme Court in this matter, see Kremnitzer & Segev, *Using Force during Investigations*, *supra* note 17, at 671-77; Kremnitzer & Segev, *Interrogational Torture*, *supra* note 17, at 510-16.

⁵⁴HCI 5100/94 The Public Committee against Torture in Israel v. The Government of Israel [1999] IsrSC 53(4) 817. For an English translation of the judgment, see www.stoptorture.org.il.

⁵⁵*See supra* Section II.

⁵⁶The view that there is such a specific rule could be based on two reasons. First, public international law seems to forbid the use of all kinds of torture and ill-treatment and to deny any exception to this rule, even at times of war or in emergencies. Since this absolute rule reflects a customary international law prohibition, it has the status of internal law in Israel. Second, the Israeli Criminal Code includes an offense that forbids the use of force by a public servant even when the aim is to reveal information "concerning an offence." This rule might apply not only with regard to information concerning an offence that was already committed, but also to information that might help prevent future offenses. Both these points are elaborated in Kremnitzer & Segev, *Interrogational Torture*, *supra* note 17, at 552-55.

could be the basis for the use of special interrogation means by public officials in order to extract information that might help prevent acts of terror and, if so, when such means are legal.

The Court's answer to this question is ambiguous in two central respects. First, the judges did not explain the substantive conclusions implied by the concept of lesser evil. The Court did not define the "appropriate circumstances" where the use of special interrogation means might be justified. Second, the Court did not explain the meaning and implication of its seemingly puzzling position concerning the distinction between the administrative and the criminal spheres. This position implies that, when governmental interrogators are not authorized to use special interrogation means, presumably even in exceptional circumstances, the criminal defense of necessity might nevertheless apply to interrogators who did use such means on certain occasions. What is the implication of the applicability of the criminal defense absent specific administrative power? Is it an action that is compatible with the defense legal or not?⁵⁷

The practical outcome of the Court's ambiguous position is to pass the buck to the investigating authorities and grant them almost unfettered discretion. This possibility raises difficulties regardless of the assumption concerning the moral justification and the legal grounding for the use of force in interrogation to extract information relating to potential acts of terror as the lesser evil. If the assumption is that the law does sanction the use of force in interrogations, once certain conditions are met, then the Court's abstention from an explicit declaration to that effect, accompanied by an elucidation of these conditions, might prevent justified actions that save people's lives since interrogators will not know that such actions are within their powers. On the other hand, if the assumption is that the law does not sanction the use of force in interrogations, either absolutely or if certain conditions are not met, then the Court's position might lead to unjustified means of interrogation, due to the interrogators' assumption that such acts are within their power. In any case, the practical implication of the Court's position is to shift one of its main responsibilities, the interpretation of a complex legal notion while important interests are at stake, to an executive body. In light of this judgment, security officials are required to interpret and implement the complex idea of lesser evil in a difficult context without any real guidance with respect to its content and proper manner of implementation.

The Court's ambiguous position cannot be the last word on the subject. It was clear that not every interrogator would act in light of his personal judgment on each occasion, and that some general policy would be adopted by the relevant security authorities. Indeed, the available evidence suggests that, contrary to several initial assumptions, the use of force in interrogation has not ceased after the Court's judgment was delivered. Though there were some changes in the kinds of measures used, it is hard to find a principled distinction between the previous policy and the new one.⁵⁸

⁵⁷For an analysis of the judgment in general, and of this position in particular, see *id.* at 516-59.

⁵⁸For discussions of the policy of the security service after the judgment, see THE PUBLIC COMM. AGAINST TORTURE IN ISRAEL, BACK TO A ROUTINE OF TORTURE: TORTURE AND ILL-TREATMENT OF PALESTINIAN DETAINEES DURING ARREST, DETENTION AND INTERROGATION – SEPT. 1999 TO SEPT. 2001 (2003), available at www.stoprtorture.org.il; THE PUBLIC COMM. AGAINST TORTURE IN ISRAEL, FLAWED DEFENSE: TORTURE AND ILL-TREATMENT IN GSS

The issue of the use of force in interrogation as a means of extracting information to help prevent acts of terror demonstrates the considerations discussed in the previous section against wide executive powers to interpret and implement the concept of lesser evil. It is possible and appropriate to roughly determine the nature and scope of the power to interrogate people suspected of having information concerning future acts of terror. This kind of situation is unfortunately often, perhaps even routinely, encountered by security services in Israel and is thus obviously not impossible to predict. Therefore, the legislature—or in its absence, the judiciary—should have made the decision regarding what means are justifiable in these kind of situations rather than leave this decision to the interrogators themselves without meaningful guidance.

