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TORTURE, SUICIDE AND *DETERMINATIO*

JEREMY WALDRON

I. *DETERMINATIO*

Though this is the annual “Natural Law” lecture, I am going to talk mainly about positive law. This is because the best accounts of the nature and importance of positive law come from the natural lawyers.¹ It is the natural lawyers who explain why, even on the most optimistic assumptions about our ability to apprehend natural law principles, even on the most optimistic assumptions about our ability to think through their bearing on the problems of social, economic and political life, we still need positive law to establish an order among us and to render the practical effect of these principles into a more determinate form—a form that can be shared among us and administered as a common point of orientation in our life together.

As the theoretical part of my title suggests, I have in mind Thomas Aquinas’s explication of the way in which human law is derived from natural law—the Latin term he used was “*determinatio*,” which might be translated as “concretization” or “positivization,” but is probably better understood in terms of a few paragraphs of exposition than in terms of a synonym.²

Determinatio, says Aquinas, is a mode similar to “that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape.”³ Natural law principles might indicate that a house should be sturdy and weather-proof, with doors and floors and windows and plumbing, and capable of accommodating safely and comfortably those who have to live in

1. Cf. John Finnis, “On the Critical Legal Studies Movement,” *American Journal of Jurisprudence* 30 (1985): 1606.

2. John Finnis, *Natural Law and Natural Rights* (referred to hereafter as Finnis, *NLNR*) (Oxford: Clarendon Press, 1980), 284n, suggests that while there is no “happy English equivalent” of *determinatio*, “implementation,” would be a rough equivalent. Finnis also refers to Hans Kelsen’s notion of “concretization,” but I think that expresses a slightly different idea, namely, the application of an abstract norm to the real-life conditions of a particular action or incident: see Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 2006), 135.

3. St. Thomas Aquinas, *Summa Theologiae*, I-II, Q. 95, a. 2. (St. Thomas Aquinas, *Treatise on Law* [Chicago: Gateway Editions, 1988], 78-9.)

it. But still, in designing a particular house, the architect has choices to make—choices of detail—which are not governed precisely by the natural law principles to which he is responding.

And something similar may be true for law. Natural law principles—indeed, commonsense moral thinking by itself—might indicate to any sensible person the need to slow down whatever they are driving (a horse and cart or an automobile) when they move from a rural to an urban setting. But human law is needed to specify exact speed limits and determine where exactly the limits kick in (where the signs are posted) and that is a task for *determinatio*.

Or, natural law principles may indicate the importance of keeping promises that one has given to others, but the positive law of contracts, with its detailed rules on contract-formation, offer-and-acceptance, consideration, and breach and liability, will be the product of human work. These details are not given as matter of the initial apprehension of natural law, though it would be wrong to suggest (as some natural lawyers do) that they are therefore in a domain of creativity⁴ or pure will,⁵ as though moral considerations had run out altogether.

(Natural law jurisprudence sometimes exaggerates the distance between the kind of natural law thinking required for the apprehension of basic values and principles, and the kind of thinking required to give these the determinate form of human law. The difference is primarily one of detail and complexity; it is certainly not the difference between rationally constrained thinking and creative will. All natural law thinking involves

4. Robert P. George, “Kelsen and Aquinas on “the Natural-Law Doctrine,” *Notre Dame Law Review* 75 (2000): 1639-40: “[I]nsofar as human law is a matter of *determinatio*, lawmakers enjoy a measure of rational, creative freedom that Aquinas himself analogizes to that of ‘the craftsman [or, as we might say, architect who] needs to determine the general form of a house to some particular shape,’ yet who may design the structure, compatibly with the purposes it is meant to serve, to any of a vast number of possible shapes.” See also Robert P. George, “Natural Law,” *Harvard Journal of Law & Public Policy* 31 (2008): 189: “Like the architect, the lawmaker will in many domains exercise a considerable measure of creative freedom in working from a grasp of basic practical principles. He will direct actions towards the advancement and protection of basic human goods and away from their privations. Through his exercise of creative freedom, he will craft concrete schemes of regulation aimed at coordinating conduct for the sake of the all-around well-being of the community—that is, the common good.”

5. John Finnis, “On the Practical Meaning of Secularism,” *Notre Dame Law Review* 73 (1998): 498, talks of “a sheer *determinatio* whereby one amongst two or more ‘equally’ reasonable options (proposals) is adopted by creative choice (will) for the sake of common good.” I am not sure what the significance of the scare-quotes around “equally” is supposed to be.

reasoning, and I think it extends without discontinuity from initial reasoned insight into natural law principles through to the complex tasks of reasoned detail that *determinatio* requires.)⁶

Another example that Aquinas gave for *determinatio* was the specification of punishment: “[T]he law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.” Again, this is not a matter of creative decision—sentencing is not an art form—and if Aquinas meant to suggest it was (like an architect’s choice of decoration) he was wrong.

Aquinas wrote in the thirteenth century. But we find the same theme of *determinatio* pursued four hundred years later in the natural law doctrine of John Locke.⁷ (Locke did not quite use that word, though he did protest against “undetermined resolutions.”)⁸ Locke’s view was that “[t]he Obligations of the Law of Nature, cease not in Society, but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to inforce their observation.”⁹

The penalties point is familiar, but it is important also to focus on the “drawn closer” part of Locke’s assertion. “Drawing closer”—the business of specification—is necessary even when there is a clear norm underlying the positive law. As John Finnis observes, “the integration of even an uncontroversial requirement of practical reasonableness into the law will not be a simple matter.”¹⁰ For example, nothing is morally more important than the law about murder; that is something we apprehend by pretty straightforward processes of moral thinking. But still details have to be settled, mental and physical elements of the offense specified, patterns of justification and excuse established, degrees of the offense set out, and ranges of punishment laid down. Some of this will involve elements specific to homicide; some of it will involve integrating this offense into the general structures of criminal law, with its characteristic rules of evidence, burdens of proof, and presumptions, etc. The law-maker has to do all this,

6. In all of this, I am trying to get beyond just *quoting* Aquinas over and over again, as many epigones of natural law simply do. I believe we should *think* a little about *determinatio* for ourselves, and not just *copy* Aquinas’s images and formulations. For example, we should not accept his image of the architect, without asking whether law-making at its best might be quite unlike the creative (and aesthetic and artistically idiosyncratic) process that characterizes architecture is at its best.

7. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, §§136-7 (pp. 358-60).

8. *Ibid.*, §137 (360), my emphasis. See also text accompanying note 29 below.

9. *Ibid.*, §135 (357).

10. Finnis, *NLNR*, 283-4.

and his work—when done may look quite unfamiliar to the layman.¹¹ But what appear to the layman to be technicalities are exactly what we need for an administrable law of homicide. “That is why,” as Finnis tells us, “‘*No one may kill...*’ is legally so defective a formulation.”¹²

II. HUMAN, ALL TOO HUMAN

Determinatio is a human process, an aspect of the way in which humans make positive law. The idea is that natural law would be no use to us without *determinatio*.

But here is an important point. It is a mistake to say that *determinatio* is directed at natural law itself, to make it useful as human law. What *determinatio* is directed to, is a *human conviction* about natural law, a *human* opinion or apprehension of what natural law requires in a given area. We don’t apply *determinatio* to something objective in the sky; we apply it to the initial products of our natural law reasoning. Since our natural law reasoning is not infallible, sometimes we will be applying *determinatio* to a conviction or judgment which is not (as we think it is) a true apprehension of natural law. Perhaps we will disagree about this: some people will say that natural law requires one thing in a given area and others will say it requires something different. They will compete to occupy the position of human law-maker, and when one side gets it, it will be to their convictions about natural law (in that area) that they try to give the form of human law. Another way of looking at this is to say that bad products of natural law reasoning as well as good products of natural law reasoning require *determinatio* before they can have the form of human law; mistaken natural law judgments as well as correct natural law judgments must undergo this process if they are to be of any legal use.

