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The Torture Lawyers

Jens David Ohlin*

One of the longest shadows cast by the Bush Administration's War on Terror involves the fate of the torture lawyers who authored or signed memoranda regarding torture or enhanced interrogation techniques against detainees. Should they face professional sanction or even prosecution for their involvement? The following Article suggests that their fate implicates some of the deepest questions of criminal law theory and that resolution of the debate requires a fundamental reorientation of the most important areas of justifications and excuses. First, the debate about torture has been overly focused on justifications for torture. This can be explained in part by a general confusion in U.S. law over the necessity defense. Second, this Article argues that necessity, when properly understood, constitutes two separate defenses, one a justification and the other an excuse, each with its own standard. The necessity justification does not apply to government agents who tortured detainees, though necessity as an excuse might apply under certain conditions. However, excused necessity—like all excuses—does not generate a corresponding exculpation for accomplices, like the torture lawyers, who might be said to have aided and abetted the principal perpetrators. Third, the Article questions the usual assumption of lawyers that they are liable as accomplices only if they supported their client's criminality through frivolous legal arguments, though even under this standard the torture lawyers might face accomplice liability for some of their arguments. Finally, commentators are wrong that such prosecutions would be unprecedented. The United States itself prosecuted Nazi officials at Nuremberg for their failure to properly advise the Reich that their conduct violated international law.

INTRODUCTION

On April 16th, 2009, President Obama stood before the nation and declared that government agents who had tortured detainees during the Bush Administration would not be prosecuted.¹ The declaration came as welcome relief for some, and renewed anguish for others. Perhaps more than any other constitutional dilemma regarding the Bush Administration detainee policy, the moral and legal controversy regarding torture became a shibboleth to distinguish between Bush Administration hardliners and their supporters on the one hand, and their opponents who argued that we should fight the War on Terror within the confines of international law—not outside of it.² Of

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1. See Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES, Apr. 17, 2009, at A1 (quoting Obama as saying “nothing will be gained by spending our time and energy laying blame for the past”).

2. See, e.g., *Transcript of Cheney on ‘Fox News Sunday’*, FOX NEWS, Aug. 30, 2009, <http://www.foxnews.com/politics/2009/08/30/raw-data-transcript-cheney-fox-news-sunday/> (“[E]nhanced interrogation techniques were absolutely essential in saving thousands of American lives and preventing further attacks against the United States, and giving us the intelligence we needed to go find Al Qaeda, to find their camps, to find out how they were being financed. Those interrogations were involved in the arrest of

particular interest is the fate of the so-called “torture lawyers,” Administration lawyers who wrote or approved memos analyzing the legality of torture and harsh interrogation methods.³

But the Obama Administration officials quickly backtracked. First they indicated that their prior announcement did not apply to higher-level Bush Administration officials and lawyers—the announcement only applied to government agents on the ground who relied on the Justice Department’s legal advice.⁴ Then the Obama Administration backtracked again and simply announced that everyone’s fate (that of both agents and lawyers) would be decided by the Justice Department after reviewing the relevant facts and deciding if prosecution was warranted.⁵ Most commentators assumed that the decision was sparked by political considerations and outrage from the left.⁶ But a far more sophisticated and legalistic decision-making process was probably also responsible for the decision. As is well known, the Convention Against Torture sets up a prosecute-or-extradite scheme that binds all states parties to the Convention.⁷ But the Convention does not require prosecution in every case of alleged torture. Rather, the Convention requires that a state party exercise jurisdiction in a case by deciding whether to prosecute “in the same manner as in the case of any ordinary offense of a serious nature under the law of that State.”⁸ Of course, it is unclear what “in the same manner” means in the context of the Convention Against Torture.⁹ However, it is doubtful that an ad hoc announcement by the President of the United States

nearly all the Al Qaeda members that we were able to bring to justice. I think they were directly responsible for the fact that for eight years, we had no further mass casualty attacks against the United States. It was good policy. It was properly carried out. It worked very, very well.”). Compare JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE ‘WAR’ ON TERROR* (2007).

3. These include John Yoo, former Assistant Attorney General at the Office of Legal Counsel and now a professor of law at the University of California at Berkeley; Jay Bybee, formerly at the Office of Legal Counsel and now a federal appellate judge on the Ninth Circuit; and Alberto Gonzales, former White House Counsel and then Attorney General. David Addington, a former legal advisor to Vice President Dick Cheney, was also a key player in formulating aspects of the legal strategy of the War on Terror, though his role is largely unexamined here. Steven G. Bradbury, the former head of the Office of Legal Counsel, wrote several memoranda concluding that the C.I.A.’s interrogation techniques were lawful under specific circumstances. This Article concentrates on the two most famous torture memos written by Yoo and Bybee.

4. See Mazzetti & Shane, *supra* note 1.

5. See Craig Whitlock, *European Nations May Investigate Bush Officials Over Prisoner Treatment*, WASH. POST, Apr. 22, 2009, at A4 (noting that Obama indicated that it would be up to Attorney General Eric Holder to decide whether to prosecute senior officials for their involvement in torture).

6. R. Jeffrey Smith, Michael D. Shear & Walter Pincus, *In Obama’s Inner Circle, Debate Over Memos’ Release Was Intense: Some Feared That a Partisan Outcry Could Obstruct Larger Agenda*, WASH. POST, Apr. 24, 2009, at A1.

7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4–8, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

8. *Id.* art. 7.

9. *But see* MANFRED NOWAK & ELIZABETH McARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 366 (2008) (noting that “this simply means that the normal procedures relating to serious offenses, both in the extradition and criminal proceedings, and the normal standards of evidence shall apply”).

qualifies as the “same manner” as most criminal prosecutions in this country. A regular decision regarding torture by the Attorney General, upon a recommendation from Justice Department lawyers, was arguably required by our commitments under international law and the Convention Against Torture.

After extensive review, the Justice Department reportedly has declined to prosecute either the agents who tortured detainees or the lawyers who approved the interrogation methods, and the Department is currently in the process of finalizing its report.¹⁰ However, the potential legal exposure of the torture lawyers does not end there. They also face disciplinary action before state bar committees, criminal charges in Spain—where a pioneering investigative judge has launched a criminal probe under the authority of Spain’s universal jurisdiction statute¹¹—and civil liability in U.S. federal district court.¹² A district court judge recently refused to dismiss a lawsuit filed by José Padilla against John Yoo.¹³

Although there have been reams of commentary written about torture and some consideration of the contributory role played by Bush Administration lawyers,¹⁴ very little attention has been paid to the underlying issues of criminal law theory that will help determine their liability. Specifically, this Article advances the argument that it makes a great difference which defense we apply to the government agents who tortured the detainees. If the agents are exonerated—either in a court of law or in theory—by justified necessity, then arguably their justification will “flow down” to the lawyers who are charged as accomplices for their work behind the scenes. But if the agents are exonerated by excused necessity, then their excuse is arguably personal and does not flow down to any accomplices. For reasons that will be demonstrated in this Article, it is unlikely that the lawyers could assert their own independent claim of either version of the necessity defense. Consequently,

10. See Carrie Johnson, *Report on Bush Policy May Come In ‘Weeks’*, WASH. POST, June 18, 2009, at A3.

11. Spain’s lower house recently enacted legislation that curtails the universal jurisdiction statute which provides the jurisdictional basis for its investigation of Bush Administration officials. However, the version of the legislation originally introduced is not retroactive and would probably not prevent current cases from going forward. The bill must also be passed by the upper house before becoming law. Robert Marquand, *Global Reach of Spain’s Courts Curtailed*, CHRISTIAN SCI. MONITOR, June 25, 2009, available at <http://www.csmonitor.com/2009/0626/p06s02-woeu.html>.

12. Padilla v. Yoo, No. C 08-00035 JSW, 2009 U.S. Dist. LEXIS 50154 (N.D. Cal. June 12, 2009).

13. *Id.* at *86 (dismissing Padilla’s Fifth Amendment claim for violation of his right against self-incrimination but refusing to dismiss all other claims).

14. See, e.g., José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 179 (2006) (detailing the manner in which the torture memos distorted U.S. treaty obligations); Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUY 1, 5 (2009) (arguing that “being professionalized as a lawyer begins with moral desensitization”); Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT’L L. 231, 231–32 (2006) (arguing that a “ticking bomb” hypothetical is not helpful in thinking about torture); Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, in TORTURE: A COLLECTION 299, 300 (Sanford Levinson ed., 2004) (discussing “rush to rationalization” by lawyers).

the fate of the torture lawyers opens up some of the most vexing questions of criminal law theory regarding justifications and excuses.¹⁵

Resolution of their fate requires that we consider the intersection of the necessity defense, the dividing line between justifications and excuses generally, the status of accomplices, and the law of lawyering. First, Part I will examine the torture memos to determine if the legal advice expressed in them was sufficiently fallacious to generate accomplice liability. Second, Part II will argue that contrary to the standard scholarly assessment, the necessity defense is not one but two defenses, one a justification and the other an excuse. Government agents who tortured detainees were not justified but might be excused for their actions. Part III will then delve further into criminal law theory and argue that excuses, by virtue of their nature, do not flow down to accomplices like the torture lawyers whose fallacious legal advice might constitute complicity in torture. In fact, this “flow down” thesis is one of the hallmarks that divides justifications from excuses, because justifications embody the right of third-parties to intervene or provide assistance, while excuses do not. Finally, Part IV will present often overlooked Nuremberg-era precedents including cases where government advisers were prosecuted for providing legal advice that led to the commission of international crimes.

I. LEGAL ADVICE AS COMPLICITY

This Article seeks to understand how a torturer’s necessity defense might affect accomplices such as the torture lawyers who advised the government regarding its program of harsh interrogations. But before we answer this question, we must first ask whether there is a plausible argument that the advice tendered by the lawyers is sufficient to establish their complicity in the torture that followed directly from their work.¹⁶ At first glance, their conduct appears to meet the basic standards for either criminal accomplice liability or criminal facilitation.¹⁷ First, it is at least possible that the torture lawyers meet the mental element required for accomplice liability and second, it is probable that the memos aided or facilitated the actual torture.

As to the first point, there is some variance regarding the required mental element depending on the jurisdiction. Federal courts generally follow the Model Penal Code and require that an accomplice act with the purpose of

15. A number of issues remain outside the scope of this Article, including whether the requirements for torture as an offense were met in this case, either under U.S. federal law or international criminal law.

16. See generally HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* (2009).

17. See, e.g., MODEL PENAL CODE § 2.06(3) (1962) (“A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or committing it, or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to so do, or (b) his conduct is expressly declared by law to establish his complicity.”).

promoting or facilitating the offense, or in Learned Hand's famous formulation, "associate himself with the venture" or "seek by his action to make it succeed."¹⁸ However, other courts only require that accomplices have knowledge that their actions will have the effect of assisting the principal in his or her commission of the offense.¹⁹ Even among states that follow the stricter purpose standard, some (such as New York) codify a separate and lesser substantive offense of criminal facilitation that only requires knowledge.²⁰ Furthermore, it is unclear which standard would be used by a foreign court applying universal jurisdiction and the correct standard in international criminal law is contested. International tribunals have historically applied the knowledge standard²¹ and continue to do so today,²² and although one of the Rome Statute provisions on complicity requires purpose, a second provision governing complicity in collective criminality requires only knowledge.²³ Consequently, a prosecution in a jurisdiction such as New York or before an international tribunal would only have to demonstrate that the torture lawyers were reasonably aware that their memos would facilitate the interrogation techniques in question. As will be explained in Part IB, it is not necessary that the torture lawyers believed that these actions amounted to torture—a legal conclusion that does not form an element of the offense.²⁴ What if a case were to proceed in a federal court applying the

18. See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The Learned Hand formulation was reiterated by the Supreme Court in *Nye & Nissen v. United States*, 336 U.S. 613, 618–19 (1949).

19. See, e.g., *United States v. Fountain*, 768 F.2d 790, 797–98 (7th Cir. 1985) (lowering mens rea requirement for accomplice liability for major offenses to knowledge). However, *Fountain* is an outlier and not representative of the Seventh Circuit jurisprudence on the question. Compare *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989). For a discussion, see G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability under RICO*, 33 AM. CRIM. L. REV. 1345, 1393–95 (1996). Furthermore, one commentator has convincingly documented that although every circuit pays lip service to Learned Hand's formulation from *Peoni*, the actual substance of their standards lacks uniformity to the point of chaos, even on the purpose vs. knowledge issue. See Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1350–52 (2001–2002).

20. N.Y. PENAL LAW § 115 (McKinney 1967) (substantive offense of criminal facilitation when the actor believes that it is "probable" that his actions will aid the principal).

21. See, e.g., *Trial of Bruno Tesch and Two Others*, 1 WAR CRIMES COMM'N, U.N. LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (1947) (British Military Court Hamburg, Germany) (*Zyklon B*) (finding defendants guilty of knowingly providing chemicals used in Nazi gas chambers).

22. See, e.g., *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, ¶¶ 61, 79–80 (Mar. 24, 2000); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 245–46 (Dec. 10, 1998).

23. Compare Rome Statute of International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90 ("for the purpose of facilitating the commission") with art. 25(3)(d)(ii) (contributions made "in the knowledge of the intention of the group to commit the crime"). The second provision is arguably most applicable to the torture lawyers because they provided assistance not to a single individual but to multiple individuals acting with a "common purpose" to torture detainees. Recent Alien Tort Statute cases in the Second Circuit have overlooked Article 25(3)(d) in their analysis of corporate aiding and abetting and have erroneously concluded that international criminal law follows the purpose standard. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016-cv, 2009 U.S. App. LEXIS 21688, at *39 (2d Cir. Oct. 2, 2009).

24. However, a finding of willful violation of the law might be necessary for prosecuting agents who actually committed the torture. Congress specifically included this requirement in the Detainee Treatment Act of 2005. See *infra* notes 103–06 and accompanying text.

purpose standard? This presents a factual question that is impossible to resolve here. It is conceivable that the memos were authored by truly dispassionate lawyers who were genuinely indifferent whether coercive techniques should be used by government interrogators. However, it is also possible that a jury might reasonably infer from the tenor of the memos—advocacy as opposed to disinterested assessments of the law—that they were written by partisans who wanted to assist the principals in committing torture by constructing legal arguments for them. A full assessment is provided in Part IA.

Second, causation can be established because the torture memos made the use of torture by federal agents much more likely, though of course it is possible to argue that the torture might have happened anyway.²⁵ Moreover, the memos aided or facilitated the torture by providing legal cover sufficient to constitute aiding and abetting according to either the Model Penal Code or the federal complicity statute. In civil cases, it often matters whether the lawyer provided advice directly to the plaintiff or whether the plaintiff is a third party who was harmed by the lawyer's negligence or intentional misrepresentations.²⁶ In criminal cases, however, the issue is just causation—that is, whether the lawyer's advice actually assisted the principal. The Office of Legal Counsel lawyers worked for the government, so their exact relationship to the government agents is complicated; it is unclear whether the agents were clients or third parties. In the end, however, the issue is moot because the advice in the memos made its way down the chain of command to agency and department supervisors who then authorized the agents to commit torture because of the content of the legal reasoning. A direct causal link can be drawn from the memos to the torture committed against detainees.

Third, there is legal support for charging lawyers with aiding and abetting criminal endeavors. One example was the federal prosecution of attorneys who allegedly aided and abetted Charles Keating in the savings and loan scandal.²⁷ The prosecutions provoked outrage among lawyers, in much the same way as does the possibility of prosecution or disciplinary action for

25. For criticisms of the causation requirement in the law of accomplice liability, see Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 301 (2007). Cf. Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 402 (2007).

26. Many jurisdictions have now relaxed the privity requirement. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987).

27. The case—and the controversy—is chronicled by Professor Simon. See William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998). The question of lawyer complicity is most well developed in securities law. See, e.g., *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978). Another area of the law where the topic has been broached is lawyer involvement in the tobacco industry's concealment of the risk of smoking. See Roger C. Cramton, *Lawyer Conduct in the "Tobacco Wars"*, 51 DEPAUL L. REV. 435 (2001); Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun?"*, 51 DEPAUL L. REV. 407 (2001).

the torture lawyers.²⁸ Nevertheless, the general idea of holding lawyers responsible for complicity in criminal wrongdoing hardly breaks new legal ground. Although prosecutions for specifically providing legal advice (as opposed to structuring transactions) are rare, it is certainly wrong to conclude that the case law precludes such prosecutions. This issue is explored in depth in Part IB, while Part IC analyzes the interaction between the criminal law rules on complicity and the rules of professional responsibility, which do not perfectly coincide. Part ID asks whether the legal arguments in the torture memos were frivolous and might require sanction even under the more forgiving rules of professional responsibility. Finally, Part IE considers (and rejects) potential modes of liability other than aiding and abetting. Before this analysis can be completed, however, Part IA must first explain how the torture memos distorted the law.

A. *The Memos*

There were several torture memos written by multiple federal offices, but two are most relevant to our analysis here. The first, written at the Office of Legal Counsel on January 9, 2002 by then-Deputy Assistant Attorney General John Yoo, argued that Al Qaeda and Taliban detainees were protected neither by the Geneva Conventions nor by federal laws against torture and war crimes.²⁹ This memo also served as the basis for a January 22, 2002, memo signed by Jay Bybee, which incorporates most of the analysis and text of the original Yoo Memorandum.³⁰ The arguments from this memo are addressed in Section 1. A second memo from August 1, 2002 was written by Jay Bybee of the Office of Legal Counsel and sent to White House Counsel Alberto Gonzalez.³¹ This memo concluded that interrogation techniques could not be considered torture if they only produced pain and suffering insufficient to cause organ failure or death. The arguments from this memo are addressed in Section 2.

1. *Application of the Geneva Conventions to Al Qaeda*

Yoo's 2002 memo concluded that the Geneva Convention protections did not apply to nonstate actors such as Al Qaeda.³² Part of the memo is based

28. For examples of incredulity among the public about the possibility of prosecuting the torture lawyers, see Josh Weis, Editorial, *Potential Prosecution for Torture Rife with Problems*, ORLANDO SENTINEL, May 16, 2009, at A17.

29. Memorandum from John Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. 1 (Jan. 9, 2002) [hereinafter Yoo Memorandum]. Alberto Gonzales subsequently authored another memo that reiterated and supported the conclusions reached in Yoo's memo. Memorandum from Alberto R. Gonzales, Attorney Gen., to George W. Bush, President of the United States (Jan. 25, 2002).

30. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 22, 2002).

31. Memorandum from Office of the Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memorandum].

32. Yoo Memorandum, *supra* note 29, at 11–14.

on a colorable argument.³³ The debate stems from confusion over Common Article 3 of the Geneva Conventions, which applies to “armed conflict not of an international character” as opposed to the bulk of the Geneva Conventions, which apply to regular wars between states parties to the Conventions.³⁴ The question is which armed conflicts are “not of an international character.” The majority view, and the correct view, is that Common Article 3 applies to all armed conflicts that are not wars between states parties to the Conventions.³⁵ This view is supported by the obvious gap-filling function of Common Article 3.³⁶ However, a minority view holds that Common Article 3 only applies to civil wars within a country and does not apply to armed conflicts between a state and a nonstate actor, such as a terrorist organization (for example, Al Qaeda).³⁷ The argument for the minority view appeals to the text of Common Article 3, and the common sense understanding that the war against Al Qaeda is patently international, such that Common Article 3 does not apply.³⁸ Since the rest of the Geneva Convention does not apply either, the Geneva Conventions as a whole—including portions regarding treatment of detainees—are irrelevant for the Bush Administration’s prosecution of the War on Terror. Although the Supreme Court subsequently and unequivocally held in 2006 that the majority view is correct, and that Common Article 3 applies to the war against Al Qaeda, there was no such official judicial determination at the time the torture memos were drafted.³⁹ While the torture memos are arguably wrong on this point in retrospect (and *clearly* wrong by today’s law of the land), their arguments with regard to Common Article 3 are probably non-frivolous.

33. See Yoo Memorandum, *supra* note 29, at 8 n.11 (citing YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4339 (1987)). However, the International Committee of the Red Cross Commentary also states that “the scope of application of the Article must be as wide as possible.” INT’L COMM. OF THE RED CROSS, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean de Preux ed., 1960).

34. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

35. See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995); INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1351 (1987).

36. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27) (finding that Common Article 3 applies in all conflicts).

37. This view was articulated by the court of appeals in *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005).

38. *Id.* at 42 (“To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President’s reasonable view of the provision must therefore prevail.”).

39. *Hamdan*, 548 U.S. at 630–31 (applying *Hamdan*’s Common Article 3 right to be tried by a regularly constituted tribunal).