Entrusting the power to interpret and implement the concept of lesser evil to security officials has indeed led to the dangers discussed in the previous section. One such danger is the possibility of mistake. There seems to be wide agreement among philosophers and lawyers who study this subject seriously that the use of force in interrogation might be justified only in extraordinary circumstances, primarily when strong evidence exists that force is the only way to prevent severe harm to many people.⁵⁹ The general agreement regarding this proposition might be misleading in an important respect. Such views are typically left in this abstract level, without much elaboration regarding the nature of the harm sought to be avoided, the force that could be used, and the evidence required with respect to the existence of the danger and the ways of preventing it. Yet it seems clear that the common view of those who have seriously considered the subject does not support the policy adopted by the security officials in Israel with regard to the reliance on the concept of lesser evil as the basis for the use of force and other special interrogation means in a large number of situations.

This mistaken policy could be attributed to the materialization of another danger mentioned in the previous section: that executive officials will tend to attach more than the appropriate weight to the specific duty for which they are entrusted. Thus, discovering information concerning possible acts of terror could come at the expense of other, more important considerations. In any case, the bottom line is that the virtually unfettered discretion of security officials often led to the employment of unjustified and severe interrogational means, sometimes for prolonged periods.

Finally, this issue demonstrates the danger of abuse of power by executive officials and the difficulty of employing effective supervision on executive powers, especially with respect to wide and vague powers. The use of force in interrogations in Israel was concealed for years, during which security officials have intentionally

INTERROGATIONS FOLLOWING THE SUPREME COURT RULING – SEPT. 1999 TO SEPT. 2001 (2001), available at www.stoptorture.org.il. See also Kremnitzer & Segev, *Interrogational Torture*, *supra* note 17, at 530-31.

⁵⁹See the sources mentioned in Kremnitzer & Segev, *Using Force during Investigations*, *supra* note 17, at 712-13; Kremnitzer & Segev, *Interrogational Torture*, *supra* note 17, at 543-54.

and systematically misled the courts.⁶⁰ In addition, interrogators exceeded internal instructions regarding the measures they were permitted to employ.⁶¹

VI. A PARTIAL SOLUTION: INTERMEDIATE GUIDELINES

What is the conclusion that should be drawn, in light of the discussion in the previous sections, with respect to the desired nature and scope of executive powers to act on lesser evil grounds? Wide and unfettered executive powers to act directly in light of the rudimentary concept of lesser evil, or even in light of some general substantive conception of it, such as powers to implement vague criminal or tortious defenses, should not be granted. The question is thus how to address the difficulty of formulating more detailed instructions concerning the scope of executive powers to implement the notion of lesser evil, especially in contexts where there might be a strong justification to perform harmful acts as the lesser evil. A partial solution to the problem is comprised of two parts: legislative and judicial. The main solution should be based on an attempt to strike a proper legislative balance with regard to the level of generality of lesser evil powers. Generally, executive powers based on the notion of lesser evil should be intermediate in their level of generality, between wide powers to act directly in light of general principles of lesser evil and detailed powers to perform specific actions that are justified as the lesser evil. Such powers should be conferred only in situations where there is indeed a genuine difficulty in specifying in exhaustive details the actions that might have a lesser evil justification. Moreover, such powers should be conferred only in situations where it is difficult to specifically identify in advance actions that might have a strong lesser evil justification. These powers should include guidelines that instruct specific executive officials regarding the way general principles of lesser evil should be applied in specific kinds of conflicts that might arise in their area of responsibility. The guidelines should include limitations concerning the actions that might be performed in each situation.

The legislative guidelines concerning the proper way to implement the concept of lesser evil should refer to every aspect with respect to which specification is possible. These aspects should generally include the identity of the officeholders who have the power to execute the power at hand, the kinds of interests that conflict between them as the basis for employing the power, and the nature of the conflict between these interests. Furthermore, the guidelines should take into consideration the seriousness and the probability of the danger that justifies the execution of the power, the magnitude of the harm that it is permissible to inflict to confront the danger, and the limitations on the way the power should be executed, taking into account the possibility of mistake. This kind of intermediate powers should, moreover be limited with respect to every executive authority that is entrusted with them, to the center, rather than the periphery, of its area of responsibility. This will, ensure that lesser evil actions will be carried out by officeholders who have the best available resources, knowledge and skills necessary for their proper execution.

⁶⁰Kremnitzer & Segev, *Interrogational Torture*, supra note 17, at 511-14; Kremnitzer & Segev, *Using Force During Investigations*, supra note 17, at 677-80.

