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Torture, Necessity, and the Union of Law & Philosophy

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CONTENTS

ARTICLES

SYMPOSIUM

THE INAUGURAL PAPERS OF THE RUTGERS–CAMDEN INSTITUTE FOR LAW AND PHILOSOPHY

NOTES

TORTURE, NECESSITY, AND THE UNION OF LAW & PHILOSOPHY

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If law professors are thought to be intellectuals in ivory towers, philosophers build those towers to new heights. Thus, the question arises as to how the union of these two fields, and the formation of an Institute for Law and Philosophy, could contribute to issues of "contemporary relevance" as we claim it will do.[1]

In my view, not only do both of these disciplines have much to say about issues of contemporary relevance, but the sum of these two disciplines is stronger than their individual parts. While law frequently foots in reality, many of its presuppositions are, at root, philosophical. We are thus more prepared to address the challenges of our times when we combine these fields.

Indeed, consider the memoranda, written by departments within the Bush Administration, opining as to the permissibility of torture. In August 2002, the Justice Department's Office of Legal Counsel (OLC) authored a memorandum that was signed by Jay. S. Bybee, then-head of the OLC, and now a Ninth Circuit judge, advising White House counsel Alberto Gonzales as to the conditions under which it would be legal to torture.[2] The motivation for the memorandum was a post-September 11, 2001, request by the Central Intelligence Agency for legal guidance as to how it could permissibly

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1. The Institute for Law and Philosophy, Mission, *at* http://www.lawandphil.rutgers.edu/mission.html (last visited Nov. 30, 2004).

2. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter DOJ Memo], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf; *see also* Kathleen Clark & Julie Mertus, *Torturing the Law; The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B03; Dana Milbank & Dana Priest, *Bush: U.S. Expected to Follow Law on Prisoners; President Is Pressed on Interrogations Memo*, WASH. POST, June 11, 2004, at A06.

interrogate key al Qaeda leaders.[3] This memorandum in turn formed the basis for a March 2003 memorandum authored by the Department of Defense.[4] Both memoranda contain a number of legal arguments, including the claim that shall be our focus: that the justification of necessity might be available as a defense to violations of 18 U.S.C. § 2340A,[5] the federal statute that criminalizes torture.[6]

The defense of necessity is a catch-all justification wherein a defendant has a defense to a crime when the commission of that crime constitutes the lesser evil.[7] Necessity is commonly thought to be a justification,[8] wherein we view the defendant's act to be right or permissible, as opposed to wrongful

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3. Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush; Aide Says President Set Guidelines for Interrogations, Not Specific Techniques*, WASH. POST, June 9, 2004, at A03.

4. WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003) [hereinafter DOD MEMO], *available at* http://online.wsj.com/public/resources/documents/military_0604.pdf; *see also* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Department Gave Advice in 2002*, WASH. POST, June 8, 2002, at A01.

5. The statute provides:

> (a) Offense.--Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
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> (b) Jurisdiction.--There is jurisdiction over the activity prohibited in subsection (a) if—
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> (1) the alleged offender is a national of the United States; or
>
> (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
>
> (c) Conspiracy.--A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000). Torture is defined as "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." *Id.* § 2340.

6. DOJ Memo, *supra* note 2, at 39; DOD MEMO, *supra* note 4, at 25.

7. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 22.01 (3d ed. 2001).

8. *See* Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 284 (1989).

but excused because of a peculiarity of the actor or the actor's situation.[9] The rationale for the defense is that the legislature cannot provide specific defenses for all the circumstances in which we would want the defendant to act, and thus, the defendant should be permitted to choose the lesser evil in those instances where had the legislature considered the situation, it would have authorized the defendant's conduct.[10] The necessity defense is implicated in different classes of cases ranging from those generic cases wherein one may cause some small harm to another in order to avoid a great harm;[11] to instances of civil disobedience;[12] to the hard cases that involve torture or the taking of innocent lives, such as the classic *Regina v. Dudley and Stephens*.[13]

The torture memoranda make a number of legal claims about the viability of the necessity defense. First, they state that the defense, although not codified, has been recognized by the Supreme Court.[14] Second, the authors assert that "the necessity defense can justify the intentional killing of one person to save two others."[15] The authors also cite to the LaFave and Scott hornbook[16] for other elements of the necessity defense, including its applicability to all harms; the requirement of justificatory intent; the fact that the balance of evils is assessed from what the defendant reasonably believed, but that the actual balancing is itself an objective question decided by the court; and the requirement that other alternatives not be available.[17] In light of these elements, the memoranda conclude that the necessity defense could

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9. *See* Joshua Dressler, *Foreword: Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161-63 (1987) (distinguishing justification from excuse).

10. DRESSLER, *supra* note 7, § 22.01.

11. For example,

> the necessity defense applies if a seaman violates an embargo by putting into a foreign port due to dangerous and unforeseeable weather conditions, a person drives on a suspended license in order to take a loved one to the hospital in a dire emergency, or a motorist exceeds the speed limit in order to pass another car and move to the right lane, so that an emergency vehicle can pass.