However, the memo also includes other, more outlandish arguments. The Yoo Memorandum concluded that the Taliban were not protected under the Geneva Conventions because, *inter alia*, “Afghanistan’s status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions.”⁴⁰ The memo supported this argument by claiming that the Taliban and Al Qaeda were operationally intertwined and “functionally indistinguishable” from each other,⁴¹ and that the President was authorized by the Constitution to suspend all treaty obligations with Afghanistan because of its status as a failed state.⁴² The memo offered shockingly little support for this point of law, relying mostly on previous Attorney General opinions and a couple of cases that simply suggest that the issue is a political question that will not be resolved by the judiciary.⁴³ But as a matter of modern international law, the structure of international humanitarian law is no longer entirely based on reciprocity—that is, another country’s non-performance of its international humanitarian law obligations does not relieve another country in the conflict of its obligations.⁴⁴ The memo’s attack against this common understanding of the Geneva Conventions is inapposite and strangely relied on the fact that the Conventions do not specifically prohibit temporary “suspensions” of the treaty’s effectiveness, apparently resting on the fact that such a word is nowhere used in the Conventions.⁴⁵ It is obvious why the word is

40. Yoo Memorandum, *supra* note 29, at 2.

41. *Id.* at 23.

42. *Id.* at 14 (stating that executive branch has plenary authority to declare Afghanistan a failed state and that Taliban members are therefore unprotected by the Geneva Conventions).

43. *Id.* at 15–16 (citing, *inter alia*, *Clark v. Allen*, 331 U.S. 503 (1947); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902)). The *Clark* case dealt with the question of whether a pre-World War II treaty signed by Germany survived the war. The Yoo Memorandum’s argument can be boiled down to the view that the President’s “foreign affairs power is independent of Congress.” Yoo Memorandum, *supra* note 29, at 15–16 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), a case that did not deal with executive abrogation of congressionally authorized treaties).

44. The Yoo Memorandum argument comes dangerously close to the outmoded argument of *tuo quoque*, or the idea that one party can retaliate with violations of international law in responses to an adversary’s violations. See Yoo Memorandum, *supra* note 29. Contemporary scholars and courts reject this view. See, e.g., *Prosecutor v. Kupreskić*, Case No. IT-95-16-T, Judgment, ¶ 521 (Jan. 14, 2000) (noting certain international humanitarian law norms may never be violated); cf. Geneva Convention IV, *supra* note 34, art. 2 (“Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”).

45. Yoo Memorandum, *supra* note 29, at 28–34. The memo at least discusses the possibility of a no-suspension rule. However, some of Yoo’s arguments for rejecting the no-suspension rule simply do not make sense. For example, Yoo claims that because the Geneva Conventions distinguish between grave and non-grave breaches of the Geneva Conventions, then suspensions of the treaty must be contemplated. *Id.* at 32–33. This does not follow. The fact that some breaches are more significant than others does not entail nor even imply that the Conventions (or some parts of it) may be suspended. As an analogy, consider that a government might tell its citizens that all aspects of criminal law must be followed and cannot be suspended, though some deviations are more serious (that is, grave) than others. The existence of grading among violations has nothing to do with suspension and confusion of the two represents a problematic form of legal reasoning.

not discussed in the Conventions: suspensions are neither contemplated nor allowed by the Geneva Conventions scheme.⁴⁶ Nowhere does the memo indicate the novel nature of these legal claims.⁴⁷

Finally, the Yoo Memorandum concluded that non-treaty international law, such as customary international law, was not federal law that could bind the President.⁴⁸ The traditional view is that customary international law was incorporated into federal law as recognized by *Paquete Habana*,⁴⁹ and is binding on the President.⁵⁰ The Yoo Memorandum emphatically rejected this view in favor of the revisionist view that “customary international law . . . is not federal law.”⁵¹ The legal support for the new view included past Office of Legal Counsel memos and previous executive branch positions taken in federal court,⁵² a series of recent law review articles,⁵³ and the Eleventh Circuit’s decision in *Garcia-Mir v. Meese*.⁵⁴ The *Garcia-Mir* argument stresses that the *Paquete Habana* decision suggested recourse to the law of

46. In a bizarre citation, Yoo cites Article 60(5) of the Vienna Convention as support for his view that the Geneva Convention can be suspended. Yoo Memorandum, *supra* note 29, at 33. Article 60 deals with material breaches but specifically exempts humanitarian treaties protecting “the human person” (a category which clearly includes the Geneva Conventions) from the general rule stating that a material breach entitles a party to invoke the breach as grounds for terminating the treaty. Vienna Convention on the Law of Treaties art. 60(5), May 23, 1969, 1155 U.N.T.S. 331. The citation supports the opposite of Yoo’s position.

47. Indeed, it appears to do the exact opposite. See Yoo Memorandum, *supra* note 29, at 11 (“It is clear from the foregoing that members of the al Qaeda terrorist organization do not receive the protections of the laws of war.”) (emphasis added).

48. *Id.* at 34–39. For a discussion of the issue, see Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1162 (2006).

49. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.” (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64, 214–15)).

50. See Yoo Memorandum, *supra* note 29, at 34 n.107 (citing Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional*, 80 NW. U. L. REV. 321, 325 (1985); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567 (1984); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 70 VA. L. REV. 1071, 1179 (1985); Jonathan I. Charney, *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT’L L. 913 (1986)).

51. Yoo Memorandum, *supra* note 29, at 34. Yoo did more than simply raise doubts about the traditional view; he flatly rejected it as “seriously mistaken.” *Id.* at 35.

52. *Id.* at 34 n.104 (citing *Authority of the Federal Bureau of Investigations to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. Office of Legal Counsel 163, (1989)).

53. *Id.* at 35 n.108 (citing Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997)). Compare Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371 (1997).

54. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453–55 (11th Cir. 1986) (holding that the Attorney General’s termination of the parole determination procedure pending deportation was a controlling executive act).

nations in the absence of a controlling executive or legislative act.⁵⁵ Under the revisionist view, the President's detention policies would be a controlling executive act that takes the relevant norm outside the scope of the *Paquete Habana* incorporation doctrine. However, the *Garcia-Mir* interpretation of *Paquete Habana* is not universally accepted. It is unclear whether the Bush Administration's controlling act was made pursuant to constitutional authority,⁵⁶ and it is also not clear that the argument could ever apply to a non-derogable, *jus cogens* norm, such as the customary prohibition against torture.⁵⁷

The Yoo Memorandum also cited *Alvarez-Machain* for the proposition that customary international law is not incorporated into federal law.⁵⁸ There, the Court held that an international abduction did not violate an extradition treaty with Mexico and did not deprive federal courts of jurisdiction over the defendant, a Mexican national accused of killing a U.S. drug enforcement agent.⁵⁹ The memo persists in confusing two related questions: whether the judiciary can stop the President from violating customary international law, and the underlying issue of whether customary international law prohibits the United States from treating detainees in a certain manner.⁶⁰ The position that no institutional organ in the United States has the power to constrain the President (which may or may not be true), does not logically entail the further conclusion that the conduct is legal under inter-

55. *Id.* at 1454–55.

56. See Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 935 (1986) ("A case can be made also, that, in some cases, the President can supersede a principle of international law or a treaty by law made under his own authority, in those special circumstances when the President has constitutional authority to make law in the United States.").

57. See, e.g., *United States v. Buck*, 690 F. Supp. 1291, 1301 (S.D.N.Y. 1988) (suggesting in dicta that judicial compliance in the face of executive branch violations of *jus cogens* would be comparable to the judicial compliance in Nazi Germany). For a discussion, see José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 186–89 (2006); Emma V. Broomfield, Note, *A Failed Attempt to Circumvent the International Law on Torture: The Insignificance of Presidential Signing Statements Under The Paquete Habana*, 75 GEO. WASH. L. REV. 105, 120–22 (2006).

58. Yoo Memorandum, *supra* note 29, at 34 n.105 (citing *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)).

59. The issue in *Alvarez-Machain* was whether the extradition treaty with Mexico prohibited international abductions. The defendant argued that the treaty was silent on the issue because such abductions were already prohibited by customary international law, thus eviscerating the need to prohibit it under the treaty. The court rejected this argument, not because customary international law is not part of federal law, but because they did not agree that the treaty should be interpreted to prohibit such actions. *Alvarez-Machain*, 504 U.S. at 669. Also, the Supreme Court held that even a violation of international law would not necessarily vindicate Alvarez-Machain's argument. *Id.* at 668 n.15 (citing *The Richmond*, 13 U.S. 102 (1815), and *The Merino*, 22 U.S. 391 (1824)). This is hardly shocking, for it simply represents the standard view that a violation of international law between two nation-states is a matter for resolution between the two states and does not necessarily entail a violation of an individual's rights that can be vindicated in a court of law, absent specific provisions. See also *CrimC (Jer) 40/61, Israel v. Eichmann*, [1961] IsrDC 45, 3 (holding that abduction of Eichmann, a former Nazi, in Argentina did not deprive the Israeli court of jurisdiction to try him for Holocaust-era crimes).

60. Yoo Memorandum, *supra* note 29, at 36. ("It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority.").

national law.⁶¹ One need only look to other jurisdictions that refrain from exercising judicial review of legislation to understand that these two elements are separable.⁶² Just as a national legislature might pass an unconstitutional law that its supreme court cannot invalidate due to a lack of judicial review, so too the President might violate international law without transforming an otherwise illegal act into a lawful one.⁶³ This mistake is perhaps best exemplified by the memo's conclusion that "if customary international law is truly federal law, it presumably must be enforceable by the federal courts," a syllogism that does not follow as a matter of logic.⁶⁴ The question of federal court jurisdiction does not exhaust the overall question of legality and in particular any sanctions that might follow as a matter of international law.⁶⁵

Finally, the memo argued that *Paquete Habana's* holding that federal law incorporates customary international law did not survive the Supreme Court's overruling of *Swift v. Tyson* in *Erie Railroad v. Tompkins* and its famous rejection of general federal common law.⁶⁶ This view has also been

61. Yoo cites *Brown v. United States*, 12 U.S. 110, 128 (1814), which simply holds that the executive has discretion in applying "modern usage" with regard to the seizure of property during wartime when there is no applicable act of Congress. Yoo Memorandum, *supra* note 29, at 36 (concluding on the basis of *Brown* that violating customary international law may be a "bad idea" but is allowed anyway). But Yoo does not cite Chief Justice Marshall in *The Nereide*, 13 U.S. 388, 423 (1815) ("the Court is bound by the law of nations which is a part of the law of the land").

62. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); see also MITCHELL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004).

63. In the background of this entire debate is a general debate over whether customary international law—and international law generally—is really binding law or just a convergence of state interests. If it is just the latter, then surely the President can simply ignore it when a state's interests change. Yoo seems to be implying this worldview when he cites Justice Marshall in *Brown v. United States*. This view has been given extensive expression by Jack Goldsmith and others in a series of publications cited by Yoo, *supra* note 29, at 38 n.122. See also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 42 (2005) (describing customary international law as mere coordination). However, Goldsmith and Posner mistakenly assume that their rational choice analysis of customary international law is inconsistent with the view that it is binding as law. See *id.* at 176–77 ("Talk clarifies which actions count as cooperative moves and which count as defections that will provoke retaliation"). They appear not to have read DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986) (deducing the structure of morality from the problem of rational behavior as modeled by the Prisoner's Dilemma). The fact that both law and morality can be expressed as a coordination problem does not rob either of their norm-giving force, and failure to recognize this point demonstrates a certain degree of philosophical naivety. For other responses along similar lines, see generally ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1825 (2002); Robert Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720 (2006) (reviewing Goldsmith and Posner's *The Limits of International Law*).

64. See Yoo Memorandum, *supra* note 29, at 39. The memo concludes that this view is most consistent with democratic theory because "conceiving [] international law as a restraint on war-making would allow norms of questionable democratic origin to constrain actions validly taken under the U.S. Constitution by popularly accountable national representatives." *Id.*

65. See Alvarez, *supra* note 57, at 188–89 (detailing consequences of international violations, including suits before the ICJ, denials of reciprocal treatment in other areas of the law, and most disturbingly, countermeasures against other states).

66. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

explored by Bradley and Goldsmith in several law review articles.⁶⁷ The argument finds its apex in their view that federal courts are wrong to apply customary international law in federal courts under the guise of the Alien Tort Claims Act, a human rights *modus operandi* first allowed in *Filartiga* and then extended by its progeny.⁶⁸ Although there is much to be said about the view that the entire history of Alien Tort Statute litigation is *just wrong*,⁶⁹ it is perhaps sufficient to note that the Supreme Court as long ago as 1964 had disapproved of a proto-argument on the basis of the *Erie* doctrine.⁷⁰ None of this was included in the Yoo Memorandum.⁷¹

In the end, the Yoo Memorandum fails not just because of its substantive positions but also because of its mode of presentation. The memo takes revisionist positions and presents them as undeniably correct.⁷² Instead of counseling the President regarding the contested nature of the underlying legal theories, the memo presents an almost one-sided picture.⁷³ The document purports to offer a nuanced and objective analysis of the law, yet in reality offers polemical advocacy with little consideration of contrary legal arguments, and places no weight on the consequences of failing to live up to our obligations under international law.

67. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). Compare Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

68. See Yoo Memorandum, *supra* note 29, at 37 n.122 (discussing *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and noting that the Second Circuit's view was supported by several circuits, but rejected by the D.C. Circuit in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)).

69. *Id.* at 38 n.132; Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 330 (1997).

70. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (citing Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939) for the proposition that "rules of international law should not be left to divergent and perhaps parochial state interpretations"); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 n.18 (2004) (noting that although *Sabbatino* was not directly applying international law, "neither did it question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts"). Although *Sosa* post-dates the Yoo Memorandum by several years, *Sabbatino* pre-dates it by several decades.

71. The Supreme Court has since firmly established that federal courts may enforce violations of customary international law. See *Sosa*, 542 U.S. at 732 (holding that federal courts can enforce violations of the law of nations that are "definable, universal, and obligatory"). The court rejected the Yoo and Goldsmith view that federal courts in the post-*Erie* world cannot hear torts in violation of the law of nations. *Id.* at 729 ("*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."). For a discussion of the underlying theory behind Alien Tort Claims Act litigation, see GEORGE P. FLETCHER, *TORT LIABILITY FOR HUMAN RIGHTS ABUSES* (2008).

72. Indeed, even one of the law review articles relied upon describes itself as "revisionist." See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

73. See Alvarez, *supra* note 57, at 186-87 ("The memoranda elevate a one-sided, strongly contested revisionist conception of the status of international law in U.S. law, advocated by some U.S. scholars, into the status of hornbook law.").

2. *The Definition of Torture*

The Yoo Memorandum was only one half of the equation. The Bybee Memorandum from August 1, 2002 provided an essential foundation for the Bush Administration's torture policy by crafting "creative" legal arguments in favor of a narrow definition of torture as a crime under federal and international law. The memo was severely criticized for its shortcomings and legal distortions.⁷⁴ It specifically addressed the applicability of the Convention Against Torture and the U.S. federal law criminalizing torture that was passed as implementing legislation for the international treaty.⁷⁵ The memo concluded that even cruel, unusual, and degrading treatment would not violate the statute as long as it did not rise to the level of pain and suffering "of the requisite intensity" as defined by the memorandum, which required "physical injury, such as organ failure, impairment of bodily function, or even death."⁷⁶ Bybee's legal support for this conclusion stemmed from federal statutes defining an emergency medical condition for the purpose of establishing *health benefits*.⁷⁷ The memo used this standard to distinguish between torture and the less severe category of "cruel, inhuman, or degrading treatment or punishment," conduct which states that parties to the Convention Against Torture are not required to criminalize,⁷⁸ though they are required to prevent.⁷⁹ However, the Bybee Memorandum fails to emphasize that other obligations under the Convention Against Torture apply to cruel, inhuman or degrading treatment, including the duty to systematically review "interrogation rules, instructions, methods and practices,"⁸⁰ the duty to investigate where there is "reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction,"⁸¹ and most importantly the duty to prohibit *by express rule* such treatment by police and military personnel and any other officials involved in interrogations

74. See, e.g., W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 & n.2 (2005); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 811 (2005).

75. See Convention Against Torture, *supra* note 7, art. 1; 18 U.S.C. § 2340(1) (2000) ("[T]orture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.").

76. Bybee Memorandum, *supra* note 31, at 1.

77. *Id.* at 5–6 (citing 8 U.S.C. § 1369 (2000) and 42 U.S.C. §§ 1395–96 (2000)). The memo conceded that these statutes "address a substantially different subject from Section 2340, but argued that they are nonetheless helpful for understanding what constitutes severe physical pain." For further analysis of the seriousness of this legal argument, see *infra* Part II.D.

78. *Id.* at 15.

79. Convention Against Torture, *supra* note 7, art. 16(1) ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

80. *Id.* art. 11.

81. *Id.* art. 12.

or detentions.⁸² Additional duties under the Convention Against Torture might also apply to cruel, inhuman or degrading treatment.⁸³

The memo provided a further element to its argument, this time stemming from the criminal law theory concept of specific intent.⁸⁴ According to both the federal statute and an Executive Branch understanding attached to the Convention Against Torture, a defendant accused of torture must demonstrate specific intent to inflict severe pain.⁸⁵ Consequently, the memo concluded that if a defendant only believed that it was reasonably likely that his interrogation methods would cause severe pain, this would insulate him from criminal liability under the statute because he lacked the “specific intent to inflict severe pain.”⁸⁶ The Bybee Memorandum then concluded that an interrogator who only intended to inflict non-severe pain on a detainee, but who nonetheless produced *severe* pain, would not meet the federal statute standard of specific intent that the Senate intended when it ratified the Convention and enacted the anti-torture statute. However, it is more likely that the specific intent standard was meant to criminalize intentionally inflicted suffering but exclude unintended suffering that results from an intentional act.⁸⁷

B. *Exceptions for Lawyers*

Under the traditional rules of professional responsibility, lawyers are not subject to professional sanction for assisting or counseling a client in criminal conduct if there is a non-frivolous argument that the conduct is legal.⁸⁸ Lawyers often assume that the same standard governs their potential *criminal* liability as accomplices.⁸⁹ In other words, lawyers believe that they are free from *both* professional discipline *and* legal liability for any non-frivolous legal arguments they make, even if such arguments help advance a client’s criminal enterprise.⁹⁰ This version of the standard is, by its very terms, ex-

82. *Id.* art. 10.

83. See NOWAK & McARTHUR, *supra* note 9, at 539 (discussing provisions which are neither criminal nor strictly preventive).

84. See Bybee Memorandum, *supra* note 31, at 3–5.

85. 18 U.S.C. § 2340(1) (2000).

86. Bybee Memorandum, *supra* note 31, at 3–5.

87. See, e.g., Zubeda v. Ashcroft, 333 F.3d 463, 473 (3d Cir. 2003); 8 C.F.R. § 208.18(a)(5) (2009); see also M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 396–97 n.33 (2006).

88. RESTATEMENT (THIRD) OF THE LAW OF LAWYERING § 94(2)(b) (2000).

89. Cf. Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, in *THE TORTURE DEBATE IN AMERICA* 241, 244, 245 n.8, 246 & n.9 (Karen J. Greenberg ed., 2006) (stating that lawyers can only be held accountable as accomplices if they knowingly offer legal advice based on a frivolous legal argument that facilitates a client’s illegal enterprise).

90. See generally 1 GEOFFREY C. HAZARD ET AL., *THE LAW OF LAWYERING* (3d ed. 2000); GEORGE M. COHEN ET AL., *THE LAW AND ETHICS OF LAWYERING* 26–27 (4th ed. 2005) (noting that lawyers confuse immunity for advocacy in court with immunity for client counseling); Geoffrey C. Hazard Jr., *How Far May A Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981) (noting the relative paucity of precedent on this point).

pressly lawyer-centric: it opens up a unique standard for lawyer complicity that does not apply to those outside of the profession. These assumptions require deeper scrutiny.

Under standard criminal law rules of complicity, all that matters is that the accomplice aid and abet, facilitate, encourage, or otherwise assist the principal's actions.⁹¹ There are several theoretical quandaries about the status of accomplices, including the problem of causation—that is, must the contribution assist the principal's crime or is it sufficient that the accomplice intends to assist him even if that assistance turns out to be unneeded or ineffectual?⁹² But the status of the lawyer involves a completely different scenario. Under the rules that are usually said to apply to lawyers, the lawyer must know that he is providing a frivolous legal argument to help his client's illegal effort.⁹³ Consequently, the lawyer is shielded from liability if he has a non-frivolous basis for believing that his client's actions are completely lawful. Then, his alleged complicity is transformed into a protean lawyerly activity: providing advice.

But what if the lawyer is wrong? What if the client's activities are in fact illegal, though the lawyer has mistakenly and erroneously reached a different assessment about the law? Essentially, the lawyer in such a position is laboring under a classic mistake of law situation.⁹⁴ He believes that the client's actions are lawful and can be assisted but his belief is in error. Under normal rules of accomplice liability, this mistake of law would be completely irrelevant. Mistake of law is relevant as a defense if it negatives, as the Model Penal Code puts it, a mental element of the offense.⁹⁵ However, the only time that a mistake of law would negative a mental element of an offense is when the crime in question requires that the defendant know that his actions violate the law. Very few crimes in question require such knowledge; tax evasion is the classic and notable exception.⁹⁶ Consequently, principals who mistakenly believe that their actions are lawful are out of luck; mistake of law simply is not relevant for their mens rea.

