



## The Torture Lawyers: A Reply to Parry and Harel

Responding to  
John T. Parry, *Do the “Torture Lawyers have Guilty Minds?”* and  
Alon Harel, *The Torture Lawyers: A Response*

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I am grateful to John Parry and Alon Harel for their careful consideration of my article and their insightful comments about my arguments. They raised many important objections, not all of which I can address in this short reply. However, I do think it is useful to continue the conversation with Parry regarding the mens rea for torture and with Harel regarding justified necessity.

### 1. Parry on Intent and Pain

In his thoughtful response, John Parry offers an elegant dissection of the different mens rea standards for accomplice liability.<sup>1</sup> Parry argues that the choice of standard would greatly influence the outcome regarding the torture lawyers, and leans in favor of the purpose standard. In my article, I point out that different jurisdictions use different standards,<sup>2</sup> that some jurisdictions that use the purpose standard nonetheless have separate penal provisions criminalizing knowing criminal facilitation,<sup>3</sup> and that international criminal law generally uses

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<sup>1</sup> See John T. Parry, *Do the “Torture Lawyers” Have Guilty Minds?: A Response to Jens Ohlin*, 51 HARV. INT’L L.J. ONLINE 23 (2010).

<sup>2</sup> The different standards might be relevant if the torture lawyers were prosecuted in absentia by a foreign court exercising universal jurisdiction. Although it is unlikely that this would result in jail time (due to problems regarding extradition), they could nonetheless yield convictions.

<sup>3</sup> See, e.g., N.Y. PENAL LAW § 115 (1967).

the knowledge standard for accomplice liability.<sup>4</sup> Indeed, the required mental state for accomplice liability is one of the most contested areas of criminal law theory. Parry is also correct that U.S. federal courts (where litigation against the torture lawyers is most likely) use the purpose standard. But it is also true that there is a wide disparity in how different federal courts—all ostensibly applying the same “purpose” standard—actually cash out the notion of accomplice liability.<sup>5</sup>

However, I agree with Parry that at the heart of our disagreement is not the mens rea standard for accomplice liability, but rather the required mens rea for the primary offense in this case: torture. Suppose we take the Model Penal Code (“MPC”) formulation of accomplice liability, which requires not just acting “with the purpose of promoting or facilitating the commission of the offense” but also with “the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.”<sup>6</sup> Parry correctly identifies that the latter prong of this standard might function to narrow accomplice liability in the case of the torture lawyers, depending on a further analysis of the kind of culpability required for torture.<sup>7</sup> What then is the required culpability for the crime of torture?

Parry and I offer different answers to this question, though both of us admit that the issue is complex.<sup>8</sup> For Parry, the story begins with the decision by the U.S. Senate to ratify the Convention Against Torture, but only on the basis of a reservation that torture be limited to cases where an individual “specifically intended” to cause severe pain or suffering.<sup>9</sup> (The Convention itself says “intentionally inflicted”).<sup>10</sup> This reservation was then carried over to the federal anti-torture statute passed in the wake of the Senate’s ratification of the Convention.<sup>11</sup> Parry cashes out this reservation as imposing what criminal lawyers sometimes call “specific intent”—or the idea that a criminal defendant has to have a required intention that goes beyond the general intent to commit the crime.<sup>12</sup> For example, burglary is often classified as a specific intent crime because the defendant must not only have the intent to enter the dwelling, but must also have the further intent to commit a felony inside the dwelling

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<sup>4</sup> The knowledge standard for accomplice liability has dominated international criminal law since Nuremberg. See *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 U.N. War Crimes Comm’n, Law Reports of Trials of War Criminals 93 (1947) (Brit. Mil. Ct. 1946) (convictions for knowingly providing chemical used in Nazi gas chambers). U.S. courts have sometimes erred in this point. The issue is most relevant in Alien Tort Statute cases against corporations for aiding and abetting human rights violations. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (purpose standard); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 276 (2nd Cir. 2007) (same). The Second Circuit ignores the vast majority of international case law. See, e.g., *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, ¶ 162 (Mar. 24, 2000). The Second Circuit also misreads the Rome Statute. Although Article 25(3)(c) of the Rome Statute requires acting with purpose, Article 25(3)(d) only requires acting with *knowledge* of the intention of the group to commit the crime. The Second Circuit apparently has overlooked the latter provision.