Id.

12. *See, e.g.*, United States v. Schoon, 971 F.2d 193 (9th Cir. 1992).

13. 14 Q.B.D. 273 (1884).

14. DOJ Memo, *supra* note 2, at 40; DOD MEMO, *supra* note 4, at 25.

15. DOJ Memo, *supra* note 2, at 40; *see also* DOD MEMO, *supra* note 4, at 25.

16. WAYNE R. LAFAVE & AUSTIN W. SCOTT, 1 SUBSTANTIVE CRIMINAL LAW (1986 & Supp. 2002).

17. DOJ Memo, *supra* note 2, at 40; DOD MEMO, *supra* note 4, at 25-26.

be successfully maintained.[18] For instance, the Department of Justice memorandum notes the significance of the September 11 attacks and the presence of al Qaeda sleeper cells intent on making other such attacks, and concludes that "a detainee may possess information that could . . . equal or surpass the September 11 attacks in their magnitude. Clearly any harm that might occur during an interrogation would pale insignificance [sic] compared to the harm avoided by preventing such attack, which could take hundreds of thousands of lives."[19]

The claim that torture may be justified – that is, that it is right or permissible to torture another human being – is and should be immediately controversial. When our government claims that its agents may legally engage in such conduct, such a claim should be subjected to significant scrutiny. How can law and philosophy help us to better understand the issues at hand?

From a lawyer's standpoint, the memoranda's claims are themselves problematic. First, it is actually an open question whether the Supreme Court recognizes the necessity defense as a matter of federal common law. The authority cited in the memorandum,[20] *United States v. Bailey*,[21] was called into question by *United States v. Oakland Cannabis Buyers' Cooperative*.[22]

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18. DOJ Memo, *supra* note 2, at 40; DOD MEMO, *supra* note 4, at 25. While the DOD Memo generally asserts the necessity defense's applicability, the actual application of the analysis, which appears in the DOJ Memo, has been redacted from the DOD Memo. *See* DOD MEMO, *supra* note 4, at 26.

19. DOJ Memo, *supra* note 2, at 41.

20. DOJ Memo, *supra* note 2, at 40; DOD MEMO, *supra* note 4, at 25.

21. 444 U.S. 394 (1980).

22. 532 U.S. 483 (2001). The Court (albeit in dicta) stated:

> As an initial matter, we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute. A necessity defense "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." United States v. Bailey, 444 U.S. 394, 410, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). Even at common law, the defense of necessity was somewhat controversial. See, e.g., Queen v. Dudley & Stephens, 14 Q.B. 273 (1884). And under our constitutional system, in which federal crimes are defined by statute rather than by common law, see United States v. Hudson, 7 Cranch 32, 34, 3 L.Ed. 259 (1812), it is especially so. As we have stated: "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." United States v. Rutherford, 442 U.S. 544, 559, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979). Nonetheless, we recognize that this Court has discussed the possibility of a necessity defense without altogether rejecting it. See, e.g., Bailey, supra, at 415, 100 S.Ct. 624.

Secondly, while the memoranda claim that necessity is a defense to intentional killings[23] – that claim is also controversial. The memoranda endorse the Model Penal Code's necessity test,[24] thus ignoring the traditional common law bar on necessity as a defense to homicide.[25] Thus, any lawyer addressing the torture memoranda would question whether the memoranda are overreaching.

While the memoranda are controversial even at the level of hornbook law, their approach can also be analyzed from the perspective of criminal law theory. Paul Robinson, a leading criminal law scholar, contends that we must focus on criminal law's structure and function.[26] Specifically, Robinson distinguishes between *ex ante* rules of conduct that are directed toward citizens, and *ex post* rules of adjudication that determine whether the violation of the conduct rule warrants criminal liability.[27]

Consider the torture memoranda at this more macroscopic level. Necessity, as a justification, sets forth an *ex ante* rule of conduct.[28] It tells citizens what they may or may not do. Can the executive branch have a policy that torture is necessary? Notice that such a policy conflicts with the underlying structure of the defense. As Alan Dershowitz has noted, "[t]he point of the necessity defense is to provide a kind of 'interstitial legislation', to fill 'lacunae' left by legislative and judicial incompleteness. It is not a substitute legislative or judicial process for weighing policy options by state agencies faced with long-term systemic problems."[29] Hence, we should question whether the *executive* should have a long-standing policy as to a

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Id. at 490.

23. DOJ Memo, *supra* note 2, at 40; DOD MEMO, *supra* note 4, at 25.

24. MODEL PENAL CODE § 3.02 (1985).

25. *See* DRESSLER, *supra* note 7, § 22.05.

26. *See generally* PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW (1997).

27. *Id.* at 125. Jeremy Bentham formulated the distinction between conduct rules and decision rules, but this differentiation found root in criminal law theory in the works of Meir Dan-Cohen and Paul Robinson. *See* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfred Harrison ed., 1948); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625-30 (1984); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

28. ROBINSON, *supra* note 26, at 138.

29. Alan M. Dershowitz, *Is it Necessary to Apply "Physical Pressure" to Terrorists – And to Lie About it?*, 23 ISR. L. REV. 192, 198 (1989).

determination delegated to citizens by the *legislature* only in cases of emergency.