In this regard, accomplices usually stand in the exact same position as principals. It does not matter if the accomplice is laboring under a mistake about the lawfulness of the principal's project.⁹⁷ The accomplice's mistake of law is irrelevant for his mens rea, in much the same way as for the principal. What matters is that he intends to assist the principal's project, not whether

91. See, e.g., 18 U.S.C. § 2(a) (2000) (providing that anyone who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"); MODEL PENAL CODE § 2.06 (1980).

92. See generally Kutz, *supra* note 25.

93. RESTATEMENT (THIRD) OF THE LAW OF LAWYERING §§ 8, 94(2) (2000).

94. See MODEL PENAL CODE § 2.04 (1980).

95. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 167 (5th ed. 2009).

96. See *Cheek v. United States*, 498 U.S. 192 (1991) (holding that a tax evasion statute requires a willful attempt to avoid paying taxes).

97. It could in theory be relevant if the mistake stems from a mistake of fact about what the principal is doing, but that is a different category of mistakes.

he understands the relevant law in question. So if the principal is engaging in torture, it does not matter for his mens rea that he thinks torture is lawful, because knowing that his actions violate the law is not an element of the offense. Similarly, it does not matter for the accomplice that he, too, thinks torture is lawful—all that matters is that he intends to assist the principal. This standard criminal law analysis is often neglected when the case of lawyers is considered. Admittedly, this creates a form of strict liability for lawyers who give erroneous legal advice. However, the rest of the citizenry faces strict liability for mistakes of law, and it is unclear on what basis lawyers should be exempt from this general principle of criminal law (*ignorantia juris non excusat*). Furthermore, lawyers only face this strict liability when they: (1) give *ex ante* advice as opposed to *ex post* legal arguments in a defense capacity; and (2) either intend to aid the principal's conduct (under federal law) or know that their conduct would assist the principal (in other jurisdictions). Most lawyerly activities will not satisfy this standard. Whether the torture lawyers intended their memos to aid or encourage the interrogators is a question of fact, though a reasonable fact-finder could probably infer such intent from the very nature of the memos. Under a knowledge standard there would likely be no question at all.

Lawyers also assume that the advice of counsel defense will preclude their own liability. This is completely false.⁹⁸ The advice of counsel defense can be asserted to demonstrate that a defendant did not have the intent to violate the law because he relied on counsel's advice that his conduct was lawful.⁹⁹ The Model Penal Code also includes a defense for reasonable reliance on official interpretations of the law.¹⁰⁰ But these defenses have a limited application and usually apply in cases where the defendant's violation of the law must be willful.¹⁰¹ Traditionally, the crime of torture did not require intent to willfully violate the law.¹⁰² However, in 2005 Congress enacted a specific defense arising from detainee interrogations for agents who did not know that their actions were illegal and "a person of ordinary sense and understanding would not have known the practices were unlawful."¹⁰³ Congress also stated that good faith reliance on advice of counsel was one factor among others in applying the "ordinary sense and understanding" standard.¹⁰⁴ At first, it was unclear if federal courts would apply this defense

98. Brad Wendel helped clarify this point in conversation with me.

99. *See, e.g.,* United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1194 (2d Cir. 1989).

100. *See, e.g.,* John Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997).

101. *See* United States v. Impastato, 543 F. Supp. 2d 569, 573 (E.D. La. 2008).

102. *But see* Bybee Memorandum, *supra* note 31, at 3, which appears to be confused about this point. Bybee cites Ratzlaf v. United States, 510 U.S. 135, 141 (1994), though that case involved the crime of structuring transactions in violation of 31 U.S.C.S. §§ 5322(a) and 5324(3), a crime which, like tax evasion, requires that the defendant know that he is evading the regulations in order for the conduct to be *criminal*. This is completely inapplicable to the crime of torture.

103. Detainee Treatment Act of 2005 § 1004(a), 42 U.S.C. § 2000dd-1.

104. *Id.*

retroactively, but in 2006 Congress clarified that the defense applied to all interrogations after September 11, 2001.¹⁰⁵ Although this would appear to create a salient defense for government interrogators, it is unclear whether government lawyers can assert it because the statute limits the defense to personnel “engaging in specific operational practices,” or i.e. the agents on the ground.¹⁰⁶ Furthermore, excuses such as mistakes of law do not flow down to accomplices, a thesis that will be explicitly defended in Part III.

This is one instantiation of a general problem with these arguments. Lawyers assume that the advice of counsel defense is in some ways reciprocal, so that if the defense exonerates the client on the basis of *receiving* the advice, the lawyer is by corollary exonerated for *giving* it. This is folklore with no basis in law. The structure of the argument might work if advice of counsel were an affirmative *justification*, in which case the lawyer could not be charged for aiding and abetting a client’s conduct that was not, in fact, wrongful (as implied by the notion of a justification). However, the advice of counsel defense simply negates a required element of offenses, like tax evasion or structuring, that require a willful violation of the law.¹⁰⁷

There is a basic tension between the rules of professional responsibility for lawyers and the regular rules of criminal law.¹⁰⁸ When one listens to lawyers, particularly those in government service, it sounds as if lawyers operate under a different set of rules, which can be justified by strong public policy grounds for protecting the lawyer-client relationship.¹⁰⁹ Supposedly, if clients cannot receive honest, candid and confidential advice from lawyers, there will be grave consequences for our free society.¹¹⁰ One way to protect that relationship—and to encourage the giving and receiving of advice—is to cloak lawyers with more (rather than less) relative immunity for their actions. This is not to say that lawyers are wholly immune from legal regulation, but simply that they receive unique protections, by virtue of their role, that remain unavailable to the average citizen. None of this can be denied. However, while it is true that the lawyer-client relationship has social utility, it is an exaggeration to call it sacred. What accounts for—and justifies—this exceptional treatment?

105. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2636, § 8(b) (2006).

106. See MICHAEL JOHN GARCIA, THE WAR CRIMES ACT: CURRENT ISSUES 6 (Cong. Research Serv., CRS Report for Congress Order Code RL 33662, Jan. 28, 2008), available at <http://wikileaks.org/leak/crs/RL33662.pdf> (“The statute also does not appear applicable to higher level U.S. officials who may have authorized, but did not directly engage in, specific operational practices involving detention or interrogation.”).

107. Usually there is no requirement of a willful violation of the law for mere civil liability and forfeiture. See *Ratzlaf*, 510 U.S. at 146 n.16 (citing 18 U.S.C. § 981(a)).

108. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 358 (1998) (“In this respect, the criminal law is in tension with professional norms that generally favor assisting individuals with their legal problems.”).

109. See MODEL CODE OF PROF’L RESPONSIBILITY EC 1–1 (1986).

110. See 1 HAZARD, THE LAW OF LAWYERING, *supra* note 90, at § 9.3.

C. *The Relationship Between the Rules*

Why are lawyers so inclined to read the rules of professional responsibility into the rules of criminal law or to read the two in tandem? Lawyers too often treat the rules of professional responsibility as primary and give only cursory treatment to other sources of law that might generate rules of *general* applicability that might apply to lawyers.¹¹¹ Or, to put the point more sharply, they are insensitive to the tensions created by divergences between the codified rules of professional responsibility and the general rules of criminal or tort law. If there is a tension between the two, why would one assume that the rules of professional responsibility ought to govern?

In fact, there are substantial reasons to assume the exact opposite. The rules of professional ethics were never meant to supplant the rules of criminal law or tort law in cases of conflict; they do not purport by their terms to *exclusively* regulate the conduct of lawyers.¹¹² Furthermore, many codes of professional responsibility are the product of the bar itself, and the rules are certainly enforced by the bar through disciplinary committees. State penal laws, by contrast, are codified by legislatures enacting general prohibitions. To assume that a penal standard should in any way be modified by a code of professional responsibility seems utterly contrary to legislative intent.¹¹³

Additionally, there is insufficient case law to establish the point that the rule of professional responsibility that holds that lawyers are free from discipline if they assist their clients through non-frivolous arguments governs their criminal liability as accomplices as well.¹¹⁴ Does this mean that the opposite can be inferred? This depends on a deep point about legal theory: which side of the debate has the burden of establishing precedent. Lawyers under siege will no doubt suggest that we must have precedent to establish the existence of a rule that lawyers can be convicted for providing legal advice. In reality, though, it is exactly the opposite methodology that should govern. Given that the rules of criminal law are general in nature and of universal applicability, it is the opposite result which demands precedent to establish the existence of a categorical *exception* to the general rule regarding accomplice liability. Can we find cases which directly hold that lawyers cannot be prosecuted under the normal rules of accomplice liability while engaged in their advice-giving role? No such case exists.¹¹⁵

111. *Id.* at § 5.12 (“Lawyers sometimes act or talk as though they had a special immunity exempting them from observing ‘other’ law, which is to say ordinary legal obligations existing outside of whatever code of professional conduct is in force.”).

112. See Hazard, *How Far May a Lawyer Go*, *supra* note 90, at 676 (arguing that lawyers falsely assume that the code of professional responsibility is an exclusive statement of their legal obligations).

113. *Id.* at 675 (noting that the rules of professional responsibility prohibit a lawyer from helping a client perform illegal acts, thereby incorporating other areas of the law which define the illegal acts).

114. See 1 HAZARD, *THE LAW OF LAWYERING*, *supra* note 90, at § 5.12 (establishing that lawyers have no blanket immunity based on loyalty to client).

115. Cf. *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (holding that accountants cannot be prosecuted under RICO for merely giving advice. The case, however, involved the question of whether such accountants could be considered to have “participated” in the illegal scheme as defined by the RICO

On the other hand, it must be conceded that there are few—perhaps no—cases in the United States where lawyers were prosecuted as accomplices simply for providing advice. Although many lawyers have been prosecuted and convicted as accomplices, these cases all involved a level of participation in the criminality that went beyond simple advice-giving.¹¹⁶ Perhaps this is because most of these cases involved attorneys engaged in transactional work that, by definition, involved far more than providing legal advice or making legal arguments: they structured transactions. However, even without solid case law to back up the point, professional responsibility writers assume that lawyers can be convicted as accomplices for providing legal advice.¹¹⁷ One might ask why prosecutors have not engaged in prosecutions for mere advice-giving.¹¹⁸ This might be one consequence of the general phenomenon of prosecutors who decline to charge lawyers even in situations where they conclude that the lawyer's conduct crossed the legal line.¹¹⁹ The Charles Keating case is only the most famous exception that proves the rule.¹²⁰ Per-

statute, not whether they could be guilty of aiding and abetting under general principles of criminal law.)

116. See *United States v. Locascio*, 6 F.3d 924, 932–33 (2d Cir. 1993) (noting prosecutors' assertion that Gotti's lawyer was a party to the criminal enterprise, though he was not prosecuted separately); *United States v. Morris*, 988 F.2d 1335 (4th Cir. 1993) (concerning appeal of lawyer charged with aiding and abetting drug violations); *United States v. Benjamin*, 328 F.2d 854, 863–64 (2d Cir. 1964) (upholding conviction of attorney for conspiring to commit securities fraud); *SEC v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682, 712–17 (D.D.C. 1978) (holding that although lawyers were involved in aiding and abetting securities fraud but SEC not entitled to injunctive relief because fraud was not deliberate and well-planned); *Johnson v. Youden*, [1950] 1 K.B. 544 (holding solicitor not convicted for complicity due to insufficient evidence of his knowledge of the fraudulent price of the conveyance); Hazard, *How Far May a Lawyer Go*, *supra* note 90, at 681–82 (compiling cases); see also *United States v. Beckner*, 134 F.3d 714 (5th Cir. 1998) (concerning appeal by attorney convicted of aiding and abetting client's wire fraud); *United States v. Dolan*, 120 F.3d 856 (8th Cir. 1997) (affirming conviction of attorney for, *inter alia*, aiding and abetting the hiding of assets); *United States v. Feaster*, No. 87-1340, 1988 WL 33814, at *1 (6th Cir. Apr. 15, 1988) (upholding attorney conviction for mail fraud); *United States v. Arrington*, 719 F.2d 701, 706 (2d Cir. 1983) (reinstating jury conviction of attorney accused of aiding and abetting a conspiracy to receive and sell stolen property); *United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004) (finding Swiss lawyer complicit for violations of the Foreign Corrupt Practices Act though he could not be prosecuted due to his non-resident status). For a discussion of the *Bodmer* case, see William Alan Nelson II, *Attorney Liability Under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions*, 39 U. MEM. L. REV. 255, 286–87 (2009) (noting that a similarly situated lawyer would not escape prosecution today because the non-resident loophole has been closed in subsequent amendments and that "attorneys must be aware that they can be held liable for conspiracy when counseling clients on the FCPA").

117. See, e.g., GEORGE M. COHEN ET AL., *THE LAW AND ETHICS OF LAWYERING* 144 (4th ed. 2005) ("Advising a client is legal; writing an opinion on the legality of a transaction is legal; helping a client to draft required disclosures to the SEC or another government agency is legal. But any of those acts of ordinary lawyering may become the actus reus of a crime or civil fraud, if done with culpable intent."); Hazard, *How Far May a Lawyer Go*, *supra* note 90, at 682–83 (noting that a lawyer violates his duty under both civil and criminal law if he "facilitates the client's course of conduct either by giving advice that encourages the client to pursue the conduct or indicates how to reduce the risks of detection").

118. See Hazard, *How Far May a Lawyer Go*, *supra* note 90, at 681 n.39 (noting that there is "very little authority" on what degree of lawyer involvement constitutes aiding and abetting).

119. See, e.g., *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993). It is unclear why prosecutors declined to prosecute the attorney given their conclusion that he had joined the criminal enterprise.

120. The Office of Thrift Supervision settled the case against his lawyers. See Simon, *supra* note 27, at 244.

haps the reluctance of prosecutors stems from the fact that prosecutors are, after all, lawyers, and they, too, benefit from the standard view that the rules of lawyering exclusively govern the advice-giving conduct of lawyers.¹²¹ Many prosecutors are past or future defense attorneys and have a vested stake in professional immunity for advice-giving. But a history of non-prosecution of lawyers (based on prosecutorial discretion) is not the same as a rule of law that lawyers are immune from the regular criminal law rules for complicity liability.

D. *Frivolity*

Even if one were to apply the rule of professional responsibility instead of the regular rules of criminal accomplice liability, the torture lawyers might still have a problem. The standard is that lawyers are immune from discipline if they assist their clients with non-frivolous arguments.¹²² It is strange perhaps that the whole analysis comes down to a theory of *frivolity*. What exactly is frivolity and how is it to be defined?¹²³ Is it to be defined objectively or subjectively? In other words, is the relevant analysis whether the lawyers *believed* they were making a non-frivolous argument or must we ask whether it was, objectively, a non-frivolous argument?¹²⁴

Frivolity must include an objective component.¹²⁵ If one looks at the basic structure of the larger standard governing attorney conduct, it is readily apparent that the standard combines subjective and objective elements together, uniting a culpable mental state of the lawyer with a second element that captures an objective assessment of the conduct. The lawyer obviously needs to believe that he is assisting his client by providing advice; however, if he provides a frivolous legal argument, then the immunity disappears. If we consider the notion of frivolity from the point of view of the lawyer and suggest that the lawyer gets the benefit of the immunity just as long as he *believes* that the argument is non-frivolous, then the force of the standard

121. Cf. HAZARD, *THE LAW OF LAWYERING*, *supra* note 90, at § 5.12 (noting that prosecutors are reluctant to prosecute attorneys unless conduct was flagrant).

122. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(2) (2000) (“For purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct, but the lawyer may counsel or assist a client in conduct when the lawyer reasonably believes: (a) that the client’s conduct constitutes a good-faith effort to determine the validity, scope, meaning, or application of a law or court order; or (b) that the client can assert a nonfrivolous argument that the client’s conduct will not constitute a crime or fraud or violate a court order.”).

123. See OXFORD ENGLISH DICTIONARY 205 (2d ed. 1989) (defining frivolous as “[o]f little or no weight, value, or importance; paltry, trumpery; not worthy of serious attention; having no reasonable ground or purpose,” and especially in law, “[m]anifestly insufficient or futile”).

124. This connects with a broader argument about objective or subjective standards in complicity and causation. See *generally* Kutz, *supra* note 25.

125. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. c (2000) (“The requirement of a nonfrivolous argument is measured by an objective test.”).

would completely collapse.¹²⁶ Every lawyer believes that his arguments are non-frivolous; what matters is whether the argument is *actually* non-frivolous.

There are several reasons to conclude that at least some of the torture memos were objectively frivolous. First, some of the torture memos relied on ersatz legal reasoning that could only be described as unconventional by most scholars of public international law or human rights.¹²⁷ Consider again the Bybee Memorandum, which purported to offer an analysis of the legal definition of torture, in particular the legal requirement under federal law that torture must produce severe pain or suffering.¹²⁸ In order to fix a meaning for “severe pain” (as opposed to non-severe pain), the authors of the memo treated it like any other statutory term and looked for definitions of the phrase “severe pain” in *other* federal statutes or regulations.¹²⁹ Now as a matter of legal methodology, this is, in and of itself, unremarkable. However, statutory interpretation of this manner is best when the definition comes from the same statute. When no such definition exists in the relevant federal statute, then the next avenue is to find a definition from a *similar* federal statute. Although it is problematic that the definition comes from a different statute, if one can demonstrate through legal reasoning that the two statutes deal with similar legal issues, purport to regulate similar problems, or occupy the same field, then there is a good-faith basis to believe that the definition of terms from one *might* be relevant for one’s interpretation of the other.

In the case of the Bybee Memorandum, however, the definition of severe pain was inferred from a statute that used the terms in the context of a regulation establishing eligibility for health benefits.¹³⁰ As a heuristic device, the argument is flawed because the health benefits statute did not even define “severe pain”—the phrase was used in a definition of the phrase “emergency medical condition.” The authors of the Bybee Memorandum then inferred that the definition of “emergency medical condition” was somehow indicative of congressional understanding of the phrase “severe pain” because the latter phrase was one component of the definition of the former. As a matter of logic this does not follow. Furthermore, the definition of “emergency medical condition” does not even require “severe pain,” but only refers to “acute symptoms of sufficient severity (including severe pain).”¹³¹ In other words, severe pain may be one indicator—but not the

126. This standard would be like having a self-defense standard that only requires a subjective belief that one is being attacked (as opposed to an objectively reasonable belief). Such a situation turns each individual into his or her own guardian of the standard. See *People v. Goetz*, 497 N.E.2d 41, 50 (N.Y. 1986).

127. See, e.g., DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 198 (2008).

128. See Bybee Memorandum, *supra* note 31, at 5–6.

129. *Id.*

130. See 8 U.S.C. § 1369(d) (2000) and 42 U.S.C. §§ 1395w–96u (2000).

131. 42 U.S.C. § 1395w-22(d)(3)(B) (2006).

only one—of an emergency medical condition; an individual with an emergency medical condition might be suffering from a life-threatening but *painless* medical condition, a possibility clearly envisaged by the statutory language.¹³² Moreover, none of this has any strong connection to the context of torture. The idea that a definition of a different term in a health benefits statute would have anything to do with the criminal law definition of torture is laughable. Was this even a sincere argument?

The second problem with the torture memos was their blatant omission of relevant precedent. The Texas case about water-boarding is only the most obvious. The Reagan Justice Department prosecuted members of a local sheriff's department for water-boarding prisoners under their care, conduct which the Justice Department argued rose to the level of torture.¹³³ Not only did the torture memos reach the opposite conclusion, but they did not even *cite* the Texas water-boarding case.¹³⁴ Furthermore, the memos failed to analyze or cite the U.S. prosecutions of Japanese interrogators for water-boarding during World War II.¹³⁵ The U.S. military also court-martialed its own servicemen for the practice during the Vietnam War.¹³⁶ This suggests either a deliberate attempt to construct a frivolous legal argument in defiance of the existing legal evidence, or at very least, a case of willful ignorance.

E. Other Modes of Liability

Legal liability for the torture lawyers might also be established through modes of liability other than general complicity. If the torture lawyers meet the basic mens rea standard for complicity, then they might also meet the mens rea standard for other modes of liability. It is important to engage in this analysis because for each of these alternate modes of liability, the lawyers' mistake of law regarding the lawfulness of torture is irrelevant, just as it is for accomplice liability. After careful consideration, though, each of those modes of liability must be rejected as inapplicable.

132. See Bybee Memorandum, *supra* note 31, at 6.

133. See *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984).

134. Scott Horton points out that the legal precedents would have been found with a simple database search. See Jason Leopold, *Reagan's DOJ Prosecuted Texas Sheriff For Waterboarding Prisoners*, THE PUBLIC RECORD, Apr. 22, 2009 (quoting Horton).