III. LEGAL PROCESS

Who does the determining? On whom is this duty and process of *determinatio* incumbent? The normal response is to say that it is the job of “the law-maker,” and usually we cash this out as *legislators*. But there are other law-makers in our society too. Judges make law; is their law-making

11. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994), 229: “[L]egal rules commonly contain much specific detail, and draw arbitrary distinctions, which would be unintelligible in moral rules or principles.”

12. Finnis, *NLNR*, 283.

not also sometimes a matter of *determinatio*?¹³ Natural law jurists seem ambivalent on this. They are anxious that their theories should not give comfort to defenders of judicial activism,¹⁴ but of course there is no denying the fact that a lot of positive law is made in this way.¹⁵

The fact is that natural law becomes determinate positive law in a number of different ways: formal legislative drafting and enactment is one way; framing a constitution is another;¹⁶ the making of treaties is a third;¹⁷ the formation of custom is a fourth;¹⁸ and a fifth would be the emergence of a line of doctrine based on precedent.¹⁹

Sometimes these various operatives of *determinatio* work together. A legislature enacts a statute pursuant to a natural law conviction, shared by its members, that there is a need (in justice or the common good) for a measure of a certain sort; the act of legislation produces a statute which pins down that conviction in a certain amount of technical legal detail. But some provisions of it may not be clear. So, a little later, a judge interprets a

13. George, "Natural Law," 190, says that *determinatio* is "the task of the legislator." He also says that "[n]atural law theory treats the role of judge as itself fundamentally a matter for *determinatio*" (ibid., 191), but I think he means by this that the law-maker specifies a role for the judge rather than that the judge also carries out the *determinatio* function. See also Lee J. Strang, "The Clash of Rival and Incompatible Philosophical Traditions within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition," *Harvard Journal of Law & Public Policy* 28 (2005): 997: "The nature and scope of authority of the judicial office is part of the *determinatio* made by our society."

14. See, e.g., George, "Natural Law," 191: "Natural law theory ... does not presuppose that the judge enjoys...as a matter of natural law a plenary authority to substitute his own understanding of the requirements of the natural law for that of the lawmaker in deciding cases at law."

15. Robert P. George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999), 109, acknowledges this when he says: "[T]he legislator (including the judge to the extent that the judge in the jurisdiction in question exercises a measure of law-creating power) makes the natural law effective for his community by deriving the positive law from the natural law."

16. Russell Hittinger, "Distinguishing between Constitutional Art and Morals," *Southern California Interdisciplinary Law Journal* 4 (1995): 571: "[T]he written Constitution is the *determinatio* of the general moral ideal of submitting government to a rule of law."

17. See Robert P. George, "Natural Law and International Order," in *International Society*, ed. D. Mapel and T. Nardin (Princeton, NJ: Princeton University Press, 1998), 54.

18. Steven D. Smith, "Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium," *Ave Maria Law Review* 5 (2007): 161, notes that customary law might be regarded as *determinatio* of natural law: "Custom ... would not be fully determined by abstract reason alone, but would be a concretization and adaptation of reason in and to particular circumstances—what natural law thinkers have sometimes described as *determinatio*."

19. Finnis, "On the Critical Legal Studies Movement," 25, talks of "the *determinationes* of enactments and judicial precedents."

provision of the statute that seems, as it stands, too indeterminate to settle a particular case before him; he gives it determinate meaning for that case. Another judge following him a year or two later treats this first decision as an authority for interpreting the statute in that way for other cases of a similar sort. And so the process of *determinatio* takes on both a legislative and a judicial component. *Determinatio* happens in stages.

And why stop there? Many statutes respond to felt moral necessity or the exigencies of the common good not by laying down detailed provisions but by empowering an agency, now seized of the problem, to write regulations following statutory guidelines.²⁰ That too is an example of *determinatio*. In fact, *determinatio* in the natural lawyer's sense can be understood also in terms of many, if not all, aspects of what we call *the legal process*, the process by which we move from morally articulated convictions through a number of steps, engaging the competencies of different kinds of institutions, to the detailed resolution of particular disputes.²¹ Though we speak of *determinatio* as a mode of law-making, it evidently includes a lot of what we might otherwise call law-application as well—particular sentencing decisions, for example, on John Finnis's account.²²

I do not necessarily want to take this in a legal realist direction—i.e., I do not want to be read as suggesting that there is no positive law until we get down to the decisions of tribunals in particular cases, or that statutes are just sources of law, not laws themselves. We may have human law, be in possession of human law, even though there is arguably more work by way of *determinatio* to be done. It is intriguing that Finnis, Neil MacCormick, and others have appealed to the idea of *determinatio* as a response to the corrosive skepticism of the Critical Legal Studies movement. The Critics say

20. See, e.g., Edward Rubin, "Law and Legislation in the Administrative State," *Columbia Law Review* 89 (1989): 372-5, and K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, LA: Louisiana State University Press, 1969), 27-51.

21. But it is not always a linear process: sometimes we have the phenomenon of dual-track *determinatio*, as when the same set of moral convictions about individual rights, for example, is positivized both in a national bill of rights and in an international covenant. See Gerald Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55 (2003): 1863-1900, on "dual positivization."

22. See John Finnis, "Retribution: Punishment's Formative Aim," *American Journal of Jurisprudence* 44 (1999): 103. (Again, though, I disagree with Finnis's suggestion that this *determinatio*-judgment is morally unguided: "There is no 'natural' measure of punishment, that is to say, no rationally determinable and uniquely appropriate penalty to fit the crime. Punishment is the tradition's stock example of the need for *determinatio*, a process of choosing freely from a range of reasonable options *none of which is simply rationally superior to the others.*" (Ibid., my emphasis))

that law is pervasively indeterminate; Finnis and MacCormick say, “No, all they have shown is that there is more to be done by way of *determinatio*.”²³

IV. REASONS FOR *DETERMINATIO*

If *determinatio* is done in stages, then obviously we can have more or less of it. Should we say, generally, that the law-making process is not complete until there is nothing more that could conceivably be done in the way of *determinatio*? Is it necessary to resolve every last detail of the law-making project?

I do not think so. There may be reasons for and reasons against pinning things down to a given degree. A law-maker specifies a speed limit, I said, by way of *determinatio* of the natural law conviction that care should be taken with dangerous activities in a way that is sensitive to the different kinds of danger associated with their use in a given set of circumstances. He may stipulate 45mph; or he may do what law-makers in New Zealand used to do—designate some areas as “limited speed zones,” without a lower-than-usual numerical speed limit but with an instruction to drivers to pay particular attention to whether their speed is reasonable given the changing circumstances attending the daily rhythms of life in the areas in question.²⁴ Sometimes we do better by giving legal subjects a relatively indeterminate direction and asking them to use their judgment (in self-application of the standard)²⁵ rather than holding them to a rigid rule. We do this all the time. We do it in constitutional law; for example, the Eighth Amendment, invites law-makers to make their own judgments of what would be “*excessive* bail” and “*excessive* fines.” We do it in private law: think of the duty of *reasonable* care. And so on. It does not mean that the subject has *carte blanche* or that his judgment, in self-application of the standard, cannot be second-guessed or pronounced upon by a court. But the

23. Finnis, “On the Critical Legal Studies Movement,” 23-24 (suggesting that some of the CLS critique of indeterminacy can be answered by considering the various ways in which law goes about resolving terms that might seem abstract or indeterminate). See also Neil MacCormick, “Reconstruction after Deconstruction: A Response to CLS,” *Oxford Journal of Legal Studies* 10 (1990): 548.

24. http://en.wikipedia.org/wiki/Speed_limits_by_country : “The letters LSZ (Limited Speed Zone) indicate that the limit is 100 km/h unless conditions (visibility, road condition, rain, many other road users) would make this unwise, in which case it is 50 km/h.”

