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W. Bradley Wendel

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LEGAL ETHICS AND THE SEPARATION OF LAW AND MORALS†

W. Bradley Wendel††

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INTRODUCTION

Spectacular scandals involving lawyers are certainly nothing new. Wrongdoing by lawyers brought about or exacerbated the Watergate crisis, the savings