<sup>5</sup> 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 (2002).

<sup>6</sup> MODEL PENAL CODE §§ 2.06(3) and 2.06(4) (Proposed Official Draft 1962).

<sup>7</sup> Parry, *supra* note 1, at 31.

<sup>8</sup> See *id.* at n.24.

<sup>9</sup> See 136 Cong. Rec. 36625 (1990).

<sup>10</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85. [hereinafter cited as Convention Against Torture].

<sup>11</sup> 18 U.S.C. § 2340(1) (2000).

<sup>12</sup> Parry, *supra* note 1, at 27.

(such as a theft). Parry is sympathetic to the argument that this specific intent requirement applies to torture in the following way: not only does the defendant need to have the intent to cause pain and suffering, but he must also have the specific intent to cause *severe* pain and suffering.<sup>13</sup> Consequently, under this view, if a torturer intends to cause pain and suffering but accidentally causes *severe* pain and suffering, then he is not guilty of torture under U.S. federal law, even if international law and the Convention Against Torture posit a wider standard based on general intent.<sup>14</sup>

The same analysis might apply to the torture lawyers. They may have had the intention that their memos or legal advice promote or facilitate the imposition of pain and suffering on detainees (as part of an interrogation to obtain actionable intelligence), but it is still possible to argue that they did not specifically intend to promote the imposition of *severe* pain and suffering. This is precisely the mens rea that the second prong of the MPC seems to require for accomplice liability. Under this view, the torture lawyers wanted the readers of the memo to walk right up to that line (between pain and severe pain) and remain on the right side of the line.

I am skeptical of this line of thinking for several reasons. First, there is scant evidence in the legislative history that the Senate's deployment of the terms "specifically intended" was meant to create a specific intent crime.<sup>15</sup> Second, there is vast disagreement about the meaning of "specific intent," and some criminal law theorists eschew the term completely due to its unhelpfulness.<sup>16</sup> Third, there is another, more convincing reading of the federal anti-torture statute. The reference to "specifically intended" in the statute might simply limit torture to cases of intentionally inflicted suffering but exclude cases of unintended suffering that result from an intentional act.<sup>17</sup> In other words, the statute was meant to exculpate individuals who intentionally committed actions that ended up causing torturous pain, if that was not the result desired by the perpetrator.<sup>18</sup> For example, consider a prison

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<sup>13</sup> *Id.* (stating that "OLC attorneys would rely on the torture memorandum to argue that even if they knew that their advice would lead to the infliction of pain on people at Guantánamo and other places, they did not have the purpose or goal to inflict pain, let alone severe pain. If that is true, they also did not have either a belief that 'torture is lawful' or a purpose to torture").

<sup>14</sup> See Memorandum from Office of the Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memorandum] (on file with author), at 3-4.

<sup>15</sup> The Senate never used the phrase "specific intent crime." For a discussion of the specific intent issue, see 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); Renee C. Redman, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" When Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465-95 (2007); John T. Parry, *Torture Nation*, *Torture Law*, 98 GEO. L.J. 1001, 1052 (2009) (discussing the specific intent issue, and arguing that the Senate never used the phrase "specific intent crime."). See also Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN. ST. L. REV. 1, 15-16 (2009).

<sup>16</sup> See, e.g., SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES* 218 (8th ed. 2007) (stating that "[t]he concepts of 'specific intent' and 'general intent' have been the source of endless confusion in the courts").

<sup>17</sup> See Redman, *supra* note 15, at 486-88.

