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Do the “Torture Lawyers” Have Guilty Minds?: A Response to Jens Ohlin

Responding to Jens Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193 (2010).

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I. INTRODUCTION

Jens Ohlin’s article, “The Torture Lawyers,”¹ advances the scholarly literature on several topics. First, Ohlin challenges the conventional wisdom about the extent to which lawyers may be criminally liable as accomplices when their legal advice facilitates criminal behavior. His discussion of and proposals for the complicity doctrine would create a robust but almost certainly controversial standard for the criminal punishment of legal advice. Second, drawing on German legal theory, he articulates a rich and nuanced conception of the necessity defense that allows it to function both as a justification and as an excuse, depending on the circumstances.² Ohlin also provides a useful analysis of the relatively limited circumstances in which necessity applies to accomplice liability.

Ohlin’s discussion of these issues focuses on the liability of U.S. government lawyers who provided the legal advice that facilitated the use of coercive interrogation techniques, including torture. As a result, he also contributes to the debate on the law of torture, but the implications of his analysis sweep more broadly and generally.

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¹ Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193 (2010).

² I advanced a similar but sketchier suggestion in *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 442-45 (1999). Ohlin’s account is richer and ultimately more convincing. See also Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251 (1995) (presenting a similar analysis of duress).

Finally, Ohlin carefully and fruitfully parses the *Justice* and *Ministries Cases* from the Nuremberg prosecutions and suggests ways in which those cases do (and do not) apply to the situation of government lawyers who provided legal advice about coercive interrogation.

Ohlin and I agree that at least some of the detention and interrogation practices of U.S. personnel during the War on Terror rise to the level of torture as defined by U.S. and international law. We also agree that some of this conduct resulted from policy decisions to avoid international legal rules and employ coercive interrogation practices. Opinions issued by the Department of Justice's Office of Legal Counsel (OLC) aided the development of these policies and facilitated some of this criminal conduct, in part by attempting to insulate it from criminal liability.³ Even more, we agree that there are circumstances under which the attorneys who prepared those opinions could be subject to prosecution as accomplices to torture.

Nonetheless, "The Torture Lawyers" contains some arguments that I find difficult to accept. For example, I think the difference between *ex ante* and *ex post* decisions has value for the necessity defense, and I am uncertain about Ohlin's effort to minimize it in his discussion of necessity as a justification. He also claims that treating necessity as a justification in a torture prosecution will send a signal of approval or acceptance, while treating necessity as an excuse will not. I suspect the messages sent by the case-by-case necessity analysis will be tenuous and complex no matter how one classifies the defense.⁴

I also am not convinced by Ohlin's interpretation of the *Ministries Case*. He suggests the defendants in that case "were responsible for legal advice and their failure to properly advise their clients was the subject of their legal liability."⁵ I wonder whether this statement of the holding is too broad. According to Kevin Heller, the tribunal found that the defendants in the *Ministries Case* knew that the conduct on which they were giving an opinion actually violated the law, that they therefore had a duty to advise the government accordingly, and that they failed to carry out that duty.⁶ If that is true, then the culpability of the defendants appears to have turned on their knowing failure to provide correct legal advice, which is different from and narrower than simply "fail[ing] to properly advise their clients." As such, the *Ministries Case*

³ Any criminal case against policymakers or interrogators likely would encounter the defense, based on statutory language and constitutional doctrine, that they relied on OLC's advice. See Ohlin, *supra* note 1, at 208-09; see also Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636, § 8(b) (2006); DAVID COLE, INTRODUCTORY COMMENTARY: TORTURE LAW, IN THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 1, 37-38 (2009); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997).

⁴ For Ohlin's arguments, see Ohlin, *supra* note 1, at 228, 237. For my thoughts on both issues, see Parry, *supra* note 2, at 440-42 (discussing deterrence and necessity), and John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 764-65 (2002) (discussing necessity and torture).

⁵ Ohlin, *supra* note 1, at 255.

⁶ See 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/>.

does not assist the effort to criminalize good faith legal advice, although it is certainly helpful to a prosecution based on deliberate distortion of the law.

Instead of addressing these issues, however, my response will focus on the mens rea standards that govern the accomplice liability of lawyers and on how these standards apply to the lawyers who wrote the memoranda that facilitated torture. Because I doubt that these lawyers can be found criminally liable for good faith legal advice, I will also discuss the circumstances in which they might be found responsible. Finally, I will situate my discussion in the broader context of what I believe is the deliberate attempt by states to retain discretion to use violence in situations of emergency or necessity.