⁶¹STATE COMPTROLLER OFFICE, EXTRACT FROM THE REPORT ON THE GENERAL SECURITY SERVICE INTERROGATION ARRAY IN THE YEARS 1988-1992 (2000) 4-5 (in Hebrew).

For example, it is possible to decide that officials responsible for the protection of public health should have the power to make use of private property, even if this power involves damage to property, if this is the only way to prevent dangerous materials from spreading and thereby creating a real danger to people's lives or health. This power should be constrained, however, by detailed and fact-specific guidelines as to when it is appropriate to invoke such power. First, the legislation should specify the kinds of dangerous materials that would justify the use of this power. Second, the legislation should include factors such as the quantity of the material involved and the population or environment at risk in order to ensure that only a real danger to life or serious bodily harm might justify the use of this power. Third, the law should describe, at least in general terms, the kinds of use that might be made of private property. Guidelines should be developed specifying when it is acceptable to commandeer private property to combat a threat. For example, in what conditions private property such as cars could be used to block contaminated roads that lead to contaminated areas. Finally, the rules should include limitations that clarify that the authorized use does not extend to actions that create a significant danger to human life or of serious bodily harm, e.g., blocking roads by using a physical object that is not accompanied by adequate warning signs.

This kind of legislative guidance does not necessarily include an exhaustive list of actions that can be carried out in the pertinent context based on lesser evil grounds. Thus, in the above example, the law does not necessarily need to include an exhaustive and detailed list of the kinds of private property that could be damaged or the exact procedure of forfeiture of that property. This kind of power might be proper in situations where there is a significant difficulty in establishing regular exhaustive and detailed powers to perform harmful actions that might be the only way of preventing more serious harm.

Appropriate intermediate powers of this kind could substantially alleviate the tension between the reasons for and against wide executive lesser evil powers. Intermediate powers would authorize actions based on lesser evil principles but would not allow such actions without appropriate restrictions to prevent inflicting unjustified harms to individuals.⁶²

The basic solution of legislation that includes such intermediate powers should also be supplemented by the judiciary. Courts should make the authoritative decision with respect to the interpretation of such powers in two kinds of situations. First, absent an imminent danger, an administrative official presented with a situation that may call for a lesser evil action should consult a court to confirm whether tacking a specific action is authorize by the executive's intermediate power.

Due to the exigencies of a particular emergency, prior judicial authorization may be impossible. If we require judges to make rapid decisions in time of emergency,

⁶²An example of this kind of power is found in an English judgment where the court upheld an administrative instruction that permitted fire engines to ignore traffic lights in emergencies and specified the precautions that should be taken before doing so. The judges correctly noted that such an instruction is preferable to the previous situation of unfettered discretion on behalf of the drivers. *See* *Buckoke v. Greater London Council* (1971) 2 All E. 254, 256, 258-59, 263-64, 266-67 (C.A.).

we can generally expect no more than a judicial rubber stamp for decisions taken by executive officials.⁶³

In light of this possibility, a second rule should apply if an executive action was performed in light of lesser evil principles, without prior judicial authorization. In this situation, a court should decide in retrospect whether the action was indeed justified. Such a review would help guide executive officials regarding the proper interpretation and implementation of intermediate lesser evil powers in the future.

The judicial aspect of the proposed solution is based not only on the general reasons for entrusting the courts with the power to make authoritative decisions regarding the interpretation of legislative rules. It is also based on the assumption that judicial decision-making would typically lead to more appropriate conclusions, with respect to the content and boundaries of lesser evil standards, compared to unchecked administrative discretion. This assumption is based on a previously mentioned reason: there is a better chance that courts will take a proper account of all the interests involved in a particular conflict, compared to the executive officials who are responsible for the protection or promotion of a particular aim. This is based on the assumption that executive officials will tend to place more weight on the particular aim while underestimating conflicting interests.

VII. CONCLUSION

The concept of lesser evil represents an important moral idea that should be reflected in the law. However, the institutional context of the law creates a difficult dilemma concerning the implementation of this concept, particularly with respect to emergencies. If no general lesser evil powers are granted to the executive branch of the government, serious harm that it is both possible and justifiably preventable might take place. If such powers are granted, however, there is a serious danger that they might be employed improperly. The aim of this paper was to explore this dilemma. The solution suggested to this dilemma does not solve it completely. But I believe that it reflects the most important reasons for and against bestowing lesser evil powers upon governmental authorities to deal with emergencies.

⁶³*Cf.* Ackerman, *supra* note 38, at 1066 ("With the country reeling from a terrorist attack, it simply cannot afford the time needed for serious judicial review . . . [in times of emergency], judges will not systematically stand up to the enormous pressure. It is far more likely that they will become mere rubber stamps . . .").