<sup>18</sup> Some courts have followed this analysis. See, e.g., *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) ("Although the regulations require that severe pain or suffering be 'intentionally inflicted,' (citation omitted), we do not interpret this as a 'specific intent' requirement."). The Third Circuit subsequently backed away from this language in *Auguste v. Ridge*, 395 F.3d 123, 148 (3d Cir. 2005) (describing the language in *Zubeda* as dicta). See also *Lavira v. Att'y Gen. of the United States.*, 478 F.3d 158 (3d Cir. 2007) (willful blindness or indifference sufficient to meet specific intent standard), *overruled by Pierre v.*

official who intentionally places an inmate in a poorly-run hospital clinic where the inmate receives inadequate medical treatment and, as a result, suffers terrible pain. Although the official in such a case intentionally placed the prisoner in the clinic, which resulted in severe pain and suffering for the prisoner, the official never specifically intended to cause that result and was simply running a poor prison. By crafting the statutory language in the way that it did, Congress explicitly declared that these situations did not constitute torture. This strikes me as a better reading of the statute than the alternative. The statute was not designed to allow potential perpetrators to open up a wedge between “pain” and “severe pain” and argue that they intended the former but did not specifically intend the latter. If this were the case, almost any torture prosecution would be frustrated when a perpetrator concedes that they intended to cause pain but then argue that the resulting severity was accidental. This is the wrong mens rea for torture.<sup>19</sup>

Even if one were to reject my analysis of the statutory language, there is a second route to the same destination. Assuming *arguendo* that the mens rea requires a specific intent to cause a particular severity of pain, we still need an account of “severe pain.” This was another aspect of the torture memos, which argued unconvincingly and erroneously that “severe pain” meant pain that was capable of producing organ failure or death. As I and many others before have pointed out, this argument is fallacious because it relied on statutory definitions from wholly unrelated federal regulations regarding health benefits and emergency medical treatment.<sup>20</sup> First, the Bybee memo incorrectly implied that the definition it cited was a definition of “severe pain” when in fact it was not; the words “severe pain” were simply used in the definition of *another term*, “emergency medical condition.”<sup>21</sup> Second, there are unique reasons why regulations governing emergency medical treatment would be limited to cases of potential organ failure or death—these constitute emergencies, after all.<sup>22</sup> The definition of a medical emergency has nothing to do with the feeling of pain that is the *sine qua non* of torture.

If the torturer (and his accomplice) is required to have the specific intent to cause “severe pain,” it strikes me that what is relevant is whether the torturer intended to cause

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Att’y Gen. of the United States, 528 F.3d 180, 189 (3d Cir. 2008); *see also* *Gourdet v. Holder*, 587 F.3d 1, 5 fn. 3 (1st Cir. 2009) (rejecting *Lavira* and noting that it was subsequently overruled).

However, most of these cases discuss specific intent in terms of having the intent to cause pain and suffering, but do not attempt to open up a wedge between the intent to cause pain and suffering and the resulting pain of unexpected severity. Indeed, the language usually suggests the opposite. *See, e.g.*, *Pierre v. Att’y Gen. of the United States*, 528 F.3d at 189 (“the specific intent requirement, included in the ratification history of the CAT, requires a petitioner to show that his prospective torturer will have the motive or purpose to cause him *pain or suffering*”) (emphasis added). *But see* *Pierre v. Gonzales*, 502 F.3d 109, 117 (2d Cir. 2007) (discussing specific intent in terms of severity of pain).

<sup>19</sup> The Department of Justice has explicitly withdrawn the Bybee Memo’s discussion of specific intent. *See* Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Att’y Gen., Sec. 4 (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> (“We do not believe it is useful to try to define the precise meaning of ‘specific intent’ in section 2340. In light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”).

<sup>20</sup> *See* Bybee Memo, *supra* note 14, at 1, 5-6 (citing 8 U.S.C. § 1369 (2000), 42 U.S.C. §§ 1395-1396 (2000)).

<sup>21</sup> 8 U.S.C. § 1369 (2000).

<sup>22</sup> In medicine, the appropriate contrast is between a medical emergency and a chronic condition. A patient might suffer *chronic* and overwhelming pain but this would not be considered a medical emergency if the situation did not run the risk of causing serious damage to his or her body.