II. MENS REA AND ACCOMPLICE LIABILITY

Ohlin suggests that the most common mens rea for accomplice liability is a requirement that “the accomplice act with the purpose of promoting or facilitating the offense.”⁷ He then argues that the purpose standard could be satisfied in a federal prosecution of an attorney for giving bad advice even if the lawyer believes that the advice is correct and does not know that the client’s conduct would be illegal.⁸ Ohlin claims the lawyer simply must know or have the purpose of giving the advice that will help the client accomplish its goals: “all that matters is that the accomplice aid and abet, facilitate, encourage, or otherwise assist the principal’s actions.”⁹

Ohlin’s analysis, in short, portrays the mens rea element of accomplice liability as something that the prosecution can satisfy fairly easily, even when the defendant is an attorney prosecuted for giving good faith advice. I think his portrayal is incorrect, or at least incomplete. The law in this area is not as simple as he makes it out to be, and the complications tend to work against accomplice liability based on good faith legal advice.

A. Specific Intent, Purpose, and Good Faith

Ohlin’s statement of the mens rea for accomplice liability is not the only possible definition. Joshua Dressler suggests that “it is more precisely correct to state that an accomplice must possess two states of mind: (1) the intent to assist the primary party to engage in conduct that forms the basis of the offense; and (2) the mental state required for commission of the offense, as provided in the definition of the substantive crime.”¹⁰ The second requirement makes this definition harder to satisfy than Ohlin’s.

The Model Penal Code (“MPC”) presents a third approach to accomplice liability: “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

⁷ Ohlin, *supra* note 1, at 196-97. He also notes that some states recognize a lesser knowledge-based offense of criminal facilitation, and that international criminal law tends toward a knowledge standard for accomplice liability, but he recognizes that any prosecution of federal government attorneys for their legal advice would almost certainly take place in federal court, where the purpose standard would apply. *See id.*

⁸ *See id.* at 198, 208.

⁹ *Id.* at 208.

¹⁰ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 478 (5th ed. 2009).

offense, he . . . (ii) aids or agrees or attempts to aid such other person in planning or committing it"¹¹ At first glance, the MPC seems similar to Ohlin's definition, but there is more. The MPC also states, "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."¹² This additional requirement for result elements places the MPC somewhere between Ohlin's and Dressler's formulations.¹³

For many crimes, these distinctions may not matter. For criminal prosecutions of lawyers as accomplices based on their legal advice, however, the choice among these options could make a significant difference. That is certainly a possibility when the underlying crime is torture.

Federal law defines the crime of torture as "an act . . . 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."¹⁴ Under the accomplice liability standard that Ohlin prefers, the only question in a prosecution under this statute is whether the OLC attorneys gave legal advice with the purpose of assisting the coercive interrogation of suspected terrorists. I agree with Ohlin that under this standard, the attorneys are accomplices to torture if the interrogation methods that they approved and were then used turn out to be torture, regardless of whether they gave that advice in good faith.¹⁵

Under the other two approaches to accomplice liability, however, the result could be different. Consider, first, Dressler's formulation. Prosecutors easily could demonstrate that the OLC attorneys had the intent to assist coercive interrogations of suspected terrorists. But the second prong of the test is more difficult. Did OLC attorneys act with specific intent to inflict severe physical or mental pain or suffering on the people being interrogated?

The federal definition of torture derives from the Convention Against Torture, but *mens rea* is one of the issues on which the Convention and federal statute differ. The Convention speaks only of severe pain that is "intentionally

¹¹ MODEL PENAL CODE § 2.06(3) (1985).

¹² MODEL PENAL CODE § 2.06(4) (1985).

¹³ The MPC takes no express position on the accomplice's mental state toward attendant circumstance elements, although the definitions of the MPC mental states address their general interaction with attendant circumstances. This lack of definition arguably further differentiates it from the common law. Although the common law is uncertain on this issue, Dressler suggests that "the appropriate rule is that, as long as the secondary party acts with the purpose of assisting the principal in the conduct that constitutes the offense . . . he should be deemed an accomplice if his culpability as to the attendant circumstances would be sufficient to convict him as a principal." Dressler, *supra* note 10, at 482.