135. See *United States v. Hideji Nakamura*, U.S. Military Commission, Yokohama, 1947, National Archives, NND 735027, Record Group 153: Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944–49, Box 1025, File No. 36-219-Vol.I (giving a 15 year sentence for Japanese officer, Yukio Asano, for waterboarding), cited in Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007).

136. See Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT'L L.J. 576, 594 (2007).

1. *Conspiracy Liability*

Courts have, in the past, suggested that some lawyers might be considered co-conspirators with their clients if they cross a certain line.¹³⁷ This is certainly the case in some prosecutions where the lawyers were so closely involved in the daily operations of the enterprise that they had little basis to suggest that they were simply outside counselors. Of course, the beauty of using conspiracy liability is that it also allows liability for the unforeseen actions of co-conspirators as long as the actions were reasonably foreseeable.¹³⁸ As applied to the torture lawyers, this doctrine would make the torture lawyers responsible for the actions of government agents who engaged in torture that extended *beyond* the limits established by the torture memos, to the extent that such consequences were reasonably foreseeable to the authors of the torture memos at the time they were written. The argument here is particularly strong since one could argue it was reasonably foreseeable that government agents in the heat of war might engage in unlawful actions beyond the scope of action laid out in the torture memos. This argument is particularly relevant for cases where government agents used harsh interrogation methods that even the authors of the torture memos might have labeled as torture.

The real question in conspiracy liability, though, is whether there was an “underlying agreement.”¹³⁹ A conspiracy is an agreement between two or more individuals to commit an unlawful act.¹⁴⁰ Courts are often notoriously lax about this requirement and allow either “tacit” agreements to meet the requirement or allow an agreement to be inferred on the basis of the surrounding facts even when no direct evidence of agreement between the parties can be found.¹⁴¹ But even under these theories of constructive agreements, it is unclear whether the torture memos are indicative of an unlawful conspiracy to commit torture. On the one hand, the establishment of false legal cover was an essential element of the criminal enterprise, since most of the government agents would have been unwilling or unable to perform the harsh interrogations without it. In the end, what remains uncertain is whether the torture memos are *prima facie* evidence of an underlying tacit agreement.

2. *Indirect Perpetration*

Indirect perpetration is a second mode of liability that could, in theory, explain the liability of the torture lawyers. This mode of liability is occasionally applied in common law jurisdictions (though usually under a differ-

137. See, e.g., *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964).

138. See *Pinkerton v. United States*, 328 U.S. 640, 648 (1946).

139. 18 U.S.C. § 371 note 55 (2000) (the federal conspiracy statute).

140. See *id.* § 371 note 131.

141. See, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703, 714 (1943); *Interstate Circuit Inc. v. United States*, 306 U.S. 208, 226 (1939).

ent label¹⁴²), but it is more common in German criminal law and international criminal law.¹⁴³ The idea behind the doctrine is that a perpetrator might be the primary perpetrator even though he does not personally commit the actus reus.¹⁴⁴ The classic example would be a mob boss who orders an underling to execute a criminal enemy. Under the common law definition of perpetration, the trigger man would be the principal perpetrator because he commits the actus reus and the mob boss, by virtue of his absence from the scene, could only be convicted as an accomplice.¹⁴⁵ This result seems anomalous because it fails to accord with our basic intuitions about their relative culpability. The doctrine of indirect perpetration resolves this problem by treating the mob boss as the principal by virtue of his indirect perpetration through the means of the underling, over whom he exercises direct control as an instrument of murder.¹⁴⁶

Might indirect perpetration be used as a legal doctrine to convict the torture lawyers? While the innovative theory might nicely capture the role played by higher government officials who authorized torture and directed lower government agents to perform these acts, it seems less apt for government lawyers who offered legal advice to justify the practice. There is, after all, a crucial difference between the two. The indirect perpetrator is someone who has control over the situation and merely uses another person to commit the act.¹⁴⁷ Usually, it is the indirect perpetrator who has the motive to commit the crime. In contrast, the torture lawyers really are, at most, accomplices to the torture, because their legal memoranda arguably provided legal cover for the conduct to continue and encouraged government agents by falsely and frivolously concluding that their conduct would not violate domestic or international law. In contrast, the higher-level decision makers in the Bush Administration who actually ordered the interrogations might be considered indirect perpetrators. Does this intermediate layer of policymakers break the causal chain between the lawyers and the interrogators?

142. See MODEL PENAL CODE § 2.06(2)(a) (1962) (stipulating liability for individuals who cause an innocent person to engage in criminal conduct).

143. See, e.g., *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 439 (July 31, 2003). The prosecutor of the International Criminal Court has also favored indirect perpetration in both the Darfur and D.R.C. cases under Article 25(3)(a) of the ICC Statute. See, e.g., *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 9, 2009); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008). See generally Florian Jessberger & Julia Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?*, 6 J. INT'L CRIM. JUST. 853 (2008).

144. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 639, 658–59 (Oxford Univ. Press 2000) (1978).

145. See *id.* at 657 (parsing the issue as between subjective and objective theories of perpetration).

146. This is consistent with the control theory of perpetration. See CLAUS ROXIN, *TÄTERSCHAFT UND TÄTHERRSCHAFT* 54 (3d ed. 1975).

147. See *id.*

Certainly not, since the policymakers relied on the advice of the attorneys when they authorized enhanced interrogations.¹⁴⁸

In the end, however, neither indirect perpetration nor conspiracy liability is more applicable to this situation than garden-variety accomplice liability. Even traditional rules of accomplice liability in some jurisdictions allow liability for unintended crimes that exceed the criminal plan that the accomplice meant to aid and abet,¹⁴⁹ so long as the consequences were natural and probable.¹⁵⁰ Regardless, if the torture lawyers should have known that government agents would engage in acts of torture beyond the scope of authorization contained in the memos, they might also face liability under these rules of accomplice liability.

Having established the possibility of accomplice liability for the torture lawyers, the next task is to consider the defense side of the equation. Consequently, Part II will evaluate the necessity defense, while Part III will analyze whether the defense—even if successfully pled by government agents—flows down to accomplices such as the torture lawyers. As the following analysis demonstrates, the scholarly debate on necessity has focused too much on justifications for torture, while necessity as an excuse remains systematically underexplored. Part II corrects this oversight.

II. JUSTIFIED NECESSITY AND EXCUSED NECESSITY

Though the distinction is well known in German law¹⁵¹ and other criminal codes based on the German Criminal Code,¹⁵² the distinction between justified and excused necessity is largely unknown to American criminal lawyers. The oversight is unfortunate because the current landscape of defenses reveals a curious lack of coverage of the available possibilities. In reality, necessity is two separate defenses. The following Part explains the proper difference between justified and excused necessity and then demonstrates that the former cannot be legitimately invoked as a defense to torture. Finally, this Part posits excused necessity as the one defense (if any)

148. See George Patrick Montgomery, Note, *Law's Making a Comeback: A Chayesian Analysis of the Bush Administration's Post-9/11 Interrogation Policy*, 6 GEO. J. L. & PUB. POL'Y 333, 344–45 (2008) (detailing policymakers' use of legal opinions).

149. See, e.g., *People v. Luparello*, 231 Cal. Rptr. 832 (Cal. Ct. App. 1987). The doctrine has been severely criticized and is rejected by some state jurisdictions. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, *HANDBOOK ON CRIMINAL LAW* 516 (1972) (arguing that accomplice liability for crimes that exceed the criminal plan is inconsistent with fundamental principles of criminal law).

150. The same basic standard is used in *Pinkerton* conspiracy liability under the idea of reasonably foreseeable consequences. See *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946). For a theory that provides a foundation for conspiracy liability but rejects its application for unintended consequences, see Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147 (2007).

151. See, e.g., Strafgesetzbuch [StGB] [Penal Code] May 15, 1871, Reichsgesetzblatt [RGBl] 583, § 34–35 (F.R.G.) translated in 1 GEROLD HARFST & OTTO A. SCHMIDT, *GERMAN CRIMINAL LAW* (1989).

152. See, e.g., Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, art. 17–18 (Switz.).

that might capture our charitable outlook on the torturer in spite of the wrongfulness of his actions.

A. *The Concept of Excused Necessity*

The classic categories of defenses in U.S. law are duress and necessity.¹⁵³ Duress applies in situations where the threat comes from an aggressor who threatens harm in order to coerce the victim into performing an action chosen by the aggressor.¹⁵⁴ The classic paradigm is holding a gun to someone's head to get him or her to commit a crime,¹⁵⁵ a famous example of which occurred in the *Erdemović* case.¹⁵⁶ The other paradigmatic example is the kidnapping of a family member to get someone to join a criminal endeavor.¹⁵⁷ Necessity, on the other hand, involves a threat that comes not from an aggressor but from an external circumstance, and the crime committed in response to the threat is not performed under the direction of a specific actor.¹⁵⁸ It is committed by the defendant merely to neutralize the threat from a "natural" or "non-human" force.¹⁵⁹ In most U.S. jurisdictions (though certainly there are exceptions), necessity is viewed as a justification, while duress is considered an excuse.¹⁶⁰ The reasons are obvious and, at first

153. See MODEL PENAL CODE § 2.09 (1980) (duress); MODEL PENAL CODE § 3.02 (1980) (choice of evils justification).

154. See, e.g., N.Y. PENAL LAW § 40.00 (McKinney 2009) ("[I]t is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist."); see also *United States v. Mitchell*, 725 F.2d 832, 837 (2d Cir. 1983).

155. See, e.g., *People v. Jenkins*, 625 N.Y.S.2d 70 (N.Y. App. Div. 1995) (noting that a third party threatened to shoot defendant if he did not participate).

156. Drazen Erdemović was a Bosnian Serb who turned himself in to authorities after his involvement in the massacre of 1200 Muslim civilians in Srebrenica. Erdemović pled guilty and claimed that he acted under duress because his commander said that if he refused he should line up with the victims and await his execution with them. Erdemović complied and personally executed seventy men. The ICTY Appeals Chamber held, in a close 3–2 split decision, that duress was unavailable as a defense under international law for the murder of civilians, though it could be considered at sentencing as mitigation. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment on Appeal, ¶ 19 (Oct. 7, 1997). The decision, which included a strong dissent from Judge Cassese, has sparked a large debate in the scholarly literature over the availability of duress as a defense in international criminal law. See, e.g., Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741 (2008).

157. See, e.g., *United States v. Bakhtiari*, 913 F.2d 1053, 1057 (2d Cir. 1990) ("claim that a defendant's family has been threatened might help establish the defense of duress or coercion").

158. See, e.g., *State v. Baker*, 579 A.2d 479, 481 (Vt. 1990) (allowing defense of necessity for driver with suspended license who drives injured passenger to hospital).

159. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 289 (5th ed. 2009).

160. This follows the pattern of the Model Penal Code, which lumps "choice of evils" with justifications and places duress alongside other excuses such as intoxication, although without explicitly labeling it as such. See MODEL PENAL CODE § 2.09 (1980); see also GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 83 (1998) (classifying duress as an excuse); Kyrón Huigens, *Duress Is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303 (2004) (same). This categorization only applies in jurisdictions that are careful to distinguish between justifications and excuses. *But see* *United States v. Duclous*, 214 F.3d 27, 33 (1st Cir. 2000) (suggesting that "otherwise criminal conduct may be excused when the defendant commits the acts in order to avoid a greater evil") (emphasis added); WAYNE R. LAFAVE, CRIMINAL LAW 467 (2000) (implying that duress is a justification); Peter Westen & James Mangiafico, *The Criminal Defense of Duress:*

glance, supportable. Responding to the necessity of a situation usually implies that the defendant chose the lesser of two evils—that is, the defendant engaged in a utilitarian calculation and committed one crime in order to avoid an even more drastic result. The correct choice—at least correct in the eyes of the consequentialist—means that the action was not wrongful.¹⁶¹ However, duress involves a situation where the defendant may have committed a much worse crime in order to save himself or his family (like Erdemović), thus suggesting that he did not successfully avoid the worse outcome in favor of a better one. Indeed, he chose the worse outcome overall, albeit one that saved either himself or his family. But because the threat to his life or bodily integrity compromised the freedom of his decision-making process, he is not culpable.¹⁶² The action was still wrong, but his culpability is negated by the excuse. Punishment would be useless; charity and pity are more appropriate.

The obvious problem for this scheme is that it ignores two possible combinations: justified duress and excused necessity. Justified duress would be a situation where one is compelled by force to violate the law but the end result is beneficial. This situation is rare enough that the oversight is hardly worrisome. However, the latter oversight is truly disturbing: there is no category to handle cases of necessity where the threat comes from an external circumstance but the defendant does not act justifiably. Consider a sailor onboard a small boat that is sinking after a tropical storm. He throws two individuals overboard to lighten the load and save himself. Here the defendant would appear to be acting out of necessity but does not choose the lesser of two evils (since two are dead so that one may live). Because the correct category does not exist, courts are required to squeeze this factual situation into either justified necessity or duress. The former option is completely inadequate because it falsely suggests that the action was rightful; the latter option is inadequate because it violates our commonsense understanding of the term “duress.” This is one source of the early and lingering confusion over the exact borderline between necessity and duress.¹⁶³

Fortunately, German criminal law and other national codes based on it use both justified and excused necessity, and U.S. courts would do well to

A Justification, Not an Excuse—and Why it Matters, 6 BUFF. CRIM. L. REV. 833 (2003). The *Duclos* case highlights nicely the confusion: if the defendant successfully avoided a greater evil, that is the hallmark of a justification, not an excuse. In fact, in the same breath the court also implies that the defense is a justification defense. *Duclos*, 214 F.3d at 33 (“like other justification defenses”).

161. Cf. FLETCHER, *supra* note 160, at 138–39 (arguing that necessity as a justification can be supported both by transcendental norms and utilitarian norms).

162. For theories of duress as autonomy-compromising, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 831 (1978) (describing duress as the will being overborne by threats); Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 295 (2003) (“The defense is a concession to human weakness when people are grievously threatened with harm to themselves or their loved ones.”).

163. See, e.g., *People v. Pena*, 197 Cal. Rptr. 264, 269 (Cal. App. Dep’t Super. Ct. 1983) (using the concepts of necessity and duress seemingly without distinction as co-extensive).

adopt the distinction.¹⁶⁴ Unlike most state jurisdictions where the defenses are codified in a penal statute, U.S. federal courts apply defenses based purely on precedent and common law decision-making.¹⁶⁵ Therefore, adopting a more refined understanding of necessity is an option for U.S. federal courts, which are unrestrained by any codified criminal statute that defines either necessity or duress.¹⁶⁶ Furthermore, the Supreme Court has never endorsed a particular definition of the necessity defense, preferring instead to let the lower courts apply the defense without guidance from above.¹⁶⁷ To be clear, this would not involve the incorporation of German criminal law into U.S. federal law. Rather, the suggestion is simply that U.S. federal courts could adopt a much clearer understanding of the necessity defense—a conclusion that, as it happens, many other global jurisdictions have also reached.¹⁶⁸

B. *Why Justified Necessity is Unavailable as a Defense*

The vast majority of the scholarly literature on torture, at least in the United States, has focused exclusively on whether torture might be justified.¹⁶⁹ Much of the debate deals with ticking time-bomb scenarios that have generated methodological complaints.¹⁷⁰ Far too little attention has been paid to the thesis that agents who commit torture might be excused but not justified for torturing terrorism suspects.¹⁷¹ However, the question

164. For a discussion of the distinction, see also Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 273 (1995).

165. The U.S. code defines federal criminal offenses but not defenses. Furthermore, the Supreme Court has long recognized that duress and necessity are badly in need of judicial clarification. See *United States v. Bailey*, 444 U.S. 394, 410 (1980).

166. Both categories—as defenses—are judicially defined and applied through the common law method of case law development. The leading federal case on necessity is *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991), which rejects application of the defense for indirect civil disobedience.

167. See *Bailey*, 444 U.S. at 394.

168. See, e.g., Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, arts. 17–18 (Switz.).

169. This is true regardless of whether the authors support or reject the justification. Compare Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable*, 39 U.S.F. L. REV. 581 (2005), Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations?*, in TORTURE: A COLLECTION 183 (Sanford Levinson ed., 2004), and Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280 (1989), with George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1031 (1999), Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT'L CRIM. JUST. 785 (2004), Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135, 151–53 (2004), and Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1686 (2005).

170. See, e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, in THE TORTURE DEBATE IN AMERICA 35 (Karen J. Greenberg ed., 2006).

171. One notable exception is found in Kai Ambos, *May a State Torture Suspects to Save the Life of Innocents?*, J. INT'L CRIM. JUST. 261, 285–86 (2008) (arguing that necessity as an excuse might apply in international criminal law, because “[t]he model case, similar to a situation of extreme duress, demonstrates impressively the advantage of this distinction in situations where the wrongfulness of the act, for *raison d'état*, must be upheld, but the individual wrongdoer, for reasons of personal blameworthiness, should be exempted from responsibility”). Ambos purports to be agnostic as to which excuse is applied to torture, as long as it is an excuse. *Id.* at 286; see also Sherry F. Colb, *Why Is Torture “Different” and How*

can only be decided if we first determine whether a justified defense of necessity might apply in the case of torture.¹⁷² As the following analysis demonstrates, there are multiple problems with asserting the classic defense of justified necessity—problems which evaporate when we consider necessity as an excuse. The analysis therefore suggests that we should re-center the debate from justified necessity to excused necessity.

Although the case law on necessity is not fully coherent, most cases recognize a multi-pronged standard for justified necessity: (1) the defendant was facing a choice of evils scenario; (2) the defendant had a reasonable belief that his or her conduct would prevent the harm; (3) the harm sought to be avoided was imminent; and (4) there was no other alternative action to avoid the harm.¹⁷³ The Model Penal Code also imposes a requirement that “a legislative purpose to exclude the justification claimed does not otherwise plainly appear.”¹⁷⁴ At least three of these elements of the standard prove problematic for the establishment of this defense in cases of interrogational torture arising out of the Bush Administration’s War on Terror: it is not clear that torture was the true lesser of evils, that an actual terrorist attack was imminent, and that no alternative was available. There are also other problems with the defense that will be discussed in the present Part, including the public policy implications of weakening the prohibition against torture and the more general question of whether torture is ever an appropriate means to combat an emergency.

1. *The Wrongfulness of Torture*

The first reason to reject the application of justified necessity to interrogational torture is that, on policy grounds, the justification sends the wrong message to the public.¹⁷⁵ Most scholars correctly recognize that justifications, although they are *ex post* criminal law defenses, also include a for-

“*Different*” *Is It?*, 30 CARDOZO L. REV. 1411, 1426 n.54 (2009) (discussing variant of the position that torture could be just but still unlawful); Mordechai Kremnitzer & Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 ISR. L. REV. 509, 535 (2000).

172. Self-defense is another avenue for justifying torture. See Colb, *supra* note 171, at 1416. This defense would most likely remain unavailable for actual cases of post-9/11 torture. The torturer does not commit the act to save himself. There are two possible solutions to this problem. The first is to move from individual self-defense to national self-defense under public international law, where the argument might have more logical traction as an avenue for escaping state responsibility. However, the text of the Convention Against Torture might be construed to preclude the defense. The second option is to consider defense of others a legitimate defense, that is, the unified notion of defensive force to protect oneself, others, or property. See generally GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY* (2008). Legitimate defense allows the use of force against an aggressor to stop or repel his attack. Thus, the detainee would have to be the aggressor, not merely someone with information. The argument also requires a broad understanding of “stopping” the attack so as to include actions committed in order to gain the information necessary to *prevent* the attack. The torture is aimed not at disabling the attacker but at spurring disclosure. Cf. Colb, *supra* note 171, at 1448–49.

173. See, e.g., *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989).

174. See MODEL PENAL CODE § 3.02(1)(c) (1980); see also *infra* note 222 and accompanying text.

175. See Ambos, *supra* note 171, at 287 (arguing for necessity as an excuse, not a justification).

ward-looking, ex ante element. By virtue of the fact that a justification announces that the conduct is not wrongful, the application of the defense to a particular fact pattern announces to the public that others facing similar circumstances may also engage in the conduct.¹⁷⁶ This is implicit in the nature of justifications.¹⁷⁷

A court sensitive to the public policy function of decision-making may resist this consequence. Given the fear that applying a justification of necessity to interrogational torture will encourage—rather than discourage—the practice, there may be public policy reasons to counsel against application of the defense within the context of torture. Indeed, it would appear difficult to limit the defense to C.I.A. operatives. Private citizens could torture individuals they believed—often falsely, or based on stereotypes—have access to information about terrorism, and then expect courts to exonerate them on the basis of a justification. Justified necessity, insofar as it is truly a justification, cannot remain an exception to the rule: it announces a generalizable departure from the rule that becomes codified in the case law. It is half-way on the road to policy.¹⁷⁸

The category of excused necessity avoids these public policy problems. The first benefit to this approach is that it allows us to hold on to the conclusion that torture is wrong and that it violates our ex ante policy decisions regarding the treatment of detainees.¹⁷⁹ One need not conclude that torture is right just because we are unwilling, under specific circumstances, to send torturers to jail.¹⁸⁰ Indeed, there might be strong prudential reasons to send a signal to the world that torture is always wrong, even though we

176. See Youngjae Lee, *The Defense of Necessity and Powers of the Government*, 3 CRIM. L. & PHIL. 133 (2008). Lee suggests that even if necessity is considered an excuse, it might also provide minimal forward-looking guidance, though he concedes that it would not if excused necessity involves a temporary loss of the actor's capacity to reason. *Id.* This point is implicit in the individualized nature of excuses as personal to the actor. See George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); see also *United States v. Schoon*, 971 F.2d 193, 196–97 (9th Cir. 1991) (describing necessity as one-time exception).