“severe pain” as that term is correctly understood, not whether the torturer intended to cause “severe pain” as that term is incorrectly understood by Bybee. The torturer laboring under a mistake of law regarding the phrase “severe pain” in the statute cannot use that mistake of law as an argument for how they did not specifically intend to cause severe pain during an interrogation. An example might be helpful here. Suppose an interrogator beats a detainee until the detainee confesses. The interrogator then argues that although he intended to cause pain he nonetheless did not intend to cause organ failure or death, so he did not specifically intend to cause severe pain and suffering. That argument can only be exculpatory if the Bybee definition of severe pain is correct, but it is not. To hold otherwise would turn torture into an offense that requires a knowing violation of the law, like tax evasion or structuring. That would effectively inflate the mens rea standard to “specific intent plus,” as some courts have called it, or the idea that the perpetrator must classify his conduct as torture when he commits it.<sup>23</sup> But this legal self-assessment of one’s conduct is not a requirement for the crime of torture.

This analysis flows down to the torture lawyers. At least where Bybee is concerned, it could be argued to a jury that he intended to facilitate interrogators who read his memo to impose severe pain and suffering on detainees. The fact that Bybee would not have classified this pain as “severe pain” (because he was mistaken about the law and the term “severe pain”) is utterly inapposite, even for our assessment of the subjective mens rea standard for torture. He still meant for it to be a result of the interrogations; he just would have labeled it differently. This is why I concluded in my article that basic principles of accomplice liability could yield criminal liability for the torture lawyers and that no “special rule for lawyers” exempts them from the standard rules of accomplice liability.<sup>24</sup> The criminal law directs itself toward all individuals equally and does not hand out exemptions to lawyers, or any other profession for that matter. Just as the laity is criminally responsible for its mistakes of law in most circumstances, so too are lawyers. Indeed, if there is a group that ought to receive greater protection from a strict liability scheme for legal error, it is the laity, not the bar that had the benefit of a legal education.

As a final point, it bears mentioning that some have argued that the torture lawyers might have engaged in deliberate distortions of the law. (Parry is sympathetic to this view.<sup>25</sup>) It is perhaps for this reason that Kevin Heller has suggested that the case against the torture lawyers would be stronger than the case against Woermann and von Weizsaecker in the *Ministries Case*, where both were convicted for a sin of omission, i.e. failing to advise the Reich that its planned deportations violated international law.<sup>26</sup> One could argue to a reasonable jury that some arguments in the torture memos, in particular Bybee’s claim that severe pain was limited to organ failure or death, were deliberate mischaracterizations of the law, and that even the author could not have believed them to be an accurate assessment of the law. In any event, my article attempted to sidestep this factual inquiry in favor of the stronger claim that

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<sup>23</sup> See, e.g., *Auguste*, 395 F.3d at 146.

<sup>24</sup> See Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L. J. 193, 208-09 (2010).

<sup>25</sup> See Parry, *supra* note 1, at 26.

<sup>26</sup> See *United States v. Von Weizsaecker et al. (The Ministries Case)*, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 620 (1997) (Nuremberg Mil. Trib. 1949): See also Kevin Jon Heller, *Want to Prosecute the Lawyers? Cite Ministries—Not the Justice Case*, OPINIO JURIS, Apr. 23, 2009, <http://opiniojuris.org/2009/04/23/want-to-prosecute-the-lawyers-cite-ministries-not-the-justice-case/>

erroneous legal advice might be the basis for legal liability even when made in supposed good faith.

Parry and I agree that there is little case law on this point, though I am grateful that Parry has brought *Firpo* to my attention.<sup>27</sup> Though the Second Circuit overturned the conviction of a lawyer in 1919 for assisting a deserter, my reading of the majority's opinion in the case was that the lawyer's advice to the deserter was essentially correct, which materially distinguishes it from the case of the torture lawyers. Furthermore, as Parry notes, the lawyer did not have knowledge of his client's desertion as required by the statute.<sup>28</sup> It is not entirely clear to me that the *Firpo* court would have reached the same result if the lawyer had provided outrageously erroneous advice to his client that aided his desertion.