¹⁴ 18 U.S.C. § 2340(1) (2009).

¹⁵ Not all coercive interrogation rises to the level of torture under U.S. and international law. *See, e.g.*, Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85 (referring to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture").

inflicted.”¹⁶ When the U.S. Senate gave its advice and consent to the Convention, it changed that standard from intent to specific intent.¹⁷ Although “specific intent” is itself an ambiguous term,¹⁸ the ratification history suggests that the Senate’s deliberate change of language was an effort to require “proof that the actor’s conscious object, or purpose, is to cause the social harm set out in the definition of the offense.”¹⁹ Mere knowledge that the harm – in this case “severe physical or mental pain or suffering” – will occur is not enough.²⁰ This is typically how federal courts have interpreted the mens rea requirement in immigration cases under the ratified version of the Torture Convention.²¹

As Ohlin notes, one of the most criticized portions of the August 2002 “torture memorandum” is the contention that the words “severe pain” in the federal statute refer to pain that rises “to the level of death, organ failure, or the permanent impairment of a significant body function.”²² The thrust of the memo (and the accompanying “techniques memorandum” which dealt with specific interrogation methods, such as water boarding²³) is that none of the contemplated interrogation methods would cause this level of pain.

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”²⁴ or a purpose to torture. Indeed, based on the torture memorandum’s analysis, they might even be able to deny knowledge that the interrogation methods

¹⁶ *Id.*, art. 1.

¹⁷ 136 CONG. REC. 36,198 (1990). For a fuller account, see John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1036-46 (2009).

¹⁸ See Dressler, *supra* note 10, at 137-39.

¹⁹ *Id.* at 138.

²⁰ See *id.* at 121-22, 141 (arguing with respect to the MPC’s mens rea definitions that a person who bombs an airplane in order to kill a specific person while also knowing that others would die has acted purposely only toward the specific person).

²¹ See *Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008) (en banc); 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 (2007). Ohlin plausibly suggests a different meaning for “specific intent” in the torture statute, see Ohlin, *supra* note 1, at 207. I do not think the ratification history supports his conclusion.

²² Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 6 (Aug. 1, 2002), reprinted in Cole, *supra* note 3, at 41.

²³ See Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, Office of Legal Counsel, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, re: Interrogation of al Qaeda Operative (Aug. 1, 2002), reprinted in Cole, *supra* note 3, at 106.

²⁴ See Ohlin, *supra* note 1, at 209.

would inflict severe pain.

The MPC standard could produce a similar result. The torture statute is one in which "causing a particular result is an element of an offense," because it requires specific intent to cause the result of severe physical or mental pain or suffering. Translated into the language of the MPC, the statute requires a purpose to cause severe pain. Thus, the OLC attorneys are accomplices under the MPC only if they had a specific intent or purpose to do so. In short, if one believes the OLC lawyers prepared a good faith analysis of "severe pain," then there is a strong argument that they cannot be convicted as accomplices to torture under the MPC or Dressler's summary of the common law.

A prosecutor might respond to these arguments by emphasizing that the OLC attorneys knew their advice would lead to the infliction of some mental and physical pain, and that their severity analysis (as well as other aspects of their analysis) was objectively unreasonable. But if a jury believes the attorneys acted in good faith and did not believe their analysis would lead to the infliction of severe pain, the objective unreasonableness argument will fail so long as the required mens rea is specific intent or purpose.

The objective unreasonableness argument, therefore, serves two possible goals. Either it is an effort to reduce the mens rea to general intent or negligence – that is, to change the law – or it seeks to undermine the claim of good faith and to demonstrate that the OLC attorneys acted in bad faith by deliberately distorting the law.²⁵ The latter goal is consistent with the existing law of accomplice liability because proof of deliberate distortion demonstrates a level of culpability that is quite different from the mental state that accompanies honest or good faith legal advice and counsel. Put bluntly, while Ohlin argues that "[w]hat matters is that [the lawyer] intends to assist the principal's project, not whether he understands the relevant law in question," my analysis suggests that the lawyer's understanding of the relevant law is central to the mens rea that accompanies prevailing formulations of accomplice liability.