177. Cf. Kimberly Kessler Ferzan, *Torture, Necessity, and the Union of Law and Philosophy*, 36 RUTGERS L.J. 183 (2004).

178. In its famous torture decision, the Israeli Supreme Court did not entirely recognize this point. See HCJ 5100/94 *Public Committee Against Torture v. Israel* [1999] IsrSC 53(4) ¶¶ 35–38.

179. I take it that this is precisely the move that is opposed by Eric A. Posner and Adrian Vermeule in their book *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007). Posner and Vermeule appear to detect some have-your-cake-and-eat-it-too disingenuousness in the approach of outlawing torture in general but allowing forgiveness for individual defendants who commit it.

180. Another option is to deny both the justification *and* the excuse to the torturer, but to decline to punish him anyway. This option was taken in the famous German *Daschner* case. See Landgericht Frankfurt a.M. [LG] [Regional Court] Dec. 20, 2004, *Neue Juristische Wochenschrift* 692 (692–96), 2005 (F.R.G.) [hereinafter *Daschner*]. *Daschner* involved a police official who ordered his detectives to threaten a suspect with torture to get him to reveal the location of a kidnapped boy. The Frankfurt Regional Court held that no justification or excuse applied to the case but still concluded that the defendant was not an appropriate subject for punishment. This curious result is explained in Florian Jessberger, *Bad Torture—Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany*, 3 J. INT'L CRIM. JUST. 1059 (2005). The court argued that mitigating circumstances justified the imposition of the lowest possible punishment—a monetary fine—and then suspended the sentence entirely in accordance with Article 59 of the German Criminal Code.

might treat torturers charitably in recognition of the impossible situations they face when making these difficult decisions.¹⁸¹

The insistence on excusing conduct is familiar to lawyers working in jurisdictions where Kantian theory has had a strong influence on criminal law.¹⁸² American criminal lawyers are more inclined to debate policy considerations under the guise of utilitarian calculations.¹⁸³ If torturing a suspect will potentially save thousands of lives, then presumably the torturer made the right decision because the outcome will be better.¹⁸⁴ But non-consequentialist deontic reasoning has a greater purchase in Germany, with its constitutional protection for human dignity—a protection that is famously immune from consequentialist balancing.¹⁸⁵

2. *Choice of Evils*

The second problem with justified necessity for interrogational torture is that it is not clear whether the government torturer has chosen the lesser of two evils. It depends entirely on how one understands the concept of an “evil” and whether a balancing of evils must always be a consequentialist balancing. The latter is not obviously the case.

The traditional view is that a choice of evils is a utilitarian affair. The torturer balances, on the one hand, the negative consequences of torturing the detainee (his pain and suffering) with, on the other hand, the negative consequences of not stopping a terrorist attack. Obviously, the first set of consequences is a near certainty, while the second set of consequences trade on probabilities, a fact that the scholarly literature has dwelled on extensively.¹⁸⁶ How do we know whether the information extracted from the detainee will in fact stop any terrorist attacks, especially when much of the empirical literature suggests that such information is usually unreliable?¹⁸⁷

But there is a separate problem here. Assume for the sake of argument that the information to be gained *will* stop a terrorist attack with a certain identified probability. Here, the balancing calculation could be performed. Is this the only way of understanding the “evils” from which we must

181. The *Daschner* alternative—rejecting all defenses but suspending the sentence—might arguably serve this goal even better, though perhaps at the risk of some internal incoherence. If no defenses apply and the defendant is culpable, why should the defendant escape punishment?

182. For a discussion of the Kantian basis of criminal law, see George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987).

183. For prominent examples, see Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1315 (2003) and Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

184. Cf. POSNER & VERMEULE, *supra* note 179, at 199.

185. Grundgesetz für die Bundesrepublik Deutschland [GG][Basic Law] May 23, 1949, Federal Law Gazette, as amended, § 1, art. 1(1) (protection of human dignity is inviolable).

186. See, e.g., John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 757–65 (2002).

187. See Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479 (2006). But see Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 263 (2004) (arguing that it is impossible to verify whether torture is effective or not due to lack of data).

choose? Maybe the prohibition on torture is a deontic constraint immune from consequentialist balancing. The idea here is that by considering the lesser of two evils, we ought to take into account not just the size of the evils, but also the *kinds* of evils that we are facing.¹⁸⁸ It may be the case that not all kinds of evil are equal. Some evils may be more serious than others, and violating the human dignity of a prisoner may represent a categorical evil that cannot be outweighed by any amount of positive consequences. This result would still involve a decision regarding a “choice of evils.” However, it rejects the unwarranted assumption that just to ask the question regarding a “choice of evils” is to mandate, before the debate is even started, a utilitarian framework rather than a Kantian outlook on the question.

But does this possibility fly in the face of the necessity defense? One might object that the criminal law is largely Kantian, in that it proscribes certain conduct categorically regardless of whether the conduct has positive consequences or not. Murder is wrong, period—even the murder of a baby Hitler who might grow up to cause immense suffering in the world. But the defenses in criminal law, especially the necessity defense, provide a backstop to the categorical nature of the criminal law and provide a limited consequentialist exception for conduct that makes the world a little better, even if it involves some categorical Kantian violations.¹⁸⁹ Under this view, the whole point of the necessity defense is that it represents a policy decision to temper the Kantian framework of the criminal law with a consequentialist set of exceptions. If this is the case, then it makes no sense to incorporate a Kantian gloss on “evils” into the definition of the necessity defense. The necessity defense is utilitarian through and through.

This thorough-going consequentialist interpretation of the necessity defense can and should be resisted. Historically, common law courts barred the use of necessity as a defense to several key categories of offenses. This would have been unnecessary if the necessity defense was always purely consequentialist. At common law, necessity was not a defense for the crime of murder; *Dudley & Stephens* is the most famous example of this well-known exclusion.¹⁹⁰ The rule from *Dudley & Stephens* lives on in many jurisdictions, not just in the common law, but in the international context as well.¹⁹¹ In

188. See Ferzan, *supra* note 177, at 188–89; Lee, *supra* note 176, at 140; John Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 416 (1999).

189. Under this view, the necessity defense is an exercise in crafting exceptions to general prohibitions. See *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991).

190. See *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273. Dudley and Stephens, shipwrecked and hungry, killed a cabin boy and cannibalized him. Their conviction, though it sparked some degree of popular outrage, was upheld on the ground that necessity was not a defense for the killing of an innocent human being.

191. See, e.g., *People v. Pena*, 197 Cal. Rptr. 264, 268–69 (Cal. App. Dep’t Super. Ct. 1983). However, the Model Penal Code famously rejects the rule from *Dudley & Stephens* and therefore includes no categorical exceptions to the use of the necessity defense. MODEL PENAL CODE § 3.01 (1980). For a discussion of limitations on the defense, see Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481 (2002).

Erdemović, the International Criminal Tribunal for Yugoslavia Appeals Chamber followed the same logic and ruled that duress could not be used as a defense to murdering civilians as a crime against humanity.¹⁹² How are we to understand these categorical limitations to the application of the defense? Often, as academics, we attribute them to concerns about slippery slopes or public policy. But there is a deeply theoretical language that can be used to express the very same point. The law has always recognized that the consequentialist nature of the necessity defense has to be limited to certain categories and excluded from others, and this exclusion is justified on deontological grounds. Some crimes are so heinous that no amount of positive consequences will justify their commission, precisely because such crimes represent a moral violation that is a special kind of evil that categorically “outweighs” (in the quasi-Kantian sense, not the consequentialist sense) the positive consequences.

So even if consequentialist balancing is appropriate in most cases of necessity, maybe one reaches the limits of the consequentialist approach in cases of torture, just as one reaches the limits of the consequentialist approach in cases of murder. The rationale for including both crimes in the same category stems from the fact that both represent an irremediable violation of the victim’s human dignity. There is no degree of consequence that can erase the violation of human dignity caused by murder or by torture, which leaves a moral stain.¹⁹³

3. *Threshold Deontology*

One might also argue from the opposite direction. Perhaps there is a limit to our deontology. Suppose that we consider a thought experiment where pain and suffering must be inflicted on one person to save thousands of lives. Many people would then say that the torture is justified.¹⁹⁴ One can make the thought experiment more extreme: assume that one person must be tortured to save *millions* of lives, perhaps even the whole human race. At this point, everyone would say that the infliction is justified. This argument has been used to demonstrate that, at some level, we are all utilitarians. Put another way, our deontological commitments disappear when we reach a certain threshold. This is called threshold deontology in the philosophical literature.¹⁹⁵ It is interesting because it produces a tension: if we are truly thoroughgoing Kantians, then we should stick to our Kantian impulses even at the margins.¹⁹⁶ Giving up Kantian conclusions when the stakes are so high seems to suggest that we are not deontologists at all.

192. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment, ¶ 19 (Oct. 7, 1997).

193. Rape might be placed in this category as well, though it is unclear how a necessity defense could ever apply to this crime.

194. See, e.g., Moore, *supra* note 169, at 333; cf. Colb, *supra* note 171, at 1421 & n.37.

195. See SHELLEY KAGAN, *NORMATIVE ETHICS* 70, 80–81 (1998).

196. See Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 255–57 (2007).

There are several responses to this objection. First, actual cases of torture likely to be litigated will not involve factual circumstances that approach the “threshold” of these thought experiments. The stakes are usually far lower, although it must be conceded that concerns about nuclear attacks do involve many potential deaths. Threshold deontology might demonstrate that when push comes to shove, none of us are *really* deontologists. But even if deontology only applies in the main, and not in the extremes, this does not mean that deontology is morally or conceptually bankrupt.

Alon Harel and Assaf Sharon have published an interesting response to the problem of threshold deontology.¹⁹⁷ They argue that threshold deontology misstates our intuitions that torture might sometimes be justified in extreme circumstances where our deontic intuitions lose force.¹⁹⁸ Rather, they argue that torture can never be authorized as an *ex ante* general policy.¹⁹⁹ The intuition that the threshold deontologist trades on is that the use of force in these circumstances is truly exceptional and as such it can never be part of a forward-looking authorization. It must always be an *ex post* exception that is applied against the general rule, and as such can only be applied when the particular circumstances of an individual situation are considered.²⁰⁰ There is a practical consequence to this distinction between rules and exceptions. As Harel and Sharon put it, “with regard to the reasoning of agents, incorporating rule-governed exceptions into the rule prohibiting torture is destructive not merely in the exceptional cases—cases in which the agent ought to resort to the exception—but also in non-exceptional cases.”²⁰¹ Without understanding the difference between rules and exceptions it is difficult to prevent the exception from bleeding into the rule.

Harel and Sharon are surely correct about the exceptional nature of using torture and about our moral intuition that it must remain an exception. However, they overlook the fact that even a justification can form a kind of *ex ante* authorization, in the sense that it announces the conditions under which others may engage in similar conduct. By virtue of the fact that the justification states that the act was not wrongful, it functions with an element of rule-guidance. Although its rule-guiding force is not as strong as an *ex ante* policy authorization, it is nonetheless an exception that includes a powerful forward-looking element. Saying that the conduct is not wrongful announces to the world that others may do the same under like conditions. In this respect it is no different than a criminal court’s holding that it is acceptable to shoot a would-be killer in self-defense, even if this is an exception to the general rule that killing is wrong.

197. Alon Harel & Assaf Sharon, *What is Really Wrong with Torture?*, 6 J. INT’L CRIM. JUST. 241 (2008).

198. *Id.* at 250.

199. *Id.* at 251.

200. *Id.* at 252.

201. *Id.* at 253.

The Harel and Sharon position would be correct if they accepted a very small amendment. What they ought to have said is that the exception to the rule must, by definition, be an excuse. To the extent that torture in extreme situations might be exculpated, it is only because it is excused. We treat the torturer charitably and grant him an excuse, without suggesting to others that they may act similarly. The conduct is still wrongful.

Harel and Sharon would no doubt respond that this scheme violates the threshold deontologist's intuition that torture might be *justified* in rather extreme circumstances. The point of allowing the ad hoc justification, according to them, is that it requires that the defense be considered individually according to the very particular circumstances of each case. Apparently, the existence of an ex ante policy consideration violates this requirement because it does not require the torturer to make a fresh judgment about whether the torture is actually required in a particular circumstance. However, this seems to run afoul of a basic distinction between rules and standards. A standard can be promulgated ex ante and still authorize torture if the standard is met—that is, if the requirements of a necessity defense are met. Standards always require a fresh look at the circumstances of each case. Furthermore, a judicial decision that torture is justified as long as it is necessary to avert a particular threat is just as much a forward-looking pronouncement as an ex ante policy decision. Harel and Sharon are inclined to view this as an example of practical necessity that cannot be turned into a generalizable rule.²⁰² But the only way to get around the problem is to recast the necessity defense as a pure excuse. If they want to hold on to the idea that torture in exceptional circumstances is justified, then they must also give up the idea that it is non-generalizable. The two go together.

Returning to the criteria for choosing the lesser evil, there is a second, less philosophical reason why committing torture might not represent a correct choice of the lesser of two evils, even under a completely consequentialist framework. The costs associated with torturing an individual include more than just the pain and suffering of the detainee. There are other, more nebulous consequences that flow through to the entire community. They include, *inter alia*, a sense of anxiety among regular citizens that torture is permissible against all detainees, which includes them if they are detained mistakenly; a loss of respect for the legal system among outsiders who may no longer view the legal system as constrained by the rule of law, international human rights standards, and codified responsibilities under the Convention Against Torture; and finally, a loss of respect *internally* for the legal system as governed by the rule of law. The latter consequence, in particular, has

202. *Id.* at 251.

myriad costs that may be difficult to chart.²⁰³ Widespread anxiety alone may be sufficient to change the utilitarian calculus.

One might object at this point that most of these considerations work at the level of objective truth regarding whether the choice made by the torturer is really the lesser of two evils. But is this really the relevant question? Perhaps a subjective standard is more appropriate—that is, whether the torturer *sincerely believed* that the torture was the lesser of two evils. Of course, a sincere belief is a requirement of the necessity defense.²⁰⁴ The argument in favor of the subjective standard would be that it better tracks the culpability of the individual defendant by concentrating on his mental state.²⁰⁵ If the resulting standard is then too subjective, one might constrain it—as some courts have—with an objective element that the belief is *reasonable*, where “reasonable” is interpreted to mean objectively reasonable as opposed to subjectively reasonable according to the specific defendants.²⁰⁶

However, even the subjective standard—as modified by an “objectively reasonable” constraint—sounds more like an excuse than a justification. If the lesser of two evils is judged from the subjective point of view, then the issue is not whether the chosen scenario was best, all things considered. Rather, the issue is whether the defendant had a good-faith basis for believing that he was choosing the best scenario. And this has all the hallmarks of an excuse, not a justification. Another way of putting the point is that the defendant should get the benefit of a mistake of fact situation, where he mistakenly—though perhaps reasonably—believed that the elements of the justification were present. This move from the objective to the subjective, just like the move from a real justification to a mistaken one, represents the shift from a justification to an excuse.

None of this is to say that the subjective standard is incorrect. Rather, the point is simply that in moving to the subjective standard one has shifted from justified necessity to a version of excused necessity. One cannot coherently advocate for a subjective standard and maintain the fiction that one is applying justified necessity; this is excused necessity by another name.

203. Lee makes this point nicely when he implies that there might be a systematic undercounting of the evils on the other side of the scale. See Lee, *supra* note 176, at 134 n.9 (citing MODEL PENAL CODE § 3.02 cmt. 2, n. 5 (1985)).

204. See, e.g., *People v. Trippet*, 66 Cal. Rptr. 2d 559, 563 (Cal. Ct. App. 1997) (“[T]he accused must entertain a good-faith belief that his act was necessary to prevent the greater harm.”).

205. This argument is fully in accord with the general subjectivist move made by the Model Penal Code.

206. See *Trippet*, 66 Cal. Rptr. 2d at 563. The rationale for casting “reasonable” in an objectivist light is best expressed (in the context of self-defense) in *People v. Goetz*, 68 N.E.2d 96, 111 (N.Y. 1986) (arguing that the subjective standard would permit defendants to set their own standards based on their “aberrational or bizarre” thought patterns). For a discussion of reasonableness, see GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL* (Macmillan, Inc. 1990) (1988). But see Stephen Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119 (2008).

4. *Appropriateness of the Means*

It is also unclear whether torture is an “appropriate” means of avoiding the danger—a legal requirement that prevented the Frankfurt Regional Court from applying justified necessity in the well-known *Daschner* case.²⁰⁷ In that case, a trial court in Frankfurt considered whether authorities were justified to threaten a child kidnapper with torture in the course of the suspect’s custody.²⁰⁸ The police knew that a young boy had been kidnapped and there was substantial public pressure to get the boy back before time ran out.²⁰⁹ With a suspect in custody, a police official ordered his detectives to do what was necessary to get the relevant information.²¹⁰ Though the police detectives *threatened* the suspect with torture, they did not actually torture him. Since the German statutory definition of torture encompasses threats, the *Daschner* court considered the threats akin to torture in its decision.²¹¹ The ruse worked, in a sense, because the kidnapper revealed the information.²¹² Unfortunately, the information was of little use; the kidnapper confessed that he had already killed the boy, and he told the detectives where to find the body.²¹³

The police official was prosecuted for ordering his detectives to threaten the kidnapper with torture.²¹⁴ Although the court was willing to entertain the possibility that the torture (or threatened torture) was “necessary” in some sense to save the boy, the court was apparently not persuaded that torturing a detainee was an appropriate means to avert the danger (in this case, the risk that the kidnapped child might be killed in the interim).²¹⁵ Apparently, the inappropriateness of the action stemmed from the availability of other less extreme options to pressure the detainee, and the violation of the detainee’s human dignity resulting from the threats—a Kantian right immune from consequentialist balancing.²¹⁶ This was a somewhat curious result, since such consequentialist balancing is precisely what Article 34 of the German Criminal Code appears to countenance.²¹⁷ One way of understanding the tension is that the constitutional protection of human dignity

207. See *Daschner*, *supra* note 180, at 692–96.

208. See *id.*; see also Jens David Ohlin, *The Bounds of Necessity*, 6 J. INT’L CRIM. JUST. 289, 296 (2008).

209. See Jessberger, *supra* note 180, at 1061.

210. *Id.*

211. *Id.*

212. *Id.* at 1061–62.

213. *Id.* at 1062.

214. *Id.* at 1064.

215. *Id.* at 1065.

216. *Id.*

217. Article 34 states that “whoever commits an act in a present and otherwise unavertable danger to life, body, liberty, honor, property or another law good to avert the danger from himself or another, acts not unlawfully if in weighing the conflicting interests, particularly the affected law goods [sic] and the degree of the danger threatening them, the protected interest substantially outweighs the impaired one. However, this is applicable only insofar as the act is an appropriate means to avert the danger.” Strafgesetzbuch [StGB] [Penal Code] May 15, 1871, Reichsgesetzblatt [RGBL] 583, § 34 (F.R.G.) *translated in* 1 GEROLD HARFST & OTTO A. SCHMIDT, GERMAN CRIMINAL LAW (1989).

is hierarchically superior as a source of law to the German Criminal Code. In essence, then, one might wonder how much of Article 34 still survives as good law, given how the German Constitutional Court has robustly interpreted the *Grundgesetz* (German Basic Law) protection of human dignity.²¹⁸ If the court is going to apply the protection of human dignity even in the face of contrary policy determinations made by the legislature in crafting the penal code, then it would appear that the meaning and application of Article 34 has been severely restricted.