25. Should we regard “self-application” as also a moment of *determinatio*? For a discussion of self-application as an integral part of the legal process, see For discussion of the idea of self-application, see Henry M. Hart, and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge and Philip P. Frickey (St. Paul, MN: Foundation Press, 1994), 120-21.

aim of the judicial process is not necessarily to shift us from a relatively indeterminate legislative standard to a judicially-crafted rule. Sometimes we want to let the legislative norm stand *as a standard*. We welcome and we want to facilitate the exercise of judgment that it invites.

Determinatio is not a process engaged in arbitrarily; it is undertaken for reasons. And those reasons may or may not be unrestricted in their force, may or may not lead us inexorably from the urgency of *determinatio* in one moment of the legal process to the urgency of *determinatio* in another. Let us think about those reasons. Why do we need *determinatio* in the first place? Why do we need determinate human law, if we have natural law? One is reminded of Hans Kelsen's quip: Why do we need a flashlight in the sunshine?²⁶

The primary thought, I guess, is that we need a law that is administrable as an organized system of justice here on earth. We need to take the insights and convictions delivered by natural law reason and make them apt for use by courts, by those to whom a system of justice must delegate and distribute its powers, and make it part of a usable whole in which hundreds or thousands of such insights are made jointly administrable, with a minimization of tension, redundancy and cross-purposes.

Apart from such bureaucratic necessities—and I don't at all use "bureaucratic" with the usual sneer—there is also the question of making law serviceable to individuals to use in guiding, governing and monitoring their own actions. H.L.A. Hart, in a rare acknowledgement of considerations pursued more thoughtfully by Lon Fuller, says we should consider

what is in fact involved in any method of social control ... which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be.²⁷

26. Hans Kelsen, "The Natural-Law Doctrine before the Tribunal of Science," *Western Political Quarterly* 2 (1949): 485-6: "If ... positive law is valid only insofar as it corresponds to the natural law and if it is possible- as the natural-law doctrine asserts- to find the rules of natural law by an analysis of nature; if, as some writers assert, the law of nature is even self-evident, the positive law is quite superfluous. ... [T]he activity of positive-law makers is tantamount to a foolish effort to supply artificial illumination in bright sunshine. This is another consequence of the natural-law doctrine. But none of the followers of this doctrine had the courage to be consistent. None of them has declared that the existence of natural law makes the establishment of positive law superfluous."

27. Hart, *Concept of Law*, 207.

Determinatio is partly a matter of ensuring that people are governed by norms meeting these requirements. One of the functions of law is to guide action, and one of the functions of making human law is to ensure that there is an intelligible standard for people to take on board and use as a basis of monitoring and controlling their own behavior.²⁸

I mentioned earlier John Locke's observation that human lawmakers annex "known Penalties" to "[t]he Obligations of the Law of Nature" and formulate them so that they are "drawn closer" than they are in people's natural law thinking. Locke goes on to say, in a passage of great importance for our understanding of the connections between positive law, *determinatio*, and rule-of-law ideas, how important it is for the legislature to render our understandings of natural law into "promulgated standing Laws," not to "govern by ... extemporary Dictates and undetermined Resolutions."²⁹ Locke refers to the latter—governance "by extemporary Dictates and undetermined Resolutions"—as *arbitrary* rule.³⁰ But by that he doesn't mean only that it may be oppressive, or not properly reasoned from a natural law point of view, but also and most importantly that it may be *idiosyncratic* and, in that sense, leave us no better off than we were in the state of nature where there was no telling whose natural law reasoning we might be exposed to, or what the natural law reasoning of our collaborators or our adversaries in social life might be. Natural law is not available as an innate deliverance of conscience; it requires hard intellectual work in real time.³¹ And, since it works in areas where what John Rawls called the burdens of judgment³² are to be apprehended, people are likely to come to different conclusions—different wholesale or different in detail. So if they have not properly set up a single civil system of justice with promulgated *determinationes* of natural law ideas, then, as Locke puts it,

28. This is partly a matter of facilitating the possibility of this sort of governance; it is partly also, as Fuller observed, a matter of respecting the dignity of the individual subjects; and it is also partly a matter of respecting the subjects' own need for certainty and predictability in their affairs. See Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), 162-3. See also Jeremy Waldron, "Dignity, Rank, and Rights," in *The Tanner Lectures on Human Values*, vol. 29, ed. Suzan Young (Salt Lake City, UT: University of Utah Press, forthcoming 2010). These lectures are also available at <http://ssrn.com/abstract=1461220>.

29. See also footnotes 7-8, above.

30. Locke, *Two Treatises*, II, §§136-7 (358-60).

31. See Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), 68-70.

32. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 54-58.

[m]ankind will be in a far worse condition, than in the State of Nature, if they shall have armed one or a few Men with the joynt power of a Multitude, to force them to obey at pleasure the exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justifie their actions.³³

We have had enough of being surprised by different people's unpredictable natural-law reasoning in the state of nature. Now we want a steady piece of well-formed positive law that can stand in the name of us all, whoever is administering it. The concern is to have something tangible, something we can share and look to as a point of common orientation. "For the Law of Nature being unwritten, and so no where to be found but in the minds of Men"³⁴ we need "settled standing Laws,"³⁵ properly positivized as a basis for our life together.

So, for example, Locke famously held that natural law thinking would lead people to conclusions about individual property:³⁶ it might lead them to say things like "Jones clearly owns that paddock, which he has been working on for years, even though Smith has been using it as a hunting ground" and "It is wrong of Smith to take those apples which Jones has gone to the trouble of gathering." But his theory of property is complicated and in some respects counter-intuitive; people embarking on the same trail of natural law reasoning that Locke followed might take different turns at various points, developing theories based around occupancy instead of labor, for example, or using different conceptions of labor. So: Jones might find himself in conflict with Smith, with their respective natural law theories of property at odds. They need something settled between them.³⁷ And what they need settled are not just the general principles of these conceptions but also the details: "the paddock that Jones has been working on" is not a legally adequate description; they need surveys, boundaries, precise measures of rods and perches, doctrines of accretion and avulsion, procedures for conveyancing and so on. All this is the work of positive law; it is all a matter of *determinatio*. They need this as something they share, so that they will not be subject to unpleasant surprises in their dealings with one another.

33. Locke, *Two Treatises*, II, §137 (360).

34. *Ibid.*, §136 (358).

35. *Ibid.*, §137 (359).

36. *Ibid.*, §§25-34 (285-91).

37. See Immanuel Kant, *The Metaphysics of Morals*, ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996) ??.

V. EVALUATING *DETERMINATIO*

In the jurisprudence of Aquinas, Locke, and Finnis, *determinatio* is a matter of necessity—positivized law is necessary, practically necessary, in most cases morally necessary. Like any other practically necessary process that happens in real time, this one can be evaluated as done better or worse. It can be a botched job; it can be dangerously incomplete; or it can be, as I have hinted already, an enterprise carried too far. I repeat: we should not always assume that the more *determinatio* the better. Certain people may have an ideal of the rule of law as the rule of fully determinate and operationalized rules,³⁸ but some of the practical necessities affecting the transition from natural law to human law may pull us in the opposite direction.

Locke suggests that it is arbitrary to be subject to someone's unpredictable interpretation of a standard, but there is also a different form of arbitrariness that arises from precision. In almost all cases when we replace a vague standard with an operationalized rule, the cost of diminishing vagueness is an increase in arbitrariness. We specify a number, but cases just a little bit below that number might seem to be excluded arbitrarily.³⁹

Or consider this. We worry that the absence of a bright-line rule may chill individual action in the vicinity of the rule, preventing people from approaching even the area within which they conjecture a given prosecutor or judge might just decide to draw a line. This is the problem that imprecision poses for liberty. But in some contexts we might take an adverse view of that complaint, for we don't necessarily want to buy into the classic "bad-man" attitude towards the law.⁴⁰

I want to push the envelope as much as I can, I want to get as close as possible to offending, without actually crossing the line; and I want an

38. Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175-88.