My point is not that a court must adopt the MPC or Dressler formulation of accomplice liability (although Ohlin does suggest that federal courts already follow the MPC on this issue).²⁶ Nor am I trying to argue that these formulations are normatively more desirable in general or in this context. I am not even trying to argue that the argument I have developed about the interpretation and application of these approaches to the OLC attorneys is the only possible one.²⁷

²⁵ Ohlin suggests the "good faith but mistaken" issue is really a mistake of law issue. *See id.* at 208. I disagree that this is simply a mistake of law issue, because it also goes to the attorneys' subjective purpose with respect to interrogation methods and the infliction of pain, which is relevant to accomplice liability under the MPC and Dressler formulations. Put differently, when the mens rea is purpose or specific intent, a mistake claim functions as a failure of proof defense instead of or in addition to being a potential excuse.

²⁶ *See id.* at 196.

²⁷ For example, I have not addressed the extent to which one can infer purpose from proof of knowledge. *See* *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v.*

Finally, I am not disputing Ohlin's claim that "a jury might reasonably infer from the tenor of the memos . . . that they were written by partisans who wanted to assist the principals in committing torture by constructing legal arguments for them."²⁸ I believe the OLC attorneys acted in good faith in the sense that they intended to achieve a result that they thought was appropriate under the circumstances. But when I use the term "good faith," I am referring to their attitude toward legal analysis and doctrine. On that issue, I agree that a reasonable jury could conclude that OLC attorneys acted in bad faith with respect to such things as the definition of "severe pain," whether or not they also acted as "partisans who wanted to assist the principals in committing torture."²⁹

That said, I do have concerns about one of the claims that Ohlin makes in favor of the position that the OLC's advice was frivolous or in bad faith. Ohlin takes issue with the OLC's rejection of the position that customary international law is automatically part of federal law, although it is not entirely clear if he is claiming that such a rejection is incorrect or simply that the analysis of the issue was badly done.³⁰ If he is arguing the former position, then I disagree that the OLC's conclusion was clearly incorrect. It is relevant, for example, that at least one member of President Obama's White House Counsel's office also rejects the automatic incorporation view.³¹ More generally, this may be an issue on which the prevailing academic view is

Falcone, 109 F.2d 579 (2nd Cir.); *aff'd* 311 U.S. 205 (1940); and *People v. Lauria*, 251 Cal. App.2d 471 (1967). Further, Claire Finkelstein and David Luban have argued that it is absurd to parse specific intent in the way that I have suggested the OLC lawyers might successfully do. See Claire Finkelstein, *When Government Lawyers Break the Rules*, <http://www.pennumbra.com/debates/debate.php?did=29> (last visited Feb. 27, 2010); David Luban, *David Margolis Is Wrong: The Justice Department's Ethics Investigation Shouldn't Leave John Yoo and Jay Bybee Home Free*, *Slate*, Feb. 22, 2010, <http://slate.msn.com/id/2093396/index.html>.

²⁸ See Ohlin, *supra* note 1, at 198.

²⁹ The recently released report by the Department of Justice's Office of Professional Responsibility supports Ohlin's argument on this issue. See DEPARTMENT OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS, July 29, 2009. See also Cole, *supra* note 6, at 36 (contending the "desired result drove the legal analysis" which is "the very definition of bad faith"); John T. Parry, *Responses to (Some of) the Ten Questions*, 36 *Wm. Mitchell L. Rev.* (forthcoming 2010) (advancing criticisms of the OLC memorandum that are roughly similar to Ohlin's with respect to the Geneva Conventions and the law of torture); But see Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 *Case W. Res. J. Int'l L.* 449 (2009) (arguing good faith legal advice will not support criminal liability and also asserting there is no evidence that OLC attorneys prepared the memoranda in bad faith).

³⁰ See Ohlin, *supra* note 1, at 202-05.

³¹ See Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 *Va. J. Int'l L.* 513 (2002). I tend to agree with Meltzer's assessment of this issue. I also do not think that the Supreme Court's subsequent interpretation of the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), does a great deal to support the academic consensus, precisely because the issue was how to interpret a statute that required federal courts to take

at odds with the legal conclusions of government attorneys. If that is true, I think it is insufficient to argue that failure to follow the academic majority is erroneous or frivolous, although it is certainly permissible to point out the incomplete or flawed analysis that supports the decision to reject that view.