There is no similar constitutional protection in U.S. law. The Constitution does not explicitly protect a general affirmative right to life, nor does it explicitly codify a right to human dignity.²¹⁹ That being said, one might simply return to the previous point that the inappropriateness of the means is simply another way of expressing the legal principle that some means are so evil as a category that they cannot outweigh any threat. Such categorical exclusions may be entirely consistent with the notion of a balancing of evils, as demonstrated in Part II.B.2. Therefore, applied to the case of the torture of terrorism suspects by U.S. government agents, a defendant arguing for a necessity justification might still need to argue, in some fashion, that the torture was an appropriate means to stop the threat of terrorism.²²⁰

It is not clear that torture is an appropriate response to the threat of terrorism, unless one adopts a question-begging attitude that the torture is justified to stop terrorists. But that is exactly what the standard is meant to determine and one cannot assume the conclusion in applying the standard. Another way of putting the question is to ask whether the necessity justification was designed to justify the torture of suspects in legal detention. It was clearly designed to apply to private citizens who are faced with impossible situations in the heat of danger.²²¹ But applying the same rationale to government agents, in their dealings with prisoners under their charge, is a completely unprecedented application of the justification to an area of the law where it is uncertain whether the justification was meant to be ap-

218. For example, the German Constitutional Court ruled that executive branch officials could not order the military to shoot down a hijacked airliner in order to prevent terrorists from crashing the airplane into a building as they did on 9/11. The Court based this decision on the German Constitution's Article 1 protection of human dignity, which the court believed would be infringed if the passengers were sacrificed in order to save a larger number of individuals on the ground. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (F.R.G.). For critical analysis of this Kantian result, see Tatjana Hornle, *Hijacked Airplanes: May They be Shot Down?*, 10 *NEW CRIM. L. REV.* 582, 605–07 (2007); Oliver Lepsius, *Human Dignity and the Downing of an Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 7 *GERMAN L.J.* 761 (2006).

219. Of course, the Fifth Amendment prohibits deprivations of life without due process of law. U.S. CONST. amend. V.

220. The "appropriateness" criterion might also be implied by the requirement in many U.S. jurisdictions that the defendant's belief that the act was necessary "must be objectively reasonable under all the circumstances." *State v. Riedl*, 807 P.2d 697, 701 (Kan. Ct. App. 1991). The question would be whether this implies that the means must also be reasonable.

221. See Lee, *supra* note 176, at 143 (describing the necessity defense as "creat[ing] a space in which citizens are empowered to act as if the state has disappeared from the scene").

plied.²²² Just as murder was not an appropriate means to stop a threat under the common law, so, too, torture of a legal detainee is arguably not an appropriate means to stop a terrorist attack.

5. *Inavertibility*

Both U.S. and German law include a similar requirement that the harm be otherwise inavertible to be justified.²²³ In U.S. case law, this is most often expressed as a point about whether the conduct was “necessary” to avoid the evil. Implicit in this notion is the conclusion that other more legal means were unavailable to the defendant.²²⁴ If a legal alternative (or a less evil alternative) was available, then how can it be said that the defendant’s conduct was truly “necessary” to stop the threat? This requirement has a dynamic relationship to the imminence requirement, because the greater the level of imminence, the fewer the alternatives that will remain. In any event, a justified torturer would need to successfully argue that torturing a detainee was the only means to avoid the danger and that no other military response from the U.S. government would be sufficient to counteract the threat. In a sense, the multi-pronged approach of the U.S. government to the War on Terror becomes a liability for the torturer, because to assert the defense he must show that no other governmental means will be sufficient to deal with the threat. When the great force of the U.S. government is involved in these efforts, this becomes very difficult to establish. And the burden is on the defendant asserting the justification to make this evidentiary showing.²²⁵

In situations where a very imminent specific threat is at issue, the requirement could conceivably be met in theory. The defendant might argue that the other means at the disposal of the U.S. government are powerful but too late. Only the torture of the detainee will produce the immediate results sufficient to avert the danger. On a theoretical level, this appears to be a colorable argument. But in a situation where the torture is inflicted simply because the detainee is a suspected terrorist with knowledge of future terrorist actions, then it is more plausible to argue that any number of the

222. See, e.g., MODEL PENAL CODE § 3.02(1)(c) (1962) (requiring that “a legislative purpose to exclude the justification claimed does not otherwise plainly appear”). The requirement makes clear that although justified necessity is meant to be an exception to the general rule, it must remain *exceptional*—that is, it cannot be so broadly construed that it operates to vitiate the criminal law rule crafted by the legislature in defining the offenses.

223. Compare Strafgesetzbuch [StGB] [Penal Code] May 15, 1871, Reichsgesetzblatt [RGBl] 583, § 34 (F.R.G.) available at <http://wings.buffalo.edu/law/bcl/StGBframe.htm> (“commits an act in a present and otherwise unavertable danger to life, body, liberty, honor, property . . .”), with *People v. Pena*, 197 Cal. Rptr. 264, 271 (Cal. App. Dep’t Super. Ct. 1983) (“no adequate alternative to the commission of the act”).

224. See, e.g., *People v. Galambos*, 128 Cal. Rptr. 2d 844 (Cal. Ct. App. 2002).

225. Because the defense is one of “confession and avoidance,” as opposed to a mere negation of an element of the offense, the burden falls to the defendant. See *People v. Neidinger*, 26 Cal. Rptr. 3d 221, 232 n.14 (Cal. Ct. App. 2005) (describing an affirmative public policy defense).

other resources in the War on Terror, including military action and other avenues of intelligence gathering, might alleviate any threat.

The defense is also complicated by the fact that the empirical literature shows that torture is unreliable as a source of information.²²⁶ Furthermore, other methods of interrogation, sometimes involving Prisoner's Dilemma-style deceptions, might be more productive at producing actionable intelligence.²²⁷ If this is indeed the case, then this would appear to be problematic for the inavertibility or necessity prong of the standard. The public debate and legal literature has too often assumed that the unreliable nature of torture is more an issue of pragmatics than of law.²²⁸ But that is entirely false. If torture is unreliable as a means of extracting information, this fact is highly relevant for the necessity justification because it precludes the torturer from arguing, as a matter of law, that the torture was the only means to avert the danger. This is not just a matter of figuring out our ex ante policy regarding torture; it implicates the criminal law analysis as well.²²⁹

C. *Excused Necessity as a Defense to Torture*

Excused necessity, on the other hand, perfectly captures the charitable outlook we might have on the torturer. Although his actions are still wrongful, the situation might be so serious that his decision-making process is effectively compromised.²³⁰ The category of excused necessity captures all of the essential elements that we addressed in the previous section and avoids all of the pitfalls of justified necessity. Also, excused necessity is most consistent with the requirements of the Convention Against Torture, which specifically states that "no exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other

226. See Sarah E. Stoller & Paul Root Wolpe, *Emerging Neurotechnologies for Lie Detection and the Fifth Amendment*, 33 AM. J.L. & MED. 359, 366 (2007) (noting unreliability of torture as far back as Star Chamber).

227. A segment of the case law deals with the constitutional acceptability of such interrogational methods. See, e.g., *Brandon v. LaVallee*, 391 F. Supp. 1150, 1151–52 (S.D.N.Y. 1974); see also Mitchell P. Schwartz, Comment, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1138 n.119 (2003).

228. See, e.g., Memorandum from the Joint Personnel Recovery Agency to the Department of Defense Office of the General Counsel, Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation: An Overview (July 25, 2002), at 2, available at http://www.washingtonpost.com/wp-srv/nation/pdf/JPra-Memo_042409.pdf?sid=ST200904240_3231 ("The application of extreme physical and/or psychological duress (torture) has some serious operational deficits, most notably, the potential to result in unreliable information"). For a discussion of the document, see Peter Finn and Joby Warwick, *In 2002, Military Agency Warned Against 'Torture'*, WASH. POST, Apr. 25, 2009, at A5.

229. Also, one might argue that what matters is not whether torture is reliable, but whether the agent believed that the torture, in this particular instance, would produce accurate information. If this is the claim, then the subjectivity of the analysis indicates yet again that the necessity defense being claimed here is an excuse, not a justification.

230. Cf. Jeremy Horder, *Self-Defence, Necessity and Duress: Understanding the Relationship*, 11 CAN. J. L. & JURIS. 143, 160 (1998) (discussing a relevant hypothetical).

public emergency, may be invoked as a *justification* of torture.”²³¹ Consequently, U.S. courts hearing torture cases should take advantage of their greater discretion in the area of defining criminal defenses and apply excused necessity instead.

First, excused necessity does not require that the defendant actually chose the lesser of two evils. Nor must the defendant even *believe* that he is choosing the lesser of two evils. This is unnecessary because the defense does not assert that the defendant was justified by choosing the best possible scenario. All that matters is that the defendant was *facing* a choice of evils situation and that he was moved to act by virtue of the threat. Indeed, the defendant may very well recognize the horrendousness of his decision, just as a defendant under duress might also recognize that he is making the wrong choice, but feels compelled to do it anyway.

For excused necessity to apply, the threat must constitute an infringement of the defendant’s autonomy. In other words, the defendant must be so morally threatened by the prospect of innocent people dying that he engages in a criminal act. In this sense, excused necessity is similar to duress. In situations of duress, the defendant has a gun to his head or that of his child, and so he commits the criminal act because he does not have the moral courage to live up to the demands of the law—nor would we expect him to.²³² Moral courage in such circumstances would involve either sacrificing himself or sacrificing a family member. This is an unreasonable request and one that we cannot ask of normal citizens. They need not be morally heroic in this sense; it is not a fair choice.²³³ This creates an excuse because the infringement of autonomy is similar to compromised decision-making during intoxication or insanity. In this case the infringement on the decision-making process comes not from a mental disease or defect but from an external circumstance. Nevertheless, the result is the same: we cannot expect people to behave the right way in these situations.

231. See Convention Against Torture, *supra* note 7, art. 2(2) (emphasis added). The Convention also says that a superior order shall not constitute a justification. *Id.* art. 2(3). As to the significance of the choice of words, the *travaux préparatoires* are admittedly unilluminating. See NOWAK & MCCARTHUR, *supra* note 9, at 93–94 (noting that previous drafts stated that such evidence could be considered as mitigation in punishment, but that these proposals were dropped). Perhaps these proposals were deleted because they were thought to be superfluous, or perhaps the deletion was meant to confer more room for excuses, as opposed to justifications, to operate. It must be conceded that there is no evidence that the distinction between justifications and excuses was specifically discussed by the drafters; it must also be conceded that a liberal acceptance of excuses could conflict with the object and purpose of the Convention to end torture. However, one might also interpret the Convention as simply insisting that a state of emergency does not make torture acceptable and that states still have a duty to prevent it. This is still consistent with the notion that a torturer might be subject to a partial or complete excuse. See Wendel, *supra* note 74, at 82–83.

232. For a recent example, consider the child of the Iraqi police officer who was reportedly kidnapped by Al Qaeda terrorists in an attempt to get the police officer to release Al Qaeda confederates in police custody. See Arwa Damon, *Terrorists Kidnap, Torture Boy to Bully Iraqi Policeman*, CNN.COM Aug. 7, 2009, <http://www.cnn.com/2009/WORLD/meast/08/07/iraq.kidnapped.boy/index.html>.

233. Cf. Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 72–73 (2003).

One can imagine a government agent deeply concerned about the innocent civilians who will be killed if a terrorist act is completed. Of course, this is a factual question: whether a particular torturer is generally in a state of moral anguish is a question of fact to be determined according to the particular situation. But it is at least conceivable that a government agent might be moved to act to save innocent lives, and that doing so involves an infringement of his autonomous decision-making process that is structurally similar to a situation of duress where a gun is put to his head. Or, perhaps more realistically, it is structurally similar to a situation where a ship's captain has to throw someone overboard to save the other passengers.²³⁴

Is it possible to be in a state of moral anguish over the potential deaths of strangers? The German Penal Code provision on excused necessity, Article 35, requires that the threat be aimed against a family member or someone else with whom the defendant has a close relationship.²³⁵ The idea is that strangers do not generate the emotional or psychological attachments likely to yield the moral choices contemplated by the necessity excuse.²³⁶ This seems wrong for several reasons, though the most important is that the close connection must be considered as a proxy.²³⁷ In other words, having a close connection to the person who might be killed is not morally relevant *per se*, but it does usually track a morally relevant factor: a compromised decision-making process. One's autonomy as a free agent is often compromised when family members are threatened, though it need not necessarily be the case. Conversely, it is possible to be genuinely upset by the risk of death to a stranger, though such situations are difficult to prove. They are also admittedly rare. However, exceptions are possible. Some people are totally estranged from certain family members and care little for them. Indeed, some people hate their own family members and might even be charged with murdering them.²³⁸ Conversely, it is possible that some people feel real compassion for the lives of strangers, as is evidenced by the many people who devote significant parts of their lives to charity. Indeed, acts of charity are by definition a question of kindness to, or empathy for, strangers. This is the notion of xenophilia. It is rare, but not unheard of.

234. *Cf.* *United States v. Holmes*, 26 F. Cas. 360, 366–67 (C.C.E.D. Pa. 1842) (No. 15,383) (holding necessity defense not available to crew that threw passengers overboard to lighten load of sinking vessel), cited in Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1533 n.21 (2005).

235. Strafgesetzbuch [StGB] [Penal Code] May 15, 1871, Reichsgesetzblatt [RGI] 583, § 35 (F.R.G.) translated in 1 GEROLD HARFST & OTTO A. SCHMIDT, GERMAN CRIMINAL LAW (1989). The same requirement is not prevalent in the U.S. case law. *See, e.g.*, Ark. Code Ann. § 5-2-208 (1993); *Marx v. State*, 724 S.W.2d 456 (Ark. 1987). However, the threat to the family member remains the unofficial paradigm for the defense. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 336 (1996).

236. One sees the corollary of this relationship in the discussion over the (partial or complete) defense of provocation. *See, e.g.*, Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959 (2002).

237. *See* Ohlin, *supra* note 208, at 296–98.

238. Domestic violence is the most obvious example here.

So why has the case law required the use of the proxy? The use of a proxy such as the close family connection alleviates the need to inquire further about the compromised nature of the decision-making process. Courts are generally very concerned with the mental state of the defendant—why he was motivated to break the law—but such investigations are fraught with difficulty. How does one attribute mental states to a criminal defendant? The question is so problematic that some criminal law theorists would have us move to a purely objective account of criminal law defenses, based on actions and objective circumstances and not on subjective mental states.²³⁹ But that extreme position aside, the basic paradigm is that the criminal justice system attributes mental states to defendants in just the same way that one attributes mental states to anyone. One looks at behavior—linguistic or otherwise—and one attributes the mental states that make the most rational sense of that behavior.²⁴⁰ This is the principle of charity.²⁴¹

Proxies are crude approximations that relieve courts of the burden of investigating deeper facts—in this case, mental states. But since it is possible for someone's autonomy to be compromised by a threat to an unknown group of individuals, it would be better for the law to simply delve into the lower level facts rather than rely on a crude and ill-conceived proxy. Consequently, government agents should at least be allowed to make a case for excused necessity—even though they were not trying to save family members—just as long as they can demonstrate, through some affirmative evidence, that they were genuinely compromised by the potential deaths of strangers. And the removal of the proxy is mitigated by the fact that the initial burden of production remains with the defendant.²⁴² But one must be careful here. Although it is true that in many situations torture may result in the saving of lives, it is not the saving of lives that grounds the defense. Rather, the defense is grounded by an external circumstance that compromises the defendant's autonomy by creating an impossible choice that creates a bona fide psychological disruption in the moral thinking of the agent. The whole point of the necessity defense is that external circumstances can threaten the autonomy of an agent in much the same way as an internal disruption, such as a mental illness, that unquestionably generates an excuse. Indeed, the very distinction between internal and external sources of autonomy disruption is formalistic.²⁴³ What matters is the degree to

239. The most prominent example is Paul Robinson. See 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 122 (1984).

240. See DONALD DAVIDSON, *Radical Interpretation*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 125, 134–35 (2001).

241. One assumes, charitably, that people are more—rather than less—rational, though this does not require that one assume any particular *level* of rationality.

242. See *State v. Brodie*, 529 N.W.2d 395 (Minn. Ct. App. 1995) (holding that once defense is properly raised, burden of persuasion remains with prosecution), *rev'd* 532 N.W.2d 557 (Minn. 1995) (finding that defendant failed to meet initial burden of production).

243. This way of expressing the point was suggested to me by Sherry Colb.

which the defendant's autonomy is disrupted, not the source of the disruption.

Consequently, excused necessity does not require (insofar as it is an excuse) that we determine that the harm avoided actually outweighed the pain and suffering of the detainee. This is important, because in many situations the pain and suffering of the detainee will be quite severe and the potential benefits to the world will be speculative and shrouded in probabilities and uncertainties. Furthermore, the torture of a detainee, as stated above, might be a categorical evil that cannot be outweighed by the saving of innocent lives. But all of this is irrelevant to the question of excused necessity. The question is no longer whether the defendant chose the better of two outcomes, but whether the danger was so severe that it compromised the decision-making process of the agent. If he committed torture because to avoid doing so would have required an act of moral courage that we could not expect of anyone, then, in some sense, we might be correct to say that the government agent could not have done otherwise.²⁴⁴

However, this does not necessarily entail the conclusion that a government agent should completely escape punishment for his actions. It is still an open question whether excused necessity should be a total defense requiring acquittal or, like provocation, a partial excuse that merely mitigates the severity of the punishment. The latter is a plausible position and the scholarly literature and case law on provocation is extensive.²⁴⁵ Advocates of the partial defense solution might also claim that if we consistently fail to punish torturers by giving them a full excuse, one implicitly sends a signal approving of the conduct—precisely what this Article argued should be avoided. However, this objection ignores the fact that the criminal law already refuses to punish criminals with other excuses, such as insanity, and in so doing does not send a signal of approval or endorsement. The question need not be resolved here because it makes no difference to the fate of the torture lawyers. If excused necessity does not flow down to the torture lawyers, then it does not matter whether it affords a partial or complete defense to the government agent.

It should also now be clear why the torture lawyers cannot assert their own independent defense of necessity and why this Article concentrates instead on the impact of the principal perpetrator's defense to the lawyers as accomplices. All of the problems associated with justified necessity apply with equal force to the torture lawyers. Furthermore, excused necessity,

244. This conclusion is not meant to be a metaphysical statement about causation but rather a legal conclusion about reasonableness. Cf. Michael Corrado, *Criminal Law: Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465, 469 (1991) (discussing an "inability to do otherwise" theory as a motivation for punishment).

245. See, e.g., Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1392–93 (1997). There is some confusion in the U.S. law over whether provocation is a justification or an excuse, in part because it mixes the element of loss of control with the requirement that the defendant must not have acted unreasonably.

while a plausible defense for the torturers themselves, finds no application in the case of the torture lawyers, who knew they were assisting government agents who needed advice but were not providing that advice under the same exigent circumstances. To be sure, the memos were produced in a climate of heightened anxiety in the aftermath of 9/11. They were not, however, produced in the immediacy of a particular threat that required instantaneous action. By their very nature, the torture memos were laboriously crafted works of legal scholarship, produced over the course of weeks and months, under conditions of cool reflection, research, and deliberation. The result might be different if we considered a lawyer who offered a snap piece of legal advice after being telephoned by a government agent at an undisclosed location who sought authorization to torture a specific detainee to stop an imminent attack. But we cannot seriously conclude that the autonomy of the torture lawyers' decision-making process was similarly constrained.

Of course, some will argue, and have argued, that torture can neither be justified *nor* excused.²⁴⁶ This is a plausible position and I will not confront it here. There may be sound jurisprudential reasons to reject *both* the justification *and* the excuse in this context. However, if this is indeed the correct conclusion, then it is of no help to the torture lawyers. The sole aim of Part II was to defend the position that if a government agent accused of torture is exculpated, then it could only be on the basis of an excuse. However, it may be the case that the torturer cannot be exculpated at all. Both possibilities—the agents are excused or the agents have no excuse—yield the same result for the torture lawyers: the lack of a defense that flows down to them.

III. THE FLOW-DOWN THESIS OF COMPLICITY

Having established in Part II that only excused necessity could exculpate a government agent accused of torture, we must now consider the interaction between the defenses asserted by the torturers themselves and the liability of the lawyers. Part III defends the conclusion that if the lawyers face accomplice liability for writing the memos, they cannot benefit from any necessity defense asserted by the torturers. The first half of this argument was presented in Part II, which defended the thesis that the torturers could argue excused necessity but not justified necessity. (This Article also considered and rejected the possibility that the torture lawyers might appeal to their own necessity defense.) The second half of this argument is now

246. See David A. Wallace, *Torture v. the Basic Principles of the US Military*, 6 J. INT'L CRIM. JUST. 309 (2008); cf. Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1, 38 (2008) ("Whatever the values they seek to defend, the intellectual proponents of weakening the absolute ban on torture in order to confront terror fail to grasp that, as explained above, diluting the prohibition of torture inherently destabilizes the notion of terror and why it is wrong."); Waldron, *supra* note 169, at 1686 (arguing that post-September 11 prohibitions on torture should remain in effect).

presented by defending the thesis that while a justification “flows down” to accomplices, an excuse does not. If the torture committed by government agents is justified, then arguably the defense flows to the torture lawyers as well. Conversely, however, if the torture was only excused, as suggested above, then the defense does not flow to the accomplices.²⁴⁷ Several objections to the flow-down thesis will be considered and rejected in this Part.