39. Cf. Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1689: "Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but not all of those who lack this faculty. And it will incapacitate some who actually possess it. From the point of view of the purpose of the rules, this combined over and underinclusiveness amounts not just to licensing but to requiring official arbitrariness. If we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of 'free will' directly to the facts of each case."

40. See Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897): 457-78.

assurance of immunity from prosecution as I do this. That's why I need the law to be determinate and its administration fully predictable.

This attitude, which might seem appropriate in some cases, will seem quite inappropriate in others; and it may be part of the wisdom associated with an intelligent participation in *determinatio* to be able to know the difference.

Well—this is where torture and suicide come in. I want to use the examples of the law relating to torture and the law relating to suicide to illustrate some of the points I have just made about *determinatio*.

VI. ASSISTED SUICIDE

I will begin with suicide, and my example is going to be drawn from the other side of the Atlantic. In 1961, the Westminster Parliament abolished the offense of suicide for England and Wales.⁴¹ Killing oneself or attempting to kill oneself was no longer an instance of homicide or attempted homicide (as it had been under Common Law). However, suicide was not wholly decriminalized. Section 2(1) of the 1961 Suicide Act provided that “[a] person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction ... to imprisonment for a term not exceeding fourteen years.”⁴² Assisting suicide, in other words, remained an offense. The difference is that it is now a primary offense in its own right, no longer ancillary to (no longer a mode of complicity in) suicide itself as a principal offense. But it is an offense whose prosecution is hedged around with safeguards. Section 2(4) of the statute provides that no proceedings shall be instituted for

41. Suicide Act 1961, ch. 60, section 1: “The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.” This statute is available at http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1961/cukpga_19610060_en_1.

42. *Ibid.*, section 2 (1). Note that this subsection has since been superseded by the following provision of the Coroners and Justice Act 2009, ch. 25, section 59 (2): “In section 2 [of the Suicide Act 1961] (criminal liability for complicity in another’s suicide), for subsection (1) substitute— “(1) A person (“D”) commits an offence if— (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D’s act was intended to encourage or assist suicide or an attempt at suicide. (1A) The person referred to in subsection (1)(a) need not be a specific person (or class of persons) known to, or identified by, D. (1B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs. (1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years.” This statute is available at http://www.opsi.gov.uk/acts/acts2009/ukpga_20090025_en_1.

assisting a suicide except with the consent of the Director of Public Prosecutions (DPP).⁴³

As in America, there has been considerable pressure in the U.K. for people to be helped to end their lives when they can no longer endure the suffering, debilitation, and indignity brought on by an incurable disease. Some jurisdictions in Europe permit this (as do some state jurisdictions in the United States).⁴⁴ There are clinics, for example, in Switzerland which provide facilities for the people who are brought there by their loved ones to end their lives carefully and painlessly. But there are no such facilities in Britain; their operation would be unlawful under section 2 (1). So, some people travel to Switzerland. In the nature of things, because of the condition they are in, they usually need the presence and help of loved ones for this last journey, though the loved ones' assistance in the actual process of death is not required at the clinic. In a number of famous incidents, the Director of Public Prosecutions has declined to give his consent to the prosecution of families or loved ones who have gone through this process.⁴⁵ But until recently, that official has not made clear the principles on which he bases these decisions.

In a decision last year by the House of Lords—acting as a court, acting for the very last time as a court (before its functions were taken over by a new Supreme Court, properly separated from the legislature),⁴⁶ indeed in the very last judgment ever issued by the House of Lords, the Law Lords unanimously decided to instruct the DPP to issue public guidelines on this matter. I know; I was there, as a participant in a judicial-academic

43. Suicide Act 1961, ch. 60, section 2 (4)

44. In the United States, assisted suicide is legal in Oregon, Montana and Washington: see, e.g., Oregon's Death with Dignity Act 1984 (Oregon Revised Statutes 127.800-995). In Europe, assisted suicide is lawful, in one form or another, in Belgium, Luxembourg, the Netherlands, and Switzerland.

45. For example, in December 2008 the Director decided not to prosecute the parents of Daniel James., aged 23, who was paralyzed as a result of a serious spinal injury in a rugby accident. Mr. James had travelled with his parents to Switzerland to end his life at the Dignitas clinic. According to Richard Edwards, "Couple will not be Prosecuted over Son's Suicide," *The Daily Telegraph*, December 10, 2008, 5, the DPP, Keir Starmer, said: "This is a tragic case involving as it does the death of a young man in difficult and unique circumstances. While there are public interest factors in favour of prosecution, not least of which is the seriousness of this offence, I have determined that these are outweighed by the public interest factors that say that a prosecution is not needed. I would point to the fact that Daniel, as a fiercely independent young man, was not influenced by his parents to take his own life and the evidence indicates he did so despite their imploring him not to."

46. The final court of appeal in England is no longer the Judicial Committee of the House of Lords. That body's judicial functions were transferred to a new Supreme Court for England and Wales, in 2009.

conference gathering together scores of chief justices and other apex judges from around the world, and some academics too, to celebrate the demise of the House of Lords as a court, and to discuss the role of the supreme courts in the modern world.⁴⁷ The case was *R. (on the application of Purdy) v. Director of Public Prosecutions*.⁴⁸ Deborah Purdy is a young woman suffering from an incurable and progressive form of multiple sclerosis, diagnosed in 1995.⁴⁹

By 2001 she was permanently using a self-propelling wheelchair. ... [S]he has lost the ability to carry out many basic tasks for herself. She has problems in swallowing and has choking fits when she drinks. Further deterioration in her condition is inevitable. She expects that there will come a time when her continuing existence will become unbearable. When that happens she will wish to end her life while she is still physically able to do so. But by that stage she will be unable to do this without assistance. So she will want to travel to a country where assisted suicide is lawful, probably Switzerland. Her husband ... is willing to help her to make this journey.

But naturally, Ms. Purdy did not want to implicate her husband in this if he would face the prospect of prosecution. The DPP's recent decisions gave some indication that this might not happen. But they could not be sure; hence their request for guidelines.

When the Law Lords gave their decision, Ms Purdy was overjoyed. I was there: you could see it in her face. She said to the press afterwards that her legal victory was not about death, but about life.

It gives me my life back. I want to live my life to the full, but I don't want to suffer unnecessarily at the end of my life. This decision means that I can make an informed choice, with Omar, about whether he travels abroad with me to end my life because we will know exactly where we stand.⁵⁰

Her thought was that if her husband could not travel with her, she would have to undertake her journey to Switzerland quite soon. But if the DPP

47. "The Role of Supreme Courts: A Judicial/Academic Conference," organized by the office of the Lord Chief Justice and King's College, London, July 2009.

48. *R. (on the application of Purdy) v DPP* [2010] 1 A.C. 345. I will cite this case hereafter as *Purdy*.

49. This description and the paragraph that follows are adapted from Lord Hope's summary of the facts in *Purdy*, 381-2 (§17).

50. "'Right to Die' Campaigner Debbie Purdy in House of Lords Ruling," *The Times*, July 31, 2009. See also the observation of Lord Hope in *Purdy*, 387 (§31): "[S]he wants to be able to make an informed decision as to whether or not to ask for her husband's assistance. If the risk of prosecution is sufficiently low, she can wait until the very last moment before she makes the journey. If the risk is too high she will have to make the journey unaided to end her life before she would otherwise wish to do so."

issued guidelines indicating that persons in his situation were unlikely to be prosecuted, she could postpone her journey for a few years and then travel with him by her side.

