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# Rettungsfolter (“Rescue Torture”): Report on the Gäfgen v. Germany Case Pending Before the European Court on Human Rights

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*Rettungsfolter* (“Rescue Torture”):  
Report on the *Gäfgen v. Germany* Case  
Pending Before the European Court on Human Rights

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Michael Davis says we may wonder “whether torture has a place in a democracy.” A similar question is being discussed in Germany where Professor Eric Hilgendorf asks if there can be “Torture in the Rule-of-Law State (*Rechtsstaat*)?” Professor Hilgendorf in his essay, much as Professor Davis in his, is concerned with clarity in the definition of torture. As does Professor Davis, he speculates whether torture can be distinguished from less severe forms of treatment. Unlike Professor Davis, Professor Hilgendorf considers whether torture might be justified morally or legally. This leads him to consider the relationship between law and morals and to look at one possible justification for torture. This comment reports Professor Hilgendorf’s essay and the case that gave rise to it. That case has been subject of many decisions of German courts, including both the German Supreme Court and the German Constitutional Court, and is now before the European Court for Human Rights. The German discussion of torture is particularly poignant because of the national memory of torture in the Nazi dictatorship.

On September 27, 2002 the 27-year old law student, Magnus Gäfgen, kidnapped an 11-year old boy, Jakob von Metzler in Frankfurt in the German state of Hessen. Gäfgen demanded a ransom of one million Euros. At 1:10 AM on September 30 the police observed Gäfgen pick up the ransom. They continued to observe him throughout the day as, together with his girl friend, he made deposits at several banks, drove to the Bavarian city of Aschaffenburg, where he test drove and purchased a Mercedes, returned to Hessen to visit a travel agent, where he booked a trip for the following week to the beaches of the Canary Islands, and along the way visited several bars. Noting that Gäfgen took no action to free the boy or otherwise provide for the boy's welfare, at 4:20 PM the police arrested him. At 6:20 PM they began to question him intensely. The police interrogators made clear that their main concern was the welfare of the boy. They feared that the boy might have been left without food or water and exposed to the elements. Gäfgen attempted to minimize his role in the kidnapping and to throw the police off the trail, but the police persisted in their belief that Gäfgen was the kidnapper. They had already found half the ransom in his apartment. Nevertheless, Gäfgen steadfastly refused to give any information about the whereabouts of hostage. Gäfgen requested and received legal counsel. At 8:00 AM the next morning Gäfgen's mother visited him. Meanwhile Wolfgang Daschner, Vice President of the Frankfurt police and in charge of the force in the absence of the president, gave the order that to save the life of the kidnapped boy, with prior warning, pain should be inflicted on Gäfgen, but without causing injuries, and under medical supervision. At 8:40 AM after Gäfgen's mother was escorted from the room, a police official told Gäfgen that if he did not disclose where the boy was, he would be subject to pain "that he would not forget." Gäfgen

then began to talk. Eventually and without police resort to pain or to further threats, he confessed that he had killed the boy on the day of the abduction. Gäfgen was subsequently convicted of murder and sentenced to life in prison. His attempts to block prosecution because of the unlawful interrogation were rejected by the trial court, by the German Supreme Court and by the German Constitutional Court. He has appealed to the European Court on Human Rights, which has accepted his appeal but has yet to rule on it. Police Vice President Daschner and a subordinate were tried and convicted of criminal coercion and related offenses.

Professor Hilgendorf completed his essay before any of the principal court decisions were handed down. He sought answers to the question whether torture has a place in a rule-of-law state. In broad strokes, his essay parallels that of Professor Davis. Both authors observe the need for care in defining torture. As does Professor Davis, Professor Hilgendorf sees the popular understanding of torture as extreme pain to be too wide. He seems satisfied with the definition of torture found in Article 1(1) of the UN Convention on Torture of 1984. Professor Hilgendorf breaks that definition down into three elements. The first is an objective one; it consists of causing great physical or mental suffering. This element seems to correspond to Professor Davis' linguistic definition. The second element is a subjective one: intention of the perpetrator. The third element is the actor's connection to state authority. These latter two elements adopt an agent-centered approach advocated by Professor Davis.

Professor Hilgendorf places the question of torture in a rule-of-law state in the context of Gäfgen's kidnapping of the Metzler boy. Torture, he notes, is banned by the first

paragraph of the first article of the German Basic Law (*i.e.*, Constitution) which provides: “Human dignity is inviolable. To respect and protect it is the duty of all state authority.” Torture assaults not only the autonomy of the individual tortured, but destroys even the capability of autonomy. But some in Germany ask, Professor Hilgendorf notes, doesn’t the State’s duty to protect human dignity require that it torture to save the life of an innocent victim? Proponents of this view, he observes, point out that German law allows police to shoot hostage-takers if necessary to save the lives of hostages. Should not, then, the police be able to torture hostage-takers to determine the location of the hostages they have taken? German commentators have coined a term for this phenomenon: *Rettungsfolter*, *i.e.*, rescue-torture. Professor Hilgendorf notes that commentators in Germany have overwhelmingly rejected the idea that *Rettungsfolter* is permissible.