In a similar respect, cases that purport to protect lawyerly advice on First Amendment grounds have similar problems.<sup>29</sup> For example, a New York appellate court recently prohibited a district attorney from prosecuting an attorney for conspiracy and endangering the welfare of a child.<sup>30</sup> The court held that the client's conduct did not constitute a crime, so that it was logically impossible to conclude that the attorney had *advised* his client to commit a crime.<sup>31</sup> In that case, however, the advice was not only held to be in good faith but also objectively reasonable, thus suggesting that unreasonable good faith advice might not be similarly protected.<sup>32</sup> My entire article was meant to demonstrate the patently unreasonable nature of the torture memos, and their subsequent withdrawal by the Department of Justice supports this conclusion.

## 2. Harel on Justifications and Excuses

Alon Harel outflanks me from the other direction. Harel suggests that the torture lawyers can be neither justified nor excused for their involvement in interrogational torture, so Harel apparently believes that there are even fewer doctrinal barriers to their prosecution than I do. Although Harel raises intriguing conceptual points about the distinction between justifications and excuses, he does not question my overall conclusion that the torture lawyers cannot benefit from an interrogator's excuse. Harel merely goes further and concludes that they cannot benefit from an interrogator's justification either.<sup>33</sup>

We can now pursue the deeper philosophical issues raised by Harel's account of justification and excuses and how they relate to the necessity defense. Harel argues that

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<sup>27</sup> *Firpo v. United States*, 261 F. 850 (2d Cir. 1919).

<sup>28</sup> *Id.* at 852.

<sup>29</sup> See, e.g., Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449, 456 (2009). Ku believes that attorney liability is limited to cases where there is an "illicit purpose," and that this requirement would be an impediment to prosecuting the torture lawyers. See *id.* at 453. I find this hard to understand. Ku cites *Pierre v. Att'y Gen. of the United States*, 528 F.3d at 189, for this proposition, but the majority in that case specifically noted that an interrogator might have dual purposes, e.g. impose pain and suffering *and* elicit information from the detainee. (Indeed, the two purposes are causally linked). This would still constitute torture. *Id.* at 190 n.7. This description perfectly captures the Bush Administration's policy of using enhanced interrogation techniques.

<sup>30</sup> *Vinluan v. Doyle*, 873 N.Y.S.2d 72, 82–83 (A.D.2d 2009).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 83.

<sup>33</sup> See Alon Harel, *The Torture Lawyers: A Response*, HARV. INT'L L. J. ONLINE 12, 21 (2010).

justified necessity can only apply to an actor motivated by the sheer necessity of the situation, as opposed to someone acting under “rule-governed directives.”<sup>34</sup> Harel thinks that the very nature of the torture memos—“designing rules to guide the interrogators’ decisions”—is incompatible with this requirement.<sup>35</sup> As for excused necessity, Harel rejects its application to interrogators because he believes that they are acting as state agents and state acts cannot be excused.<sup>36</sup>

Finally, Harel worries that my application of excused necessity to the interrogators is dangerous because it will encourage non-professionalism and sentimentalism.<sup>37</sup> I worry that Harel’s position regarding justified necessity is vulnerable to the same concern. Consider the following hypothetical: Suppose an interrogator works for an agency that has a policy allowing torture. When confronted with the threat of a ticking time bomb, the interrogator decides to follow the policy and commit torture. Under Harel’s view, the interrogator would not be exculpated by justified necessity. Contrast this case with a second interrogator working for an agency that has a policy *against* torture. When confronted with a ticking time bomb, the interrogator decides to go rogue and torture the detainee. Under Harel’s view, the interrogator would now be eligible for the defense of justified necessity. This result promotes non-professionalism, because of the two interrogators (both of whom commit torture), only the rogue agent benefits from the defense. This does not make Harel’s view incorrect; it simply indicates that the dangers of non-professionalism lurk in every corner of the sordid endeavor of torture.

I am also unsure how exactly Harel draws the line between rule-guided behavior and acting out of sheer necessity. I argued in my original article that justifications inherently perform a rule-guiding function because they announce to others the conditions under which they can be exculpated.<sup>38</sup> Harel concedes that in “genuine cases of emergency” every agent acting out of sheer necessity would be justified, but responds that they would not be justified on the basis of the rule.<sup>39</sup> This result strikes me as counter-intuitive. In the prior hypothetical, all of the agents are justified. But if one agent is aware of this fact and *acts on that basis*, then suddenly he is no longer justified. The agent’s awareness of the global situation precludes his exculpation.