In any event, analyzing the specific factual issues relevant to the good or bad faith of the OLC attorneys is also not my goal. Rather, the point of my accomplice liability analysis is simply to argue that as a matter of formal legal doctrine, good faith legal advice will sometimes be inconsistent with accomplice liability, even in the context of torture.³² This issue is central to Ohlin's analysis, because I suspect that few courts or commentators would dispute that *bad faith* legal advice given by partisans who wish to assist the infliction of torture would support accomplice liability – no matter what standard of accomplice liability applies.

My analysis here is limited to accomplice liability under the federal torture statute, and it has more general implications for crimes with a mens rea of specific intent or purpose. I have not attempted to resolve the larger question that Ohlin also addresses: the extent to which attorneys are generally insulated from accomplice liability when they provide good faith legal advice. On that issue, the Dressler and MPC accomplice liability standards appear to allow the conviction of attorneys who act in good faith when the mens rea of the underlying crime is less than purpose or specific intent.³³

some account of customary international law norms. I appreciate Ohlin's distinction between norms that are binding, and norms that are enforceable, but the point of the "international law is part of our law" argument is exactly the proposition that courts should apply it. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

³² Ohlin admits there are few if any cases imposing criminal liability for good faith advice, but he rightly points out that case law in the other direction is also sparse. *See* Ohlin, *supra* note 1, at 211-12 (I also found little in a quick search). *But see* Firpo v. United States, 261 F. 850, 853 (2nd Cir. 1919) (stating, in a prosecution of an attorney for assisting the desertion of a soldier, "[w]e think the plaintiff in error was giving his best advice and opinion to his client, without any intent of violating the law, and in doing so what he thought was within the realm of his professional obligations to his client," but also noting the statute required knowledge that the soldier was deserting). *See also* United States v. West, 392 F.3d 450, 457 (D.C. Cir. 2004) (holding the advice of counsel defense is not available to a client when the lawyer is an accomplice, and suggesting a lawyer is an accomplice "[w]hen the lawyer is a partner in a venture, takes a share of the profits, or is not a lawyer who had no interest save to give sound advice for a reasonable fee") (quoting United States v. Carr, 740 F.2d 339, 347 (5th Cir. 1984)). Also relevant are cases on the crime-fraud exception to the attorney-client privilege in the context of business-planning advice, several of which distinguish between lawyers who are unwitting or innocent accomplices in their clients' crimes, and those who know what their clients are doing, even though the crime-fraud exception applies either way. *See* United States v. Chen, 99 F.3d 1495, 1504 (9th Cir. 1996); United States v. Schussel, 291 Fed. Appx. 336, 345 (1st Cir. 2008); *In re* Hunt, 153 B.R. 445 (N.D. Tx. 1992).

³³ Thus, as Ohlin notes, an exception from accomplice liability for good faith legal advice must derive from policy arguments. He recognizes the familiar argument that a rule of no criminal liability for bad legal advice "can be justified by strong public policy grounds for protecting the lawyer-client relationship. Supposedly, if clients cannot receive honest, candid and

In sum, if it is true – as I have argued – that the OLC attorneys have a strong defense against being prosecuted as accomplices for their legal advice, the blame for that result rests neither on the accomplice liability standard nor on the existence of a special standard for lawyers. The problem, rather, is two-fold. One part is legal; the mens rea requirement of specific intent for the underlying crime of torture is too restrictive. The other part is factual; if OLC attorneys acted in good faith – which is an issue very much in dispute – then they have a plausible argument that they did not have a purpose to inflict severe mental or physical pain.

B. Knowledge, Culpability, and Proof

Ohlin’s article raises the question of whether the OLC attorneys have the guilty minds required for criminal liability. As a matter of formal doctrine, the answer might be “no” under a specific intent or purpose standard. Yet that is not the end of the analysis, for a prosecutor might well be able to establish that they had guilty minds sufficient for criminal culpability under a different mens rea standard.