Interim guidelines were released by the DPP office in September 2009, and a complete set of final guidelines were issued on February 25, 2010.⁵¹ They provide no cast-iron guarantee for the sort of case that Ms Purdy and her husband present but many of the factors that the DPP says will militate in the public interest *against* prosecution do seem to apply to their case. The Guidelines say that a prosecution “is less likely to be required” if:

- (1) the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
- (2) the suspect was wholly motivated by compassion;
- (3) the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
- (4) the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
- (5) the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide....⁵²

One thing in particular the DPP needed to clear up was how the law would regard the question of financial benefit. It is often said that the prospect of material benefit would normally count in favor of a prosecution. For example, in his decision concerning the possible prosecution of the parents of Daniel James,⁵³ the DPP had weighed the fact that the parents did not stand “to gain any advantage, financial or otherwise, by his death.”⁵⁴ But as Lord Hope noted in *Purdy*, this may not always be the case in an intimate family situation. In the assisted suicide context, the person assisting will often be a spouse who stands to benefit in the ordinary course of law from their loved one’s estate.

[A] relative might derive some benefit under the deceased's will or on intestacy. The issue whether the acts of assistance were undertaken for an improper motive will, of course, be highly relevant. But the mere fact that some benefit might accrue is unlikely, on its own, to be significant.⁵⁵

51. For the interim policy, see http://www.cps.gov.uk/consultations/as_consultation.pdf. For the final guidelines (February 2010), see http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf

52. *Ibid.*, §45.

53. See footnote 45 above.

54. See *Purdy*, 394 (§51), per Lord Hope.

55. *Ibid.*, 395 (§53).

It was therefore important to clarify that financial benefit, in and of itself, would not necessarily be treated as a factor favoring prosecution.

I believe we can look upon these guidelines—the listed factors that count against prosecution and the somewhat longer list that count in favor as a *determinatio* of the natural law conviction that actively assisting suicide must be prohibited even if suicide itself is not. The statutory provision itself (section 2(1) of the Suicide Act, as amended) is a *determinatio* of that proposition; but it is not complete. One can imagine that further work might have been done by the courts, asking for example: How direct does the assistance have to be? How substantial? For there is clearly a difference between (say) concocting a poison for someone or giving them a leg up over a fence that enables them to jump off a bridge, on the one hand, and buying a book about end-of-life issues, on the other hand. A prosecution in the former case might seem appropriate; in the latter case absurd. In between there is this quite problematic issue of travelling with someone who is determined to go abroad to a euthanasia clinic. This is the role envisaged for Ms. Purdy’s husband—travelling with her to Switzerland, seeing that she gets on and off her flight, getting a taxi to the clinic, and so on. It is arguable that these actions would count as complicity in suicide if suicide were still a principal offense. But given that suicide is not unlawful, there is a question about whether the offense of assisted suicide is still to be governed by the same logic or whether aiding and abetting should be taken now to refer only to some more substantial intervention, something more directly related to the act of suicide.⁵⁶ Just as a judge might try to clarify it through the precedential effect of his decision, so a state official such as the DPP might try to clarify it through an articulation of the way his office understands this crime. Either or both of these would be part of a process of *determinatio*.

We might also read the DPP’s guidelines as an elaboration of the principle, implicit in section 2 (4) of the Suicide Act that instructs him to consult the public interest in deciding about each possible prosecution. The public interest is important I guess in every exercise of prosecutorial discretion, but it is particularly important here where there is a specific instruction that the consent of the DPP must be obtained. This reflects the

56. I do not agree with the comment of Lord Phillips in *Purdy*, 379 (§4), quoting *Smith & Hogan Criminal Law: Cases and Materials*, 12th ed. David Ormerod (Oxford: Oxford University Press, 2008), that the words “aids, abets, counsels or procures” (or “encourage or assist”) should be interpreted in exactly the way they would be interpreted to define criminal complicity if suicide had remained an offense. It is not unreasonable to suppose that the logic of “assisting” is necessarily different from that of complicity when there is no longer a primary offense to be complicit in.

special sensitivity of the matter, in circumstances where opinions in the community are both divided and very deeply felt. In these circumstances, the public interest will favor prosecution in some such cases and not others; and the House of Lords required the DPP to issue guidelines to put flesh on that skeletal description of the matter by determining more closely the various ways in which the public interest is officially deemed to bear upon the matter.

The Law Lords did not use the language of *determinatio*. The framework they used was that of the familiar limitation provision in the European Convention of Human Rights. Arguably the prohibition on assisting suicide is a restriction on Ms. Purdy's and her husband's conduct of their personal lives under Article 8 of the ECHR (as incorporated into English law by the Human Rights Act).⁵⁷ No doubt the English authorities can make a case that some such prohibition is necessary "for the protection of health or morals," which is a recognized head of necessity under Article 8 (2). But Article 8(2) insists that any restriction permitted under this heading must be a restriction "in accordance with the law." By itself, necessity for the protection of health or morals is not enough. And this, the Lords said, must be understood not just as requiring the restriction to take legislative form, but as requiring it to conform to principles of legality, including reasonable certainty about the scope of its application.⁵⁸ As Lord Hope put it:

The word "law" in this context is to be understood [as implying] ... accessibility and foreseeability. ... A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary.⁵⁹

So: although they do not use the language of *determinatio*, the Lords' emphasis on giving the administration of this statute a legal form is quite close to the idea we have been considering. To use Locke's phrase, they are saying that it is not enough for the DPP to work in each case on the basis of his own "undetermined resolutions" about what morality or the public

57. European Convention on Human Rights, article 8: "*Right to respect for private and family life*. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the of the rights and freedoms of others."

58. *Purdy*, 390-1 (§§40-43) per Lord Hope, and 399 (§67) per Baroness Hale.

59. *Ibid.*, 390-1 (§41) per Lord Hope.

interest requires,⁶⁰ he must give his work a legal form; he must take the basis on which he thinks he is acting and give it the determinate form of positive law.

VII. FINNIS V. *PURDY*

I have offered a sympathetic reading of the decision in *Purdy*. John Finnis in a research paper takes a wholly different view.⁶¹ He characterizes Ms. Purdy and others like her in a most unsympathetic light as “a class of persons eager to violate a legal obligation, or to incite others to do so, if confident that prosecution is unlikely.”⁶² And he describes the unanimous decision of the House of Lords, requiring the DPP to set out guidelines as an “astonishing conclusion,” adding that “[i]t is hard to imagine a more unfitting end to their great jurisdiction.”⁶³ Professor Finnis also rejects the analysis that the Law Lords gave under Article 8(2) of the ECHR, asking “why ... the measure of the ‘accessibility and foreseeability’ of [the] law’s operation [should] be the desires of an individual who wishes to promote the commission of an offence.”⁶⁴

Most important for our purposes, Finnis is of the opinion that “[t]he terms of s. 2 of the Suicide Act 1961 are entirely clear.”⁶⁵ The statutory provision prohibiting people from assisting others in committing suicide does not require any further work by way of *determinatio*. In Finnis’s view, Ms. Purdy’s demand for further elaboration of prosecution policy under this provision was wholly corrupt—being the demand of somebody who wanted their friends to be able to sail right up to the edges of the effective prohibition, pushing the envelope if need be, while at the same time avoiding any real risk of prosecution to vindicate the underlying policy of the law.

60. See text accompanying note 33, above.

61. John Finnis, “The Lords’ Eerie Swansong: A Note on R (Purdy) v. Director of Public Prosecutions,” Oxford Legal Studies Research Paper No. 31/2009 and Notre Dame Law School Legal Studies Research Paper No. 09-39; available at <http://ssrn.com/abstract=1477281>.

62. *Ibid.*, 1.

63. *Ibid.*, 2 and 9.

64. *Ibid.*, 4.