A. *The Tri-partite Structure of Criminal Law*

There are several independent arguments to support the flow-down thesis. First, the thesis is supported in general by the tri-partite structure of the criminal law: the elements of the offense establish criminal liability, justifications negate the wrongdoing of the action, and excuses negate the culpability of the actor. Consequently, if excuses only negate the culpability of the actor, they cannot be applied automatically to other actors in a criminal enterprise. Justifications, on the other hand, negate the wrongdoing of the action itself, so it makes no conceptual sense to talk about the liability of an accomplice who facilitates the justified actions of a principal perpetrator. The paradigmatic example is self-defense. An accomplice cannot be faulted for coming to the aid of someone who kills in self-defense; indeed, their assistance may even be praised and encouraged on policy grounds. Conversely, an accomplice *can* be faulted for aiding a psychotic killer, even though the psychotic killer cannot be culpable for the actions caused by his mental illness.²⁴⁸ Mental illness is relevant only if suffered by the accomplice himself; the psychosis of the principal perpetrator is irrelevant to the accomplice’s culpability.

B. *Justification and Excuses and Rights of Assistance*

The flow-down thesis is also supported by the well-traveled but still unresolved controversy over the distinction between justifications and excuses. Although the distinction is virtually canonical in civil law jurisdictions, it was largely ignored in U.S. criminal law until a wave of scholarship reinvigorated the distinction in the 1970s.²⁴⁹ The distinction is now taught in virtually all introductory criminal law classes, though the case law often maintains an ambivalence regarding this conceptual classification. This may be a consequence of the fact that the U.S. Model Penal Code (whose initial

247. The torture lawyers might be able to assert their own independent defense. See *supra* Part I.C.

248. Cf. George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *ISR. L. REV.* 367 (1973) (discussing the rule of proportionality in cases of self-defense). For an updated discussion, see George P. Fletcher & Luis Chiesa, *Self-Defense and the Psychotic Aggressor*, in *CRIMINAL LAW CONVERSATIONS* (Paul H. Robinson et al. eds., 2009) (discussing disagreement over “whether defensives response should be considered justified or merely excused,” and “whether the specific ground of acquittal should be self-defense or necessity.”).

249. George Fletcher played a leading role in this effort with the publication of *RETHINKING CRIMINAL LAW* (1978).

drafting predates *Rethinking Criminal Law*), and state penal codes re-codified on the basis of it, do not make as much of this distinction as they might. Consequently, the distinction between justification and excuses is far more prevalent in the scholarly literature than in the case law, though this too is slowly changing. This Section will consider and reject the classic objections to the idea that justifications and excuses track the distinction between third parties who have a right to intervene and those who can be convicted as accomplices. This Section will then conclude by applying the flow-down thesis to the lawyers who wrote the torture memos.

1. *The Perplexing Case of Mistaken Police Officers*

Not everyone accepts the importance or the coherence of the distinction between justifications and excuses. Kent Greenawalt argued some time ago that the classification failed to accord with our basic moral intuitions in several key situations and that the distinction was therefore not useful for resolving the criminal liability of the actors in these situations.²⁵⁰ Most of Greenawalt's examples demonstrate a similar structure and involve individuals who are engaged in wrongful interventions.

One such example was the real-life case of Mr. Young, who witnessed a confrontation between two men and a youth.²⁵¹ He concluded, falsely, that the two men were assaulting the youth and he intervened on behalf of the youth against the two men. As it turned out, the two men were undercover police officers in the process of arresting the youth. Young was charged and convicted for assaulting the police officers,²⁵² though the New York legislature subsequently amended the N.Y. Penal Law to provide a defense for those in Young's position.²⁵³ The question is whether this defense is to be understood as a justification or an excuse.

Greenawalt takes it as self-evident that Young's behavior, as a matter of moral evaluation, was justified. This allegedly poses a problem for the flow-down thesis, because it is also clear in this case that the police officers were obviously justified in trying to stop Young, and third parties who correctly assessed the situation would obviously be justified in assisting the police officers in stopping Young and concluding the arrest of the youth. But if Young is justified, then none of this should happen, at least according to the view that justifications and excuses tell us something about the rights of third parties to intervene. Greenawalt therefore concludes from this example that the distinction between justifications and excuses does not always generate the right answers regarding the rights of third parties.

250. See generally Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

251. *People v. Young*, 183 N.E.2d 319 (N.Y. 1962), cited in Greenawalt, *supra* note 250, at 1919–20.

252. *People v. Young*, 210 N.Y.S.2d 358 (N.Y. App. Div. 1961).

253. N.Y. PENAL LAW § 35.15 (McKinney 2009).

The problem with the argument is that it leaves another avenue open, one which many people would not only willingly accept, but would *demand*: the conclusion that Young was not justified at all, but only excused. Young was operating under a pervasive mistake of fact: he failed to adequately assess the situation and he intervened against the wrong party. This certainly is not the action of a justified party. True, one would not want Young to face criminal liability unless he was negligent in the formation of his belief (that is, did he fail in some duty to investigate the scene before jumping into the fray?). But this is precisely what an excuse accomplishes: it relieves the actor from criminal liability based on some factor that impacts his decision-making process (such as a mistake) and thereby negates his culpability. So it would seem that the right answer to this problem is to bite the bullet and conclude that Young is excused. Once one goes down this road, everything else falls into place: the excuse generates all the right answers about the right of the police officers to stop Young and the right of unmistaken third parties to similarly intervene against him.

Consider a second example. U.S. law recognizes that prisoners may sometimes claim necessity as a defense for a jail break, if they can show that they were escaping a greater evil, such as a risk of death, in jail.²⁵⁴ The requirements for this defense are strict and are rarely satisfied, because they include the provision that the prisoner must exhaust all available remedies from jail officials and after escaping must voluntarily return himself to custody once the danger passes.²⁵⁵ In any event, it is sufficient to acknowledge that a jail break might, in some circumstances, represent a justified action because it involves the better of two outcomes: an escaped prisoner is a far less violent outcome than a brutal murder committed in prison. Greenawalt is perplexed by this outcome because he also concludes that prison guards almost always have a right to stop prisoners from escaping, except if the prison is burning down.²⁵⁶ But this result is again incompatible with our theory of justifications, because the prisoner's justification should entail the conclusion that the prison guards should not intervene against him. Instead, Greenawalt claims that prison guards *are* allowed to stop prisoners, even ones who are escaping a murder.²⁵⁷

This is where the argument goes wrong. Prison guards should not be allowed to intervene against prisoners who are escaping from prison to escape an attack, precisely because the prisoner is in mortal danger. Indeed, the prison guards, if they were doing their job properly, should be more motivated to stop the impending attack than to stop the escape. But it is precisely because no one will intervene on behalf of the prisoner in danger—

254. See, e.g., *People v. Unger*, 362 N.E.2d 319, 323 (Ill. 1977).

255. See, e.g., *United States v. Bailey*, 444 U.S. 394, 415 (1980); *United States v. Williams*, 791 F.2d 1383, 1388 (9th Cir. 1986).

256. See Greenawalt, *supra* note 250, at 1920. Incidentally, this is the basis for the former Nazi guard's liability in Bernhard Schlink's novel *The Reader*.

257. *Id.* at 1920.

such threats are routinely ignored by prison officials—that the prisoner has no other choice but to escape the danger. Indeed, there is little difference between a fire in the prison and escaping a murder; both involve justified flights from immediate danger and both should generate the same answers.

Why then are prison guards not charged with assault when they stop prisoners from escaping? The answer is not the one that Greenawalt would urge, which is that the prison guards are justified in their actions. Rather, the prison guards are not charged because they are operating under a mistake of fact and therefore have an excuse that negates their culpability.²⁵⁸ Unless they were negligent and should have known that the prisoner was escaping a murderer (and that they should have gone after the murderer), then they should not face criminal liability. But this does not mean that they are justified. Indeed, the only difference between the prisoner escaping from an imminent murder and a prisoner escaping from a fire is that a guard who stopped the latter would be clearly negligent in the formation of his erroneous belief, if indeed he has an erroneous belief about the fire. Although both the fire and the murder could be equally immediate and equally dangerous, the difference stems from the readily apparent nature of the threat of fire. It is therefore clear that the prison guards in both situations are excused, which is precisely the right result if we think of the prisoner as justified in his escape.

Consider a slightly more conventional scenario. Suppose a police officer arrives on a scene and makes a wrongful arrest. In such a situation, it is clear that the arrestee has the right to resist the wrongful action on the part of the police officer. However, Greenawalt might conclude that third parties are not permitted to intervene on behalf of the arrestee against the police officer, presumably because assaulting a police officer in any situation would be a crime. He concludes that these counterexamples prove fatal to the distinction between justifications and excuses because the arrestee is justified in his action but this justification does not generate a right of assistance on the part of third parties.²⁵⁹ (The same structure pervades all of the examples.) Since this is precisely what the distinction between justifications and excuses was supposed to do, according to Greenawalt, its failure to reach the right outcome in this class of cases entails that it ought to be discarded as either more trouble than it is worth or just conceptually infirm.

But there is a far easier way to resolve this entire class of cases. Third parties *are* permitted to intervene on behalf of those wrongfully arrested by the police. Suppose a police officer responds to a confrontation between Anton and Bobby. Anton is the aggressor and is trying to kill Bobby, and he will likely succeed unless someone intervenes to defend Bobby. However,

258. *But see* Kent Greenawalt, *Justifications, Excuses and a Model Penal Code for Democratic Societies*, 17 CRIM. JUST. ETHICS 14, 23 (1998) (rejecting excuses as the solution to the problem of mistaken police action).

259. Greenawalt, *supra* note 250, at 1923.

when the police officer arrives he misinterprets the situation. The two are wrestling on the ground and the officer falsely assumes that Bobby is trying to kill Anton. He therefore intervenes to help Anton. A third party is already at the scene and has correctly identified the real aggressor. Would he be justified in intervening against the police officer and on behalf of Bobby, the true victim? Certainly yes, and the fact that the first intervener is a police officer should make no difference to the analysis. As it happens, all of Greenawalt's examples display a similar structure and can be dispensed with as long as one is willing to bite the bullet and conclude that intervening against a mistaken police officer may be permissible in certain limited situations.

Certainly even Greenawalt would be forced to agree with the result if the mistaken intervener were a civilian.²⁶⁰ Why should his status as a police officer change the outcome of the thought experiment? The argument might have something to do with self-defense and defense of others. Under one theory, this right of intervention is limited to immediate citizen involvement before the authorities have an opportunity to arrive.²⁶¹ Under this view, the citizen defender stands in as a proxy for the police and the proxy is then removed when the police arrive on the scene. Once the police begin their work, the citizen defender loses his authority to engage in action, even if the police officer engages in work while he is laboring under a mistaken impression. The warrant to intervene belongs not to the individual but to the community—to the state, as it were—and it is delegated to individual citizens, but only in the absence of police or other officials. The delegation does not extend to situations when the police have in fact arrived.²⁶² This view is plausible but cannot be universally applied. In situations where police officers are wrong, the state must want the public to intervene, even if it means standing against the police. Opposing the police officer (and the deadly aggressor) in this situation means standing on the side of the law because the police officer is on the wrong side. This argument would be accepted in the case of the prison guard who refuses to let prisoners escape from a burning building, but it cannot logically be limited to such extreme scenarios. The community always has an interest in encouraging citizens to stand on the side of the law and against violent aggression. Consequently, the distinction between justification and excuses yields the correct answers about the right of third parties to offer assistance to victims of an attack.

260. *Id.* at 1924.

261. See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *YALE L.J.* 1070, 1108 (2008) ("Indeed, it is a generally accepted matter of criminal law doctrine that private citizens are not entitled to use force in self-defense, to effect a citizen's arrest, or to avoid the greater evil if someone closer to the center of state decision-making authority was available to make that determination. This is just another way of stating the law's imminence limit on justifications that are available to ordinary citizens.").

262. This argument is broadly consistent with Thorburn's (and Gardner's) concern for authority to make decisions regarding justifications. See John Gardner, *Justification under Authority* (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345763.

2. *The Nature of the Distinction between Justifications and Excuses*

The preceding discussion also helps clarify the nature of the distinction between justifications and excuses. The distinction is not merely a platonic classification that exists in theory and that generates, in top-down fashion, insights regarding the rights of third parties to intervene. Rather, the distinction between justifications and excuses is *just* a classification that embodies our intuitions regarding whether exculpation is general or personal. If the exculpation is individual and generates no right of assistance, we call it an excuse; if the exculpation is general and generates a right of assistance, then we call it a justification. If we were to discover—suddenly—that a particular defense generated a right of assistance when before we concluded that it did not, then we should reclassify the defense as a justification. The classification of a justification is largely a label we apply to determine how the defense applies to third parties; it is no more mysterious than that.

This, it may be presumed, is one aspect of the Greenawalt objection. Greenawalt argues that the distinction between justifications and excuses is unhelpful because it does not tell us, determinatively, whether there is a right of assistance.²⁶³ On this point, Greenawalt is absolutely correct. One cannot determine on other grounds whether a particular defense is a justification and then use that as a short-cut to determine whether a right of assistance applies. In short, this is impossible because there are no other legitimate and truly independent grounds—for example, pure structure—for determining whether something is a justification or an excuse. The right of assistance is itself one essential aspect of the original determination of the proper classification of the defenses. In other words, the classification is a holistic investigation that includes the right of assistance at the foundational level.

C. *Flowing Down to the Torture Lawyers*

Applying this doctrine to the defense of necessity, one can see the logic of the previous arguments. In the case of justified necessity, the state of emergency itself suggests that the actor did the right thing and should therefore escape prosecution. If we conclude as much, we are also saying that others would have been justified in performing the action under similar circumstances, and others might have helped in the endeavor. In contrast, the application of excused necessity prevents us from universalizing our judgment. The defense suggests that the defendant committed a criminal act while suffering from circumstances so extreme that his or her autonomy was effectively compromised. The compromised autonomy does not transform the act into a lawful one, but simply tempers our default assumption that individuals who commit unlawful acts are operating freely and are appropriate sub-

263. See Greenawalt, *supra* note 250, at 1919.

jects for blame and punishment. Those excused by necessity cannot be faulted for their Sophie's Choice; their culpability is negated.²⁶⁴ This individual assessment does not apply to other defendants who commit the same crime, nor does it say anything about the culpability of an accomplice whose autonomy is not similarly compromised. Of course, individuals in like circumstances may also have an excuse, but that is a different point. This is a second individualized assessment that happens to be identical to the first. It is separate from the generalized assessments about actions implicit in justifications.

It is therefore clear that the torture lawyers are out of luck even if government agents are exonerated, because their exoneration should be based on excused necessity, a defense that does not flow down to accomplices. The government agents, to the extent that they can be exonerated at all, might claim that they tortured detainees because they felt compelled to do so under the threat of an imminent terrorist attack that might claim dozens or hundreds of innocent lives. But the fact that the torture lawyers operated with cool reflection from the distance of the Office of the Legal Counsel, unencumbered from specific and immediate threats, removes them from the protection offered by excused necessity. And as the preceding argument has shown, the fact that the government agents themselves were compromised is entirely irrelevant to the fate of the lawyers whose autonomy was in full force.

IV. THE NUREMBERG PRECEDENTS

One of the most common objections to prosecuting the torture lawyers is that prosecution of lawyers for their advice-giving role would be without precedent. As we already saw in Part I, this is clearly an exaggeration; prosecutions of lawyers are rare but there is hardly well-established precedent that exempts lawyers from the standard criminal law rules regarding complicity. However, the special nature of the War on Terror might give some pause before applying these rules given the extraordinary situations faced by our nation. Some have simply assumed that prosecuting attorneys during wartime is without legal precedent. As it turns out, this too is false.

The Nuremberg era included two important cases that, when taken together, provide substantial support for the legal proposition that lawyers may face prosecution for their participation in violations of international law. The first, the *Justice Case*,²⁶⁵ is widely discussed in the current torture debate and is usually cited for the proposition that lawyers face liability

264. WILLIAM STYRON, *SOPHIE'S CHOICE* (1979). For application of the story to the problem of torture, see Colb, *supra* note 171, at 1468–71 (discussing dilemmas that cannot be evaded because refusing to act will result in death).

265. See *United States v. Altstoetter*, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter *Justice Case*].

when they provide the legal support required to actualize violations of international law.²⁶⁶ This is partly true, though the precedential value of this case is complicated. The second Nuremberg case, the *Ministries Case*,²⁶⁷ has been all but forgotten in the current torture debate, even though it included prosecution for government officials who failed to advise against conduct that obviously violated international law. The first case involved lawyers; the second case targeted diplomats. Ironically, though, it is the second case that is more applicable to our current discussion, as the following analysis will demonstrate.

Both of these cases were tried before the U.S. military tribunals sitting in Nuremberg, thus making them of particular interest to the current debate. These cases, which were not the first round of international prosecutions before the International Military Tribunals, were staffed entirely with U.S. prosecutors and U.S. judges.²⁶⁸ In both cases, the tribunal applied substantive international criminal law, not U.S. federal criminal law.²⁶⁹ However, the modes of liability applied in these cases were derived substantially from U.S. law.

A. *The Justice Case*

The *Justice Case*, also known as *Prosecutor v. Altstoetter*, is the standard citation in these discussions, for obvious reasons. The defendants were all, except one, trained lawyers, including judges and officials in the Reich Ministry of Justice.²⁷⁰ They were charged, in essence, for using the German judiciary as a tool for implementing the Holocaust.²⁷¹ The portrait of the rule of law during the Third Reich, painted both by the prosecution case and the judgment, is devastating. The court traces the devolution of law in Hitler's Germany.²⁷² At first, judges and ministry officials used pretext in

266. See, e.g., M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 400 n.45 (2006).

267. See United States v. Weizsaecker, in 12–14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter *Ministries Case*].

268. The prosecution seemed to take the position that the U.S. Military tribunal sitting at Nuremberg was, in fact, an international tribunal, by virtue of the fact that its authority stemmed from Control Council Law No. 10, which was enacted by the same Allied Powers that issued the Moscow Declaration that created the International Military Tribunal. See *Justice Case*, *supra* note 265, at 60, 63 (“We try them in an international court for crimes under international law which finds its authority not in power or force, but in the universal moral judgment of mankind.”). However, at other points the prosecution was a bit ambiguous on this point. See *id.* at 106 (“[A]lthough this indictment is brought in the name of the Government of the United States, this case in substance is the people of the world against these men who have committed criminal acts against the community we know as the world.”). In the judgment, however, the judges held that the tribunal was international. See *id.* at 984 (“[T]he jurisdiction of this Tribunal rests on international authority . . . and enforces international law as superior in authority to any German statute or decree.”).

269. See *Justice Case*, *supra* note 265 at 60–63; *Ministries Case*, *supra* note 267, vol. 12 at 13.

270. See *Justice Case*, *supra* note 265 at 33.

271. See *id.* at 15–26.

272. See *id.* at 284–310.

order to reach judicial outcomes favored by Hitler and the Nazis.²⁷³ Such subterfuges allowed the judicial system to at least cling to the public notion that they were still operating under something similar to the rule of law.²⁷⁴ But eventually even the pretext faded, and ministry officials were shockingly explicit about the need to sidestep the rule of law in favor of national expediency.²⁷⁵ This might not seem so dangerous, but when the national goal in question is the elimination of European Jewry, the evaporation of the rule of law constituted an abdication of legal professional responsibility so severe that it rose to the level of a crime against humanity. In the end, the German legal system boiled down to—like everything else in Germany—the Führer Principle, or the idea that Hitler was the fulcrum for all decisions on behalf of the German Volk.²⁷⁶ The rule of law became the rule of Hitler, and the defendants in the *Justice Case* transferred their allegiance from the former to the latter.²⁷⁷ In laymen's terms, this was their crime.

As the prosecution's case makes clear, the arrival of Hitler involved a centralization of legal and legislative authority within Hitler's cabinet.²⁷⁸ Furthermore, the executive authorities assumed unprecedented authority, including the right to issue unilateral decrees that violated even the Weimer Constitution.²⁷⁹ The Reich therefore suddenly had both centralized vertical authority (over German states) and horizontal authority (over other branches) over all legal matters.²⁸⁰ At the top, Hitler's will was the supreme law of the German people.²⁸¹ Although at first the actual structure of the court system was undisturbed, the courts were soon supplemented by special tribunals and extraordinary courts (*Sondergerichte*) that played an increasingly important jurisdictional role in the system.²⁸² Their jurisdiction included all acts contrary to the 1933 emergency decree, which included crimes contrary to public welfare.²⁸³ Special military courts exercised authority over all military personnel.²⁸⁴ The Nazis also created a special People's Court (*Volksgerichtshof*) to administer treason cases, staffed by two judges and three Nazi laymen.²⁸⁵

273. *See id.*

274. *See id.*

275. *See id.*

276. *See id.* at 353–593.