Specific intent or purpose is a relatively rare requirement for criminal culpability, even for serious crimes. More commonly, the mens rea for a serious crime is intent or knowledge. And, under the Model Penal Code, “A person acts knowingly with respect to a material element of an offense when [.] if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.”³⁴

Under an intent or knowledge standard, prosecutors would have a much easier time proving the criminal culpability of OLC attorneys. That is particularly true under the MPC knowledge standard. Prosecutors not only could easily prove that the attorneys had the purpose to aid the principals; they would also have a very good chance of proving that the attorneys either acted with the knowledge that their conduct would cause severe pain or suffering, or that they were aware that such a result was practically certain to occur. Claims of good faith would matter much less, if at all, because the mens rea inquiry would shift from analysis of purpose or goals to

confidential advice from lawyers, there will be grave consequences for our free society.” Ohlin, *supra* note 1, at 210. He also admits that “the lawyer-client relationship has social utility.” *Id.* But he insists that this view must give way to the general principles of criminal law in the absence of supporting precedent for an exception from ordinary rules of accomplice liability. *See id.* at 211. Ohlin’s claim about the necessary logic of general rules and exceptions does not convince me, and I think he dismisses the policy arguments too easily. It is worth noting, for example, that courts and commentators tend to present the social utility argument in a much more positive light. *See, e.g., Chen*, 99 F.3d 1495, 1499-1501. But I also see the force of the argument that, on balance, it is reasonable to insist on the possibility of holding lawyers criminally responsible for the consequences of their bad advice. Even if that conclusion does not hold in all circumstances, it might have particular application when the legal advice relates to conduct that likely will cause severe harm to another person.

³⁴ MPC § 2.02(b)(ii). Some jurisdictions that have adopted the MPC mens rea standards have chosen not to adopt the “practically certain” component of knowledge.

assessment of what they knew.³⁵

This analysis leads to an obvious law reform proposal. Congress should amend the torture statute, 18 U.S.C. § 2340, to eliminate the mens rea of specific intent. One option is to return to "intent," based on the language of the Torture Convention. But the common law concept of general intent carries a lot of baggage, and a better solution would be to adopt the MPC knowledge standard as the mens rea for torture.

III. THE "TORTURE LAWYERS," DELIBERATE STATE VIOLENCE, AND THE RULE OF LAW

Under current law, a prosecutor could bring charges against OLC attorneys and (1) make the difficult argument that the "specifically intended" language in the statute does not equate to a requirement of purpose, (2) argue that a jury could infer purpose from knowledge,³⁶ and/or (3) argue that the OLC attorneys acted in bad faith and deliberately distorted the law. In a world in which Congress took the ban on torture seriously, none of these arguments would be necessary, because prosecutors would not have to confront the possibility of proving specific intent. Going forward, Congress should demonstrate its seriousness on this issue by amending the torture statute to replace "specifically intended" with "intended" or "with knowledge." For several reasons, however, Congress almost certainly will not take this step.

First, the high mens rea standard is no accident. As I noted above, when the Senate gave its advice and consent to the Convention Against Torture, it changed the definition of torture by, among other things, raising the mens rea from intent to specific intent.³⁷ The ratification history of the Convention indicates not only that this change was deliberate but also that it was part of a broader effort to define torture as narrowly as possible.³⁸ Statutes passed to implement the Convention, including § 2340, reflect the restrictive definition of torture that emerged during ratification.³⁹

Second, Congress continues to define torture narrowly. For example, the Military Commissions Act of 2006 amended a different criminal statute, 18 U.S.C. § 2441, to create precise definitions of several war crimes, including torture.⁴⁰ The definition of torture for purposes of war crimes requires specific intent and defines the idea of severe pain and suffering in a way that tracks the analysis in the OLC torture memorandum.⁴¹

³⁵ As I noted earlier, OLC attorneys could argue that their "severe pain" analysis indicates they lacked such knowledge, but that claim is not as strong as the lack of purpose argument.

³⁶ See note 17, *supra*.

³⁷ See notes 17-19 and accompanying text.

³⁸ See Parry, *Torture Nation*, *supra* note 17, at 1037-42.

³⁹ See *id.* at 1048-49.

⁴⁰ Military Commissions Act of 2006, 10 U.S.C. § 6(b) (2006).

⁴¹ The new version of § 2441 defines the crime of inflicting cruel, inhuman or degrading treatment as "an act intended to inflict severe or serious physical or mental pain or suffering."