65. *Ibid.*, 4-5. Finnis adds: “[W]hatever the circumstances in which the applicant might invite assistance, and whatever the guidance or guidelines the DPP might have issued, she knew before these proceedings, knows now, and would know at any future time, that she would be inviting her assistant to break the law articulated in s. 2(1).”

Obviously, I am not convinced by this critique. I think the statutory provision *is* genuinely unclear; the DPP has provided guidelines for the exercise of similar discretion for other statutes whose prosecution is committed to his care; and it is not unreasonable for Ms. Purdy and others like her to look for guidance as to the law's attitude to companionate assistance in compassionate cases, particularly when (as everyone knows) the primary offense of suicide was abolished because of changes of attitude among a wide section of society towards these matters. It is not unreasonable for her to have asked for further guidance given the ambivalence reflected both in the definition of the offense such as it is and in the pattern revealed by the DPP's recent decisions.⁶⁶ I will say more about all that in a moment.

However, I also want to say that the *form* of Professor Finnis's objection is entirely familiar to me, and I wholly agree with him that in principle it is a form or type of objection that we should take very seriously. Some requests for *determinatio* are corrupt; some of them do just involve a person with a bad attitude towards law demanding an envelope to push, a bright line to sail up to in a wholly cynical manner. Finnis and I disagree about whether Purdy's request for clarification on assisted suicide is such a case. I wonder, though, whether he will agree with me about a quite different example.

VIII. TORTURE

In 2002-3, the world became aware that the United States government was using and proposed to continue using modes of coercive interrogation against people suspected of terrorism or complicity in attacks upon US and NATO forces in Iraq and Afghanistan—modes of coercive interrogation that many people were inclined to classify as torture. Now, torture is utterly forbidden under US law⁶⁷ and international law⁶⁸ and the prohibition is absolute, not being subject to any of the possibilities of derogation in time of emergency that might attend other human rights requirements.⁶⁹ But

66. See, e.g., footnote 45 above.

67. 18 USC 2340A (2000).

68. International Covenant on Civil and Political Rights (ICCPR), Article 7.

69. See *ibid.*, Article 4: (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

some Bush administration lawyers have sought to show that the interrogation techniques actually being used—things like sleep deprivation, beatings (some detainees were beaten to death), stress positions, water-boarding, and intimidation with dogs—fell just short of torture; and they undertook what purported to be an elaboration of the US. anti-torture statute, along with other laws relating to torture, to show that that was indeed the case.⁷⁰

Now, “torture” is a vivid term, and for most of us it summons up grisly and distressing images of practices that fall indisputably within its sphere of reference. But its boundaries do seem to be contestable. Is sleep deprivation torture? What about forcing people to stand in a stressed position for many hours? Did the shenanigans practiced by National Guard reservists like Charles Graner and Lynndie England at Abu Ghraib in 2003 rise (or sink) to the level of torture or were they just brutal exercises in degradation?⁷¹ Is water-boarding a form of torture?

The US anti-torture statute makes it an offense punishable by up to 20 years imprisonment to commit, conspire or attempt to commit torture (or punishable by death or life imprisonment if the victim of torture dies as a result).⁷² And the statute defines torture as follows: “[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 ... upon another person within his custody or physical control.”⁷³ Unfortunately this definition does not remove the indeterminacy; it just helps to identify its source. Torture is vague, in large part because the phrase “severe physical ... pain or suffering” is vague. More specifically, as applied to pain or suffering, the word “severe” is vague in a very straightforward sense. Severity is a continuum, but the use of the word “torture” in §2340A presupposes that we can say, of a given application of pain and suffering, that it either is severe or it is not.⁷⁴

(2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.”

70. See the discussion in Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House,” *Columbia Law Review* 105 (2005): 1681-1750, reprinted in Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), Ch. 7.

71. See, for example, the photographs in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004), 217-24.

72. 18 USC 2340A (2000).

73. 18 USC 2340 (1).

74. Notice that the problem of vagueness is not the problem of the subjectivity of pain and suffering—though that may be a problem of a different sort in the application of §2340A. Even if we had clear insight into each other’s mental states, even if pain and

In 2002, John Yoo and Jay Bybee working in the Office of Legal Counsel (OLC) within the Justice Department, sought to provide a more precise understanding of “severe pain” and thus of torture. They were both law professors in civilian life—John Yoo still is, while Jay Bybee is now a senior federal judge. But in 2002 they were not just acting as scholars setting out their opinion about the interpretation of the anti-torture statute, nor merely as private legal advisors to those above them. The OLC is an official body, articulating and elaborating legal rulings which are to be treated as authoritative;⁷⁵ its work is part of the complex legal process of *determinatio* that attends much modern law. In an August 2002 memo to the White House, Yoo and Bybee offered a clarification of the anti-torture statute, which would be binding within the Executive. It defined *severity* in terms of the level of pain characteristically associated with certain organic events such as death or organ failure.⁷⁶

Their account had two other characteristics: (1) it furnished what some have described as the most lenient interpretation conceivable to anti-torture provisions;⁷⁷ and (2) it was described by one expert, Harold Koh, as perhaps the most clearly erroneous legal opinion he had ever read.⁷⁸ It certainly is a shocker: the failure of logic in its central moves are so egregious that it is

suffering were interpersonally comparable, there would still be a problem of vagueness with “severe.” Our ability to measure pain objectively would no more settle the marginal application of “severe” than our ability to count hairs settles the marginal application of “bald.”

75. For a fine account, see Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W.W. Norton & Co., 2007), 9, 32-9, 79-80. Goldsmith succeeded Bybee as head of OLC.

76. Jay Bybee, Standards of Conduct for Interrogation under 18 U.S.C. 2340–2340A, Memorandum from the Justice Department’s Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush. August 1, 2002, reprinted in *The Torture Papers: The Road to Abu Ghraib*, ed. Karen J. Greenberg and Joshua Dratel (Cambridge: Cambridge University Press, 2005), 172. It is a matter of record that John Yoo did most of the writing for this memorandum: see Maria L. La Ganga, “Scholar Calmly Takes Heat for His Memos on Torture,” *Los Angeles Times*, May 16, 2005, A1.

77. See, e.g., Julie Angell, “Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel,” *Georgetown Journal of Legal Ethics* 18 (2005): 559, and Michael Traynor, “Citizenship in a Time of Repression,” *Wisconsin Law Review* 3 (2005): 5.

78. See also Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States*, 109th Cong. 1st sess., 2005 (Serial No. J-109-1), 534-37 (statement of Harold Koh, Dean of Yale Law School), describing the Bybee memorandum as “as offering “a definition of torture so narrow that it would have exculpated Saddam Hussein,” and as “a stunning failure of lawyerly craft.”

impossible to attribute it simply to bad judgment.⁷⁹ This was work so bad by lawyers of such proven academic competence that it can only have been a conscious and devilish attempt to deliberately twist and distort the meaning of the law. But I don't want to argue that today.⁸⁰

Let us focus on the enterprise that Yoo and Bybee undertook. They wanted to make the prohibition on torture legally more precise. Some of the legal materials do little more than repeat the natural law conviction that torture is wrong in all circumstances.⁸¹ But the US anti-torture statute (following the more specific international Convention Against Torture) began the process of *determinatio* with the definition that it offered;⁸² and Yoo and Bybee were offering to complete that process by pinning down a determinate meaning for "severe pain."

Now, why? Why did they think this further step of *determinatio* was necessary? The usual response is to point out that if the terms of a legal prohibition are indeterminate, the person to whom the prohibition is addressed may not know exactly what is required of him, and he may be left unsure as to how the enforcement powers of the state will be used against him. Soldiers, CIA agents and other officials have an interest as individuals in anticipating and avoiding war crimes or other prosecutions. Many would say that inasmuch as the anti-torture statute threatens serious punishment (capital punishment in some cases), there is an obligation to provide a tight definition so that the persons affected know where they stand.