Professor Hilgendorf discusses three possible solutions to the *Rettungsfolter* dilemma:

(1) In extreme cases torture is *morally* allowed, perhaps even *morally* required. But it must nonetheless remain *legally* prohibited, because it violates human dignity. In a rule-of-law state torture cannot be allowed under any circumstances.

(2) In extreme cases, while torture cannot be allowed, less severe measures might be permitted. This corresponds to Professor Davis’s discussion whether torture can be distinguished from other forms of inhumane treatment. According to Professor Hilgendorf, allowing less severe measures demands legislation that would distinguishing licit from illicit but that would be extremely difficult to draft. Contrary to Professor Davis, Professor Hilgendorf does not see it possible to make such a distinction under present circumstances.

(3) A third solution would be to treat torture as justified under the criminal law. Professor Hilgendorf notes that under German criminal law it is disputed whether the law's general grounds of justification for private individuals can apply to police action and protect police officers from criminal liability. He concludes that such justification is not to be accepted.

Subsequent to publication of Professor Hilgendorf's essay, the courts tried and convicted both the kidnapper Gäfgen and police Vice President Daschner.

The Gäfgen proceedings assumed the illegality of his interrogation, and have focused on the consequences. At every instance they accepted that the confession that resulted from the illegal interrogation could not be relied on to convict him. It was subject to "use prohibition" (*Verwertungsverbot*). But all three instances rejected Gäfgen's contention that the illegal interrogation so poisoned the proceedings as to require their termination. They held that the interrogation did not rise to the level of creating a "barrier to prosecution" (*Verfahrenshindernis*). The use prohibition satisfactorily protected Gäfgen's constitutional rights. In denying Gäfgen's motion, the trial court took note of the explicit constitutional prohibition of mishandling persons in custody. After denial of the motion, on July 28, 2003 the court convicted Gäfgen. The German Supreme Court subsequently found no grounds for review and rejected Gäfgen's appeal. In a five-page opinion a three judge panel held that while police action had been against the law, sufficient remedy in the case itself was denial of reliance on the evidence obtained and that Gäfgen had not shown ground for denial of a prosecution altogether, particularly in since there was no statutory authority to terminate the proceedings. In 2005 Gäfgen carried his appeal to the European

Court of Human Rights in Strasbourg, which has accepted the case for review but has yet to reach a decision.

In the prosecution of Gäfgen the issue of the role of torture in a rule-of-law state took backseat to the immediate procedural issue whether the illegal interrogation justified only a prohibition on use of the unlawful evidence or required termination of the prosecution. These issues came to the fore, however, in the subsequent prosecution of the police Vice President Daschner and one of his subordinates.

The court in the Daschner prosecution came down clearly on the side of the first of the three solutions discussed by Professor Hilgendorf, namely, that state use of torture is unlawful. The court did not consider whether there might be a moral requirement to torture. It specifically held that the duty of the state to protect life can be exercised only within the limits of action allowed to the state. Accordingly it held that the policemen were not authorized either by the constitutional obligation to protect human dignity or by police law to take such action. Quite to the contrary, it noted that constitutional and statute law explicitly prohibited such interrogation.

The court rejected explicitly the third solution discussed by Professor Hilgendorf, namely that the otherwise illegal action might be justified or excused. The court denied the defense of necessity. It held that even if the debatable question whether a state official could rely on the defense were answered in the affirmative, neither of the two statutory requirements was met here, namely that this be the only way to save the child's life and that the way chosen was appropriate. It also denied the defense of excuse. The court observed that the drafters of the German Basic Law, in awareness of the Nazi crimes, were

determined that those crimes should never be repeated. Article 2 of the Basic Law is explicit: the state cannot use physical or mental coercion on those in its custody.

While the court held the police officers guilty, it found “massive mitigating circumstances.” As a result, it refused to punish them with imprisonment, even though the crimes charged normally carried a sentence of six months to five years imprisonment, and one month to three years in less serious cases. Although finding a fine for Daschner of 10,800 Euros, and one third of that for his subordinate, it withheld even that and imposed only a warning with possibility of belated imposition of the fine.

Just as Professor Davis concludes his essay with an observation of the “Limits of Philosophy in a Democracy,” Professor Hilgendorf concludes his essay with an observation on the limits of legalism:

The discussion of the Frankfurt case shows how little suited statutory rules and juristic arguments are to give really mandatory answers in existential questions. Here jurisprudence reaches its limits. At the same time it is clear how important it is, not only to think in the categories of the juristic everyday life, but now and again to direct attention to the basic questions of law.