On the other hand, we must question whether legislation is appropriate. According to Meir Dan-Cohen, there is an acoustic separation in criminal law – there is what we tell citizens we want them to do, and what we really want them to do.[30] In light of this separation, Michael Moore has argued that a "flat ban on torture" is the appropriate legislative approach, even if the legislature truly desires for its citizens to torture in dire emergencies.[31] While we cannot resolve what the appropriate approach is here, it is apparent that we better understand the meaning of these memoranda, for citizens and state, for legislature and executive, when we come to this question armed with the tools of criminal law theory.

And yet, we can take even another step back. The necessity justification appears to be patently consequentalist. That is, it tells us that we may engage in criminal conduct in those instances in which we will do more good than harm. But to say that the necessity defense is simply a matter of consequentalist balancing is to ignore deeper moral questions about the defense.

First, we might wonder whether there are, at the very least, deontological constraints on the consequentalist calculus. That is, while most people believe it is permissible to turn the infamous runaway trolley so that it kills one lone worker instead of five, we reject that a surgeon can kill one person and use his organs to save five others.[32] As theorists note, the appropriation of the victim in the second case is what distinguishes it from the first.[33] Thus, we must ask how torture fits within this paradigm. Are we using the terrorist as a means to our ends? Does torture tread where deontology tells us we

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30. Dan-Cohen, *supra* note 27, at 637-38.

31. Moore, *supra* note 8, at 340-41; *see also* Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, LAW & PHIL. (forthcoming 2005) (manuscript at 35-39) (discussing the difficulties of how to understand the legislature's intention).

32. The Trolley Problem and the Transplant Case have received significant attention in the academic literature. *See, e.g.*, Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD J. LEGAL STUD. 15 (1967) (introducing the trolley problem); Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1064 n.1 (1993) (listing the "voluminous literature" the trolley problem has generated); Judith J. Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

33. *See, e.g.*, Alexander, *supra* note 31, at 7 ("I believe that it is different because defendant in Surgeon, but not in Trolley, violates a deontological constraint against appropriating people to benefit others."); Moore, *supra* note 8, at 287-89 (arguing that the end, no matter how good, does not justify the use of any means to achieve it).

must not go? After all, the interrogator can only gain information by intentionally torturing his victim.

Another question is commensurability – how can we compare torture to other harms?[34] Certainly, we can compare harms if the torture of one is used to prevent the torture of one hundred. But once we venture beyond preventing torture, we must ask how we are to compare torture to death and other harms, especially given that the intentional infliction of severe harm is a particularly egregious wrong.

Finally, we must ask whether the fact that the victim is a terrorist is relevant. While necessity allows harms to innocents (although perhaps not the killing of innocents), a terrorist is someone who is, in some sense, a culpable cause of the peril.[35] The more relevant the culpability of the victim, the more essential it is that we seek a high degree of certainty that the victim is a terrorist before engaging in this behavior.

The outcry over these memoranda was more than legal – it was moral.[36] In defense of the Justice Department authors, University of Chicago law professors Eric Posner and Adrian Vermeule claimed that the DOJ attorneys were in the business of giving legal advice – not moral advice – as to the permissibility of torture.[37] According to Posner and Vermeule, moral condemnation was simply not an appropriate reaction to the work of "legal technicians."[38]

As we can see, the memoranda's authors had to engage in more than legal analysis. The necessity defense directly implicates consequentialist balancing, and forces us to examine when good consequences may justify an otherwise wrongful act.

My criminal law textbook includes *Public Committee Against Torture in Israel v. Government of Israel*,[39] and thus, our class discussion includes the availability of necessity as a defense to torture. To press the question, I often

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34. Alexander, *supra* note 31, at 5-6 (raising the commensurability problem).

35. *See* Moore, *supra* note 8, at 322 ("Since he is the one creating such a threat, he in all fairness is the one to be selected when someone has to bear the harm threatened."). For this approach as applied to self-defense, see Kimberly Kessler Ferzan, *Justifying Self-Defense*, LAW & PHIL. (forthcoming 2005) (manuscript on file with author).

36. *See, e.g.*, Lawyers' Statement on Bush Administration's Torture Memos, *available at* http://www.aclu.org/Files/OpenFile.cfm?id=16235 (last visited Nov. 30, 2004).

37. Eric Posner & Adrian Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22.

38. *Id.*

39. 38 I.L.M. 1471 (1999), *available at* http://www.hamoked.org.il/items/260_eng.pdf (last visited Nov. 30, 2004).

ask my students whether it would be permissible, not to torture the terrorist, but to torture the terrorist's innocent baby. The answer to this question has changed since September 11, 2001. There is now a strong contingent of students who believe that in order to prevent another attack of that magnitude, such conduct would be permissible. These are our "legal technicians" of tomorrow. And there is no doubt that to confront this challenge, we have much to learn from the union of law and philosophy.