On the other hand, the charge of torture is unlikely to come "out of the blue" or be entirely unanticipated by someone already engaged in the deliberate infliction of pain on prisoners. It is not as though they are going to be taken by surprise: "I am shocked—*shocked!*—to find that waterboarding or setting dogs on prisoners is regarded as torture." For remember we are talking about a particular element in the definition of torture: the severity element. The concerns about imprecision that Yoo and Bybee purport to address are the concerns of potential defendants who have been, are, or may in the future be deliberately inflicting *considerable* pain on

79. Cf. Assistant Deputy Attorney General David Margolis' revision of the verdict of the Office of Professional Responsibility investigating the matter: "No Misconduct Found in Interrogation Memos," *New York Times*, February 19, 2010.

80. For substantiation, see Waldron, "Torture and Positive Law," 1707-9. For "devilish," see Jeremy Waldron, "What Can Christian Teaching add to the Debate about Torture?" *Theology Today* 63 (2006): 340-1 (reprinted in Waldron, *Torture, Terror and Trade-offs*).

81. This is the case, for example, with ICCPR Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." There is no definition of any of these terms in the ICCPR.

82. See above text accompanying note 73.

detainees already, and who just want to know where exactly the severity line is, so that they can push up against it, but not be seen to cross it. They already have the electrodes plugged in and the dial turned up to 4 or 5; they want to know how much higher they can go.

Is this a respectable request—respectable, for example, from the point of view of the natural-law conviction embodied in the existing law, namely, that torture is absolutely wrong? Is it respectable from the point of view of the undertaking, on the part of national and international law, to give that conviction positive form? From these points of view, do the people who are supposed to be constrained by the norm in question have a legitimate interest in pressing up as close as possible to the edges of the norm, and thus a legitimate interest in having a bright line definition of severity stipulating exactly what is permitted and exactly what is forbidden? The idea is that if the prohibition can be understood as a delineated threshold on a continuum of some sort, then the subject knows that he is on the continuum and that there is a point at which his conduct might be stigmatized as criminal. Does he have a legitimate interest in being able to move as close to that point as possible, with its precise location settled clearly in advance?⁸³

An example of someone who does have such a legitimate interest might be a tax-payer who says, “I have an interest in arranging my affairs to lower my tax liability much as possible, so I need to know exactly how much I can deduct for business expenses.” Another example is the driver who says, “I have an interest in knowing how fast I can go without breaking the speed limit.” For those cases, there does seem to be a legitimate interest in having clear definitions. Compare them however to some other cases: the husband who says, “I have an interest in pushing my wife round a bit and I need to know exactly how far I can go before it counts as domestic violence” or the professor who says “I have an interest in flirting with my students and I need to know exactly how far I can go without falling foul of the sexual harassment rules.” There are some scales one really should not be on, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go.

I believe torture falls into this category, and I argued that in my 2005 *Columbia Law Review* paper on “Torture and Positive Law.”⁸⁴ Our entire legal tradition takes the position that torture is to be avoided absolutely and at all costs. To this end, it is understood that the laws prohibiting torture are hedged around with other prohibitions—for example prohibitions on

83. Some material here is adapted from Jeremy Waldron, “Vagueness in Law and Language—Some Philosophical Perspectives,” *California Law Review* 82 (1994): 534-6.

84. Waldron, “Torture and Positive Law,” 1701-3.

inhuman and cruel treatment and general prohibitions on brutality and assault—part of whose function is to ensure that the boundary of torture, wherever it is, is not even approached, and certainly not approached as an envelope to be pushed or as bright line to sail up to.⁸⁵

No doubt official adoption of this attitude towards torture will chill the interrogators' sense (and their masters' sense)⁸⁶ of what they are allowed to do when they question detainees. They might complain that they are unreasonably deterred from performing acts that are in fact just short of torture. (But think how we would respond to a similar complaint in either the domestic violence or sexual harassment cases I mentioned.) Or the interrogators may put the point in a more sophisticated way. They might say that there *is* a continuum that they are legitimately on, namely a continuum of *forceful* interrogation—nothing wrong with that, they will say—but they do need to know how far they can move along *that* continuum before running foul of the prohibition on torture. But the answer is fairly straightforward. Interrogation can be forceful, discomfiting, and maybe even coercive, without involving the direct and deliberate imposition of pain to secure answers. The question of torture comes up only when one moves from the continuum of forcefulness to *a continuum of deliberate pain-infliction*. And having made that move, a person should be conscious of being already in dangerous territory. At that stage, I am not aware of any good reason why we (society and the law) should be afraid of people's actions being "chilled." A definition of torture that rests with a prohibition on the deliberate infliction of severe pain seems fine, and I don't see that anyone has a legitimate reason for demanding that the prohibition be (in Locke's phrase) "drawn closer" than that.

85. But see also Jeremy Waldron, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves," available at <http://ssrn.com/abstract=1278604> and reprinted in Waldron, *Torture, Terror and Trade-offs*, 277-8.

86. Bear in mind that, even if there is a legitimate interest on the part of potential individual defendants in having a precise definition of torture, it is evident from the tone and direction of the Bybee memorandum that the authors were attempting to exploit this in the interests of *state* policy. Their appeal to the principle of lenity was really intended to produce a definition which could more easily be exploited in the interests of the state. As we think about the case that can be made for precision, we need to remember that this is how any argument of the sort just considered is likely to be exploited.

IX. FINNIS ON SUICIDE VERSUS WALDRON ON TORTURE

As I said, I don't know whether Finnis shares my views about the torture case.⁸⁷ I think it is an example of a corrupt demand for *determinatio* more

87. The only reasons I have for thinking Professor Finnis does not agree with me are that, in common with most natural lawyers, he published nothing condemning the use of torture or the deliberate muddying of the legal waters surrounding torture during those dark years 2002-8. (There is a passage from Finnis's book on Aquinas—John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 293—that briefly reviews the Roman Catholic church's position on torture. But that was published several years before the torture crisis in the United States.) One must also consider certain remarks made in John Finnis, "Nationality, Alienage and Constitutional Principle," *Law Quarterly Review* 123 (2007): 429n, where he suggested that the English courts have taken a wrong attitude to the difference between intentionally torturing someone and deporting him to a state where they know he is likely to be tortured. Finnis said this:

The absoluteness of a state's obligation not to engage in torture and other practices contrary to art. 3 in no way entails that the person with such an absolute right has thereby the right not to be subjected to any form of treatment (e.g. deportation) that might have the foreseeable but unintended and unwelcome side-effect of his being tortured or ill-treated by some other persons. ... It is one thing for a state to deliver persons to another state so as to enable the latter to torture them, and quite another matter to remove/ deliver them to another state with all practically possible precaution against their being tortured thereafter and with the sole object of removing the real threat their presence poses to the lives of people in the removing state.

I do not know what is meant by saying that the deportee's torture remains "foreseeable" despite the deporting state having taken all practically possible precaution against their being tortured by the receiving state. For Finnis, "all practically possible precaution" seems to mean negotiations with the receiving state and the reception of "assurances" (*ibid.*, 434-5). Nor, given what we actually know about these deportations, is it clear why Finnis refuses to look through to the reality of these "arrangements," rather than stopping the inquiry at the deporting government's assurances of good faith. Deborah Purdy and her husband might wonder why they also can't be the beneficiary of such indulgence. In a communication to the author, Professor Finnis observes that "the institution of the SIAC investigations into the credibility of say Jordanian or Libyan assurances is itself the work of the UK executive as well as legislative authorities, and the result of those investigations shows that they are genuine." He says that he has "read most of the very very extensive SIAC judgment on Jordan, and subsequently on Libya." (E-mail from John Finnis to author, Friday, March 12, 2010, 1:46 PM) But in Finnis, "Nationality, Alienage and Constitutional Principle," 434n, he opines that there *was* a real risk of ill-treatment in Libya, albeit not one intended by the UK government.