Third, these legislative actions dovetail with a history of adoption by U.S. officials of coercive detention and interrogation policies and practices in a variety of contexts, beginning long before the current War on Terror.”⁴²

Fourth, all of this takes place against a legal landscape in which the regulation of state violence is shot through with ambiguities. Under U.S. law, for example, torture may be a crime, but it is unconstitutional only to the extent that it “shocks the conscience,” a standard which in turn requires that the conduct be “unjustifiable by any government interest.”⁴³ To date, federal courts have not been able clearly to declare that coercive interrogation in a national security context violates this due process standard.⁴⁴ The international law of torture is also riddled with uncertainty, such that although torture is plainly illegal, the definition of torture remains far from clear.⁴⁵

Finally, federal courts have used habeas corpus to create procedural protections for detainees in the war on terror, but they have been loath to hold federal officials responsible for the mistreatment that has accompanied those detentions. Instead, federal courts have tended to allow official defendants to take advantage of procedural defenses that prevent review of the merits of the claims against them.⁴⁶

All of this suggests, not only that the federal government is unlikely to take meaningful action against torture, but also that the actions of the OLC attorneys – while perhaps egregious – are not aberrant. For some commentators, the existence of

18 U.S.C. § 2441(d)(1)(B)(2006). It then defines “serious physical pain or suffering” as “bodily injury that involves – (i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty.” 18 U.S.C. § 2441(d)(2)(D)(2006). The statute defines torture as the infliction of “severe physical or mental pain or suffering” but does not provide a definition of “severe.” Yet the crime of torture is at least as serious as the crime of inflicting cruel, inhuman or degrading treatment: the statute defines both as grave breaches of the Geneva Conventions, and the Convention Against Torture defines torture as more serious. It seems to follow that the level of pain required to establish torture under the statute (severe pain) must be at least as high as that required to establish cruel, inhuman, or degrading treatment (severe or serious pain).

⁴² I detail some of this history in JOHN PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 135-64 (2010) and Parry, *Torture Nation*, *supra* note 17, at 1004-31. For additional information, including detailed analysis of army field manuals, see Willam Ranney Levi, Note, *Interrogation's Law*, 118 Yale L.J. 1434 (2009).

⁴³ See *City of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Chavez v. Martinez*, 538 U.S. 760, 774-76 (2003) (opinion of Thomas, J.).

⁴⁴ See *Arar v. Ashcroft*, 414 F.Supp.2d 250, 274-79 (E.D.N.Y. 2006), *aff'd* on other grounds, 532 F.3d 157 (2d Cir. 2008), *aff'd*, 585 F.3d 559 (2d Cir. 2009 (in banc)). The additional cases cited in *infra* note 46 also reflect the inability to declare that interrogational torture is unconstitutional in a national security context.

⁴⁵ See PARRY, UNDERSTANDING TORTURE, *supra* note 42, at 15-43.

⁴⁶ See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Arar*, 585 F.3d 559; *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *but see al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009). See generally Michael C. Dorf, *Iqbal and Bad Apples*, 14 Lewis & Clark L. Rev. 217 (2010).

the torture memoranda is particularly appalling, and the OLC attorneys are particularly culpable, because the legal analysis in those memoranda seems to contravene rule of law ideals that require a ban on torture.⁴⁷ I already have suggested that the clarity of this demand is less than it first appears. Further, if the rule of law really does demand a meaningful ban on torture, then it becomes hard to say that the United States has consistently or even often been a nation that adheres to the rule of law. Indeed, one might even conclude that the rule of law as it exists in the United States makes room for and rests upon a significant amount of state violence.⁴⁸

I agree with Ohlin and many other commentators that the legal advice provided by OLC attorneys deserves condemnation. Their conduct may even have been criminal under an appropriate mens rea standard. Certainly, it is worth investigating the extent to which they can or should be held to account in criminal, civil, or disciplinary proceedings. But, I do not think that they must be at the top of the list of potential torture defendants; nor do they merit special or distinct condemnation. Indeed, I worry that treating them as particularly culpable will mask the deeper reliance that our legal and political cultures place on state violence, including the possibility of torture.

For his part, Ohlin does not necessarily demand prosecution of the OLC attorneys whose advice facilitated torture. He argues instead that they are entitled to the rule of law in a more modest sense, in the form of respect for their legal rights and application of settled principles of criminal law when deciding whether to bring charges against them – even if they did not extend this respect to the people harmed by their opinions. Ohlin and I may differ on a few issues, but on this larger point, and its importance, we agree.

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⁴⁷ See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681 (2005).

⁴⁸ For a discussion along these lines, see John T. Parry, *Torture Warrants and the Rule of Law*, 71 Albany L. Rev. 885 (2008).