Perhaps the proper answer to these hypotheticals is to recognize that torturers might act with dual purposes and dual motivations. It strikes me as entirely conceivable that an interrogator might conclude that necessity demands that he torture a detainee (because of a ticking time bomb) and that a state or organizational policy permits it. In such cases, it might be difficult to determine which motivation actually caused the torture. One possibility is to treat this as a case of over-determination.<sup>40</sup> A second possibility is to ask if the interrogator

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<sup>34</sup> Alon Harel & Aasaf Sharon, *What is Really Wrong with Torture?*, 6 J. INT’L CRIM. JUST. 241, 250 (2008).

<sup>35</sup> Alon Harel, *supra* note 33, at 21.

<sup>36</sup> *Id.* at 19.

<sup>37</sup> *Id.*

<sup>38</sup> See Ohlin, *supra* note 24, at 227.

<sup>39</sup> Harel, *supra* note 33, at 21.

<sup>40</sup> This point also generates a response to Harel’s objection that if a torturer is excused due to his moral anguish, then the torture memos could not have played a role in the torture; ergo the lawyers would not be accomplices. See Harel, *supra* note 33, at 20. It strikes me as possible that an interrogator might be overcome by concern with the death of innocent victims and yet may also be aware that, according to the torture lawyers, his actions are lawful under either national or international law. The excuse recognizes

would have gone through with the torture even in the absence of the state policy. This might give Harel a gloss on whether the interrogator was truly motivated by the sheer necessity of the situation. To my mind, however, we cannot get around the odd result that under Harel's position, Bybee's legal memorandum about justified necessity precludes the application of justified necessity by those who read it or received its guidance through intermediaries. Perhaps it would be useful to distinguish between, on the one hand, a memo that lays out in advance and in detail the specific threats that would be sufficiently grave to justify torture and, on the other hand, a memo that simply explains the necessity defense and provides (erroneous) legal arguments about the definition of torture. The former would seem to be exactly the kind of ex ante rule guidance that Harel believes precludes the necessity defense, while the latter is just legal analysis as opposed to law application to fact. The real motivating factor for Harel ought to be who does the balancing: an agency or legislature engaging in ex ante balancing in formulating a policy (not justified necessity) versus individual actors engaged in balancing based on their assessment of the emergency (justified necessity). Did the Bybee memo constitute ex ante balancing? On the one hand, the memo did suggest that "the necessity defense could be successfully maintained" because a "detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude."<sup>41</sup> On the other hand, the Bybee memo hedged its conclusion by warning that "the strength of the necessity defense depends on the circumstances that prevail, and the knowledge of the government actors involved, when the interrogation is conducted."<sup>42</sup>

### 3. Conclusion

In the final analysis, it is important to emphasize that my article did not offer an all-things-considered judgment that the torture lawyers ought to be prosecuted. In fact, I am skeptical that such prosecutions are the most politically salient method of turning the page on the Bush Administration's strategy for the War on Terror. My article was simply meant to challenge the supposed legal barriers to such prosecutions: the necessity defense, the mens rea for accomplice liability, the mens rea for torture, mistakes of law, and attorney exemptions from criminal liability. After careful consideration, many of these barriers turn out to be either exaggerated or illusory.

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the compromised nature of the agent's decision making, but does not entail that the agent was so irrational that the torture memos had no effect on them.

<sup>41</sup> See Bybee Memo, *supra* note 14, at 40-41.

<sup>42</sup> *Id.* at 41. The Bybee memo dismisses article 2.2 of the Convention Against Torture which disallows justifications for torture based on exceptional circumstances, war, political instability, or public emergency, because Congress failed to explicitly include a similar provision in the federal anti-torture statute. *Id.* at 41 n.23. The footnote includes no discussion of the possibility that Congress simply felt it unnecessary to do so and that, in fact, many provisions of the CAT are not repeated in domestic implementing legislation, which does not indicate that states were reserving a right not to be bound by these obligations.

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