My broader point is that the sharp and pitiless eye that Finnis uses to dissect Ms. Purdy's protestations that she and her husband do not *really* want to violate section 2(1) of the Suicide Act would not be out of place in an assessment of the British government's claim that, given the arrangements they have made with the receiving government, deporting a suspect to Jordan or Libya knowing he is still likely to be tortured is not *really* a violation of Article 3 of the ECHR (not to mention the terms of Article 3 of the Convention Against

or less exactly analogous to what he thinks about the suicide case and the decision in *Purdy*. I think about this case, as he thinks about the suicide case, that it is a bad man's demand for *determinatio*—a demand that should not be pandered to by those responsible for the making and administration of positive law.

So why do I not agree with Finnis about *Purdy*? Why do I not say about her demand for detailed guidance by the DPP concerning assisted suicide what I say about the Bush administration's demand for precise guidance about the level of deliberate ill-treatment that counts as torture? It seems that, just like Deborah Purdy's husband, John Yoo's political masters do want cover for what is in effect law-breaking; their demand for a precise definition is supposed to serve that corrupt end. So why do I not say about supporting the assisted suicide enterprise with a demand for *determinatio* what I say about assisting the torture enterprise with a demand for *determinatio*?

The difference is in our respective estimations of the natural law background that the two bodies of law are trying to concretize. Both of us agree, I take it, that our positive laws prohibiting torture give legal form to a natural law conviction that the deliberate imposition of severe pain on a person for purposes of interrogation is absolutely prohibited. Relative to the enterprise of putting *this* conviction into positive law, the demand for a bright-line definition of "severe pain" seems corrupt. Now, Finnis said this about *Purdy*: "What received scant attention in the Lords' judgments is the public interest in maintaining a clear and exceptionless prohibition of assisting suicide."⁸⁸ But I don't believe that *is* the moral conviction that the law on assisted suicide is supposed to embody. Finnis's sense of what the public interest is, would make sense relative to a conviction that assisting suicide was wrong in large part because suicide was wrong. And it is well-known that Finnis himself does regard suicide as quite wrong in all

Torture, which the United Kingdom has also signed and unreservedly ratified). Article 3 requires that "[n]o State Party shall expel, return ... or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." It also says (in Article 8(2)) that "[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." Wisely, for the purposes of his article, Finnis refrains from mentioning this legal obligation.

88. Finnis, "The Lords' Eerie Swansong," 5.

circumstances, on natural law principles.⁸⁹ But patently this is not the position that the drafters of the 1961 Suicide Act were trying to concretize.

Their underlying conviction seems to me to have been much more ambivalent than that: their rejection of the proposition that suicide itself is an offense against life is evident; and the unusual expedient of hedging the prohibition on assisting suicide with a specific requirement for the DPP's consent—which is much more than ordinary prosecutorial discretion, and much more than an opportunity for compassion or mercy⁹⁰—indicates something subtler than “a clear and exceptionless prohibition on assisting suicide.” I think that overall the law might reasonably be read as an ambivalent attempt to navigate a diversity of views in the community by winnowing out some modes of participation in a person's suicide from others—on the one hand, cases in which the initiative comes from someone other than the person whose life is in question (“What about it, Grandma?”) and, on the other hand, cases in which the alleged “assistance” is little more than an offer of loving presence and comradeship at the end. A huge number of cases fall in between, and the drafters of the law evidently did not trust “a clear and exceptionless prohibition” without a filter of human discretion.

I am not saying that Finnis is wrong as a matter of moral principle; he may be correct about the fundamental wrongness and even injustice of suicide. But he might be wrong. Natural law reasoning, even his, is fallible, and I know Finnis would accept that the historical fact that the natural law tradition has always regarded suicide as wrong—worse than murder, on the view of Aquinas⁹¹—is itself no proof against error.⁹² Whether he is right or wrong about the natural law regarding suicide, I am

89. In a debate about these matters in *Euthanasia Examined: Ethical, Clinical and Legal Perspectives*, ed. John Keown (Cambridge: Cambridge University Press, 1997), 24, Finnis suggests that the relevant moral norms “rule out every proposal to terminate people's lives on the ground that doing so would be beneficial by alleviating human suffering,” whether the proposal is put forward and carried out by the suffering individual herself entirely on her, or with the connivance of others.”

90. Cf. Finnis, “The Lords' Eerie Swansong,” 5: “What received scant attention in the Lords' judgments is the public interest in maintaining a clear and exceptionless prohibition of assisting suicide (along with a prosecutorial discretion which could accommodate many factors including compassion while creating *no legitimate expectation of immunity*, and thus leaving always in place precisely the deterrent effect so important for many and so objectionable to Purdy and other promoters of assisted suicide and euthanasia.)”

91. A footnote in Finnis, *Aquinas*, 241n suggests that “suicide is a more serious type of wrong than murder.”

92. See Finnis, *NLNR*, 23-35 on the distinction between natural law and theories of natural law.

saying he is certainly wrong about *the natural law conviction* that is being concretized in this body of law. Remember what I said near the beginning: people may disagree about natural law, but it is their human judgments about natural law that *determinatio* applies to, not natural law itself. And even their wrong judgments about what natural law requires need concretization and elaboration before they can become human law.

So I think Finnis is wrong about the natural law judgment being concretized in the law-making process that began with the 1961 statute. Deborah Purdy and the House of Lords may have better insight than he has into the complex and ambivalent natural law judgment underlying the statute. And relative to *that*, they may be right in their claim that more is needed in the way of *determinatio*, even though such a claim would be false and corrupt on the assumption that the statute embodies what Finnis thinks is the correct natural law view.

Could something similar be said about torture? I have been assuming that the process of *determinatio* of the anti-torture statute undertaken in the Office of Legal Counsel in 2002 was corrupt because the statute embodied a powerful moral absolute that we were not supposed to come anywhere near transgressing, and so it was wrong to elaborate it as though it were like a speed limit, as though it should be understood in terms of a bright line that we were entitled to press up to as closely as we can. I know I live in a community whose people and leaders have shown themselves to be profoundly ambivalent about the matter. Polls reveal that a large portion of the American public, brave as they are, will scramble for the water-board at the slightest prospect of an enhancement in their safety. But there is a difference between public opinion and the law. The anti-torture statute was enacted pursuant to our obligations under the Convention against Torture, and both the statute and the Convention (and also the Geneva Conventions and the International Covenant) and (as I argued in 2005)⁹³ much of our own constitutional law, are thoroughly imbued with the doctrine that torture is one of the worst rights violations imaginable and that the torturer is not to be regarded as a person who happens to have crossed a technical line, but rather as someone like the pirate, the slave-trader and the terrorist—*hostes humanis generis*, common enemies of mankind.⁹⁴ Maybe Dick Cheney is right and we should repudiate these laws and the natural law convictions that they embody. But elaborating them with that project in mind would be an act of vandalism, not an instance of *determinatio*.

93. Waldron, "Torture and Positive Law," 1728-34.

94. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (1980).

I could have discussed all this—about torture and John Yoo and suicide and Deborah Purdy—without mentioning *determinatio*. We could have just talked about reputable and disreputable ways of elaborating legal provisions. But then it wouldn't have been the Natural Law Lecture.

I have found it useful to bring the natural law doctrine of *determinatio* into focus with these real-life difficult, indeed agonizing cases. Too much of what is written about *determinatio* in the academic literature is just boiler-plated thoughtlessly from book to book and article to article: some platitudes about architects, because that's what Aquinas said. Opening it up with real cases helps us to see how interesting this topic is; rescues it from the Latin; and shows yet again (as I said at the outset) that it is jurisprudence in the natural law tradition that gives us the deepest and most sophisticated insight into positive law.