277. *See id.* at 1081–1177.

278. *See id.* at 35.

279. *Id.*

280. *Id.* at 35–36.

281. *Id.* at 36.

282. *Id.* at 38.

283. *Id.*

284. *Id.*

285. *Id.* It is important to note that lay participation in judicial decision-making is common in civil law jurisdictions, where courts are often composed of a panel of judges including some that are lawyers and others that are not. This “lay participation” in the decision-making process compensates for the fact that such jurisdictions sometimes do not have juries on which non-lawyers act as decisionmakers. So the existence of the non-lawyers on the People's Court is not, in and of itself, problematic. What is dis-

The defendants in the *Justice Case* were indicted because they “seized control of Germany’s judicial machinery and turned it into a fearsome weapon for the commission of the crimes charged in the indictment.”²⁸⁶ According to the prosecution, at least, the participation of legal officials was essential to the gradual development of the Nazi program.²⁸⁷ The Nazi Party gained strength and increasing control through a slow process that would have been obstructed by an independent judiciary.²⁸⁸ Consequently, the Nazis were intent on working within a legal structure until such time as the legal structure could be dispensed with in favor of bald-faced power.²⁸⁹ The Nazis did not want to repeat the embarrassment caused by the acquittals of the defendants in the Reichstag fire trial.²⁹⁰

This use of the legal system made everything worse. Not only did the Nazis commit international crimes, but they did so internally with the blessing of the German legal system, cloaking their patently illegal actions with legality.²⁹¹ At first, the system was corrupted by justice officials who intervened in cases, both civil and criminal, when they disliked the outcome, either because one of the parties was simply a Jew or because a political opponent to the Nazis had received an inadequate sentence.²⁹² Short prison terms were converted to death sentences because Nazi officials—or Hitler himself—demanded it.²⁹³ Finally, Jews were held to be sub-human and not entitled to seek judicial redress at all, thus reducing the amount of ad hoc interventions required in individual cases.²⁹⁴

The perversions of law detailed in the case are enormous. The penal law was amended so that all acts against the “sound sentiment of the people” could be punished even if they did not violate a specific provision of the penal law—a complete abrogation of *nulla poena sine lege*.²⁹⁵ The Reich Supreme Court was relieved of the responsibility to follow precedent and explicitly required to adapt its rulings to Nazi ideology.²⁹⁶ According to the

turbing is that the lay judges were exclusively high-ranking officers of the Nazi military and the SS, or from the Party hierarchy. *See id.* at 33.

286. *Id.* at 40.

287. *Id.* at 42.

288. *Id.* at 40–41.

289. *Id.* at 40–43.

290. *Id.* at 40–41. Germany’s highest court acquitted the defendants, communists who were charged with participation in a conspiracy to overthrow the government by burning down the Reichstag parliament building. Marinus van der Lubbe was convicted and executed, but the other defendants were acquitted for lack of evidence of their participation in the conspiracy. The outcome of the trial was an embarrassment for Hitler, who had used the alleged conspiracy as a pretext for consolidating his constitutional power. The acquittals led to Hitler’s decision to create a hand-picked People’s Court to hear treason cases, many of which resulted in death sentences.

291. *See, e.g., id.* at 55–56.

292. *Id.* at 56–57.

293. *Id.*

294. *Id.* at 41.

295. *Id.* at 45.

296. *Id.* at 45–46.

prosecution, these legal changes were required in order to bring about the Nazi Holocaust.²⁹⁷

The famous Night and Fog decree is one classic example showing the deep involvement of lawyers in the Nazi program.²⁹⁸ Opponents of the Nazi regime were rounded up by secret police and tried quickly before special courts, often receiving death sentences.²⁹⁹ Many were transported to special courts in the occupied territories. At least 5,200 individuals were taken to Germany to be tried before special courts.³⁰⁰ The trials were secret, with no public announcement of executions; the bodies were given to the State police for burial.³⁰¹ Judicial officials were also involved in providing legal cover for the transfer of inmates to concentration camps. According to the prosecution, the victims were “judicially murdered by certain of the defendants using a variety of legalistic artifices.”³⁰² The judicial officials were also essential for creating a legal system of racial persecution which constituted a crime against humanity.³⁰³ The court drew a straight line from initial laws that limited the rights of Jews in civil society to their eventual extermination in the camps.³⁰⁴ It was all part of the same genocidal plan.³⁰⁵

It is easy to see why the *Justice Case* is frequently mentioned in the context of the torture lawyers. The lawyers in the *Justice Case* were prosecuted because they should have known better. By virtue of their training and legal experience, the officials at the Ministry of Justice knew that their actions, though ostensibly merely armchair lawyering, would nonetheless “probably cause death of human beings, subjected to such a perverted judicial system.”³⁰⁶ The use of ex post facto laws, the passage and implementation of racial legislation targeting Jews, the willing “submergence” of the judiciary to Nazi control and Hitler’s personal whims, the expansion of German law over annexed territory³⁰⁷—these were all lawyerly activities that were completely antithetical to the rule of law and helped Hitler consummate the Holocaust. Although the lawyers and judges did not personally commit any violent crimes, they were complicit in these crimes because they aided and

297. *Id.* at 57 (“Law and justice were destroyed for a reason. They were destroyed because by their very nature they stood athwart the path of conquest, destruction, and extermination which the lords of the Third Reich were determined to follow. The Nazi special Courts, double jeopardy, the flouting of the letter and the spirit of the law—those things were not ends in themselves. They were methods deliberately adopted for the purpose of causing death, torture, and enslavement.”).

298. *Id.* at 75–78.

299. *Id.* at 75.

300. *Id.* at 75–76.

301. *Id.* at 77–78.

302. *Id.* at 78–82.

303. *Id.* at 1063.

304. *Id.*

305. The tribunal did not use the word genocidal, since genocide at the time was not yet a distinct international crime, but rather subsumed under crimes against humanity.

306. *Id.* at 69.

307. *Id.*

abetted their commission.³⁰⁸ As to the objection that judicial officials had no choice but to comply with Nazi requirements, the judgment of the tribunal made an important distinction. In the first category were judges who attempted to maintain judicial independence.³⁰⁹ In those cases, judgments were often set aside and defendants “were frequently transferred to the Gestapo on completion of prison terms and were then shot or sent to concentration camps.”³¹⁰ At the concentration camps, many defendants were tortured, starved, and murdered.³¹¹ The second category included judges who “with fanatical zeal” willingly enforced the aims of the Führer.³¹² All of this was illegal under international law.³¹³ The tribunal concluded that “[b]oth the international rules of war and C. C. Law 10 [Control Council Law 10] inhibit the torture of civilians by the occupying forces.”³¹⁴ The tribunal also specifically rejected the defense argument that the lawyers, in the Ministry of Justice in Berlin, were unaware of the atrocities by virtue of their distance from the camps.³¹⁵

The prosecution believed that it was essential that the lawyers stand trial for the very specific role they played in the Nazi system.³¹⁶ One might ask why lawyers were targeted for prosecution when many other complicit professionals were not prosecuted. True, doctors and industrialists were also prosecuted,³¹⁷ but plenty of other professions were ignored. Singling out the lawyers represented a very specific conclusion about the duty of all lawyers to respect the rule of law and ensure that their legal work is not used as part of a criminal plan or conspiracy. The lawyers in the *Justice Case* used their position as Nazi lawyers to bring Hitler’s plans to fruition. Furthermore,

308. *See id.* at 69 (“[I]t is not amiss to point out that those who are connected with a plan to extend, or who consent to, or abet the unlawful extension of German law and German courts into overrun countries contrary to the laws of war, are doing acts which amount to larceny while armed or robbery; and that those individuals who commit acts which abet or are connected with the waging of an aggressive war or a plan to do so, or who consent thereto, are resisting the efforts of the peace enforcing nations of the world to arrest the criminal. The evidence in this case will establish the unprovoked homicide of countless numbers as the result of the doing of such acts by these defendants which are clearly felony murders.”); *see also id.* at 1137 (finding defendants guilty of aiding and abetting the Night and Fog plan).

309. *Id.* at 1025.

310. *Id.*

311. *Id.* at 1032.

312. *Id.* at 1025.

313. *Id.* at 1034.

314. *Id.* at 1061.

315. *Id.* at 1079–81.

316. *Id.* at 31–33.

317. *See, e.g.,* United States v. Brandt, in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) (trying Nazi doctors for, *inter alia*, medical experiments performed on human subjects); United States v. Flick, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) (trying industrialists charged with using slave labor); United States v. Krupp, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951).

their activities did far more than just destroy individual lives. According to the prosecutors:

The true purposes of this proceeding, therefore, are broader than the mere visiting of retribution on a few men for the death and suffering of many thousands. I have said that the defendants know, or should know, that a court is the house of law. But it is, I fear, many years since any of the defendants have dwelt therein. Great as was their crime against those who died or suffered at their hands, their crime against Germany was even more shameful. They defiled the German temple of justice, and delivered Germany into the dictatorship of the Third Reich, 'with all its methods of terror, and its cynical and open denial of the rule of law.'³¹⁸

The prosecution believed that rebuilding the rule of law in Germany would only be possible if those who destroyed it in the first instance were held accountable for their actions.³¹⁹ This linked the success of post-war nation-building with prosecution for judicial criminality. As the prosecution artfully expressed the point:

The temple must be reconsecrated. This cannot be done in the twinkling of an eye or by any mere ritual. It cannot be done in any single proceeding or at any one place. It certainly cannot be done at Nuremberg alone. But we have here, I think, a special opportunity and grave responsibility to help achieve that goal. We have here the men who played a leading part in the destruction of law in Germany. They are about to be judged in accordance with the law. It is more than fitting that these men be judged under that which they, as jurists, denied to others. Judgment under law is the only just fate for the defendants; the prosecution asks no other.³²⁰

The *Justice Case* nevertheless stands apart from our present situation because at Nuremberg the lawyers were convicted for their direct legal activities: for presiding as judges in sham trials and politically motivated executions, for acting as ministry officials who participated in the Night and Fog decree, and for implementing laws of racial discrimination that targeted Jews.³²¹ There is little sense that lawyers in the case were prosecuted for crimes against humanity simply because they gave the wrong legal advice to their government superiors or because they helped the government to commit international crimes by developing frivolous legal arguments in support

318. *Justice Case*, *supra* note 265, at 33.

319. *Id.*

320. *Id.*

321. *Id.*

of them.³²² Their participation was far more involved than that. They personally used the law to dispense cruelty.³²³ Indeed, the tribunal was careful to require specific evidence of criminal conduct by the judges, and not all were convicted. For example, Cuhorst was acquitted because although the court termed him a misguided fanatic, there was insufficient documentary evidence that he dispensed his punishments on purely racial grounds.³²⁴

The *Justice Case* stands for the legal proposition that lawyers can be guilty as accomplices; it is too much of a stretch to say that it is an example where lawyers were convicted as accomplices for the advice they gave to their clients.³²⁵ The tribunal specifically declined to hold Klemm responsible for a letter concluding that German juvenile law did not apply to Poles, Jews, and gypsies, holding that the letter was not a legal opinion but “an expression of Party policy, submitted through the Party Chancellery to the Ministry of Justice to the effect that minors of the prescribed races must be subject to the merciless provisions of the decree against Poles and Jews.”³²⁶ It is unclear why the factual distinction would be relevant if Klemm’s liability did not turn on it, but it is also plausible that the court was merely trying to refute, for the sake of accuracy, Klemm’s attempt to minimize his role. In the end, the judgment simply does not directly deal with the issue of liability for legal opinions.

B. *The Ministries Case*

The more appropriate precedent for our purposes, and one that is rarely discussed, is the *Ministries Case*, also known as *United States v. von Weizsaecker*.³²⁷ The *Ministries Case* involved defendants who worked for various Nazi government offices, including the Foreign Office.³²⁸ Although the defendants were primarily diplomats, the tribunal found that the Foreign Office was responsible for advising higher Nazi officials regarding the legal and political consequences of their foreign policy decisions.³²⁹ As the following analysis shows, the prosecutions stand for the legal proposition that complicity includes providing legal advice for government actions that clearly violate international law.³³⁰

322. *Id.*

323. They were charged with “criminal participation in government-organized atrocities and persecutions unmatched in the annals of history.” *Id.* at 1177.

324. *Id.* at 1158–59.

325. Kevin Jon Heller, *John Yoo and the Justice Case*, BALKANIZATION, May 1, 2008, <http://balkin.blogspot.com/2008/05/john-yoo-and-justice-case.html>.

326. *Justice Case*, *supra* note 265, at 1094.

327. *Ministries Case*, *supra* note 267.

328. *Id.*

329. *See id.* vol. 14, at 322, 958.

330. Although the *Ministries Case* has not received strong attention in the scholarly literature, the one example is Kevin Jon Heller, who has argued in several internet postings that the *Ministries Case* is directly relevant to the current torture cases in the United States. *See* Heller, *supra* note 325; *see also* Kevin Jon Heller, *Want to Prosecute the Lawyers? Cite Ministries—Not the Justice Case*, OPINIO JURIS, Apr. 23,

One allegation against the defendants from the Foreign Office involved a letter from Eichmann himself, advising that he intended to deport to Auschwitz 1000 French nationals and “stateless Jews” arrested in France.³³¹ Eichmann asked the Foreign Office if it had any objection to the plan.³³² The SS then amended the plan to include 5000 more Jews in the deportation.³³³ Again the Foreign Office was asked for its opinion and the officials replied that they had no objection.³³⁴ The defendants were held to be personally responsible because they initialed the reply and even annotated it with the comment “to be selected by the police.”³³⁵ The prosecution argued that both Woermann and von Weizsaecker were legally responsible for failing to advise the SS that the plan was a violation of international law.³³⁶ Although they may not have known that Auschwitz was a death camp, they certainly “knew and were well informed of the fate of any Jew who came into the tender hands of the SS and Gestapo.”³³⁷ The prosecution contended that Woermann knew that the deportations violated “every principle of international law and [were] in direct contradiction of the Hague Convention.”³³⁸

The defendants in the case had tried to argue that they were mere diplomats and that diplomats occupied a far less lofty position than the judges who were implicated in the *Justice Case*.³³⁹ The judge, according to the defense, “is necessarily the representative of the rule of law in its absolute form, while the diplomat stands for the rule of law in its attainable form.”³⁴⁰ The judge is presumably in a position to adhere to the highest principles of law and then let the chips fall where they may.³⁴¹ The diplomat, on the other hand, deals with pragmatics and the demands of *realpolitik*.³⁴² According to the defense, “[t]o the diplomat, the end does not justify the means, but his profession requires him to wrestle every day with the forces of evil for the preservation of the rule of law, but what he ultimately succeeds in wresting from these evil forces does not necessarily represent the rule of law as such.”³⁴³ In other words, the judge works with ideal world theory and “is above the world of evil,”³⁴⁴ but the diplomat “is engaged in a day-to-day

2009, <http://opiniojuris.org/2009/04/23/want-to-prosecute-the-lawyers-cite-ministries-not-the-justice-case/>.

331. *Ministries Case*, *supra* note 267, vol. 14 at 496.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 496–97.

337. *Id.* at 497.

338. *Id.*

339. *Id.* at 96.

340. *Id.*

341. *Id.*

342. *Id.* at 96–97.

343. *Id.*

344. *Id.*

struggle with the world of evil” and is tasked with making the best of a bad situation.³⁴⁵ For this reason, it makes no sense to charge the diplomats with failing to advise the SS that their conduct violated international law.³⁴⁶ This was never their place.

The tribunal specifically rejected this view of the Foreign Office and its obligations.³⁴⁷ On appeal to reconsider the sentences handed down in the case, the tribunal noted that the “Foreign Office was the only official agency of the Reich which had either jurisdiction or right to advise the government as to whether or not proposed German action was in accordance with or contrary to the principles of international law.”³⁴⁸ Of course, the Foreign Office had no power to make Hitler comply, but that was not the point.³⁴⁹ The legal implications of the proposed action were squarely within both the *de jure* and *de facto* obligations of the Foreign Office, and both von Weizsäcker and Woermann were legally and morally obligated to properly advise the government in this regard.³⁵⁰ Furthermore, the fact that Hitler would have gone ahead with the plan even if they had objected was totally irrelevant.³⁵¹ According to the tribunal:

This did not negative the importance of the fact that before the act was committed inquiry was made of the department of the Reich, whose duty it was to pass and advise upon questions of international law, as to whether or not it had any objection to the proposal. The only advice it could give within its sphere of competence and the only objection it could raise from an official standpoint was that the proposed program did or did not violate international law, and whether, irrespective of its legality, unfavorable foreign political developments would arise.³⁵²

This they did not do: “If the program was in violation of international law the duty was absolute to so inform the inquiring branch of the government.”³⁵³ Instead, the office simply responded that “The Foreign Office has no misgivings,” then Weizsäcker changed the wording to “no objections.”³⁵⁴ The tribunal based their conviction on this count on those two words.³⁵⁵ “There is a vast difference between saying ‘no’ and saying ‘no objection.’ The first would exonerate, the second is criminal.”³⁵⁶

345. *Id.*

346. *Id.*

347. *Id.* at 958.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 959.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

The tribunal's decision in the *Ministries Case*, as to this count of the indictment, can be taken to stand for the proposition that advising a client to proceed with a course of conduct that violates international law can itself generate criminal liability for the advisor.³⁵⁷ Of course, these were diplomats, but the point still holds. They were responsible for legal advice and their failure to properly advise their clients was the subject of their legal liability. The advice provided by the torture lawyers regarding torture, if found to be erroneous by a court, would seem to follow a similar pattern. The torture lawyers should have informed their superiors that torture violated both federal and international law and that there was substantial precedent that waterboarding was torture. They should never have argued that severe pain and suffering was limited to situations capable of producing organ failure and death.

CONCLUSION

Nothing in this Article warrants the conclusion that the torture lawyers should, as a prudential matter, be prosecuted in criminal court. That is a policy decision that is beyond the scope of this Article. This Article has demonstrated, however, that many of the possible obstacles to such a prosecution are simply not applicable. Specifically, the following conclusions are directly relevant to the case: the government agents who tortured detainees were not justified under a theory of necessity; government agents, if they have any defense at all, might be exonerated by excused necessity; this excuse does not flow down to the torture lawyers; and, legal advice provided by the torture lawyers could generate accomplice liability either because some of that advice was frivolous or simply because lawyers should be subject to the regular criminal law rules of complicity.

Whether the torture lawyers should be prosecuted in federal court or a foreign court exercising universal jurisdiction, disbarred, subject to other professional sanction, removed from the bench or have their tenure revoked, or subject to civil liability in U.S. federal court, are entirely different matters. Many have argued forcefully in the media that such prosecutions of the torture lawyers and other architects of the worst excesses of the Bush Administration are essential: as building blocks of a national cleansing; as a way of returning our nation to participation in international institutions; as a path to complying with our obligations under treaty-based and customary international law; and, as a renewed national commitment to the rule of law, especially in our prosecution of the War on Terror. But dangers lurk in knee-jerk reactionism. The hawks on the right demonize the terrorist and lionize the torturer, while the doves on the left flip the dichotomy and demonize the torturer. Neither sufficiently recognizes that each side is held

357. Heller, *Want to Prosecute the Lawyers?*, *supra* note 330 (discussing the *Ministries Case*).

hostage to a master-slave dialectic whose structure itself is oppressive and inhibits careful and subtle analysis.³⁵⁸ Sublation is badly needed.

The argument for prosecuting the torture lawyers comes down, once again, to the idea that we must reconsecrate the temple of justice. But rebuilding and reconsecrating temples is a complicated and messy affair, perhaps even more so than nation-building or converting foreign hearts and minds to the benefits of democracy and freedom. True, prosecuting individuals may be one way that a nation or community might demonstrate its fidelity to, and respect for, the highest principles of legality and justice, humanity and non-brutality in the law, and the preeminence of reason over brute force. However, criminal law prosecutions are also about a far more individualized and perhaps mundane subject: the culpability of single individuals for their conduct. This is, in a sense, the problem of torture in the first place: the use of the detainee as a mere instrument to achieve larger ends. The detainee is not punished by a court of law for his individual wrongdoing, but is brutalized by an official in order to achieve a scrap of information that will supposedly serve the larger goals of society. What cannot be forgotten is that we are dealing with persons. The torture lawyers are neither scapegoats nor representatives of American exceptionalism during the past eight years. They are not a pathway to a renewed national catharsis and their prosecution will not be a harbinger of a new international legal order. They are lawyers and professors and judges, though the respect that they deserve stems not from the high status they have achieved in the exalted annals of the judiciary and academia. Above all else they are targets of an investigation and deserve the inherent respect—yes, *respect*—that the highest systems of justice always afford those who face allegations of wrongdoing.

358. See, e.g., Bennoune, *supra* note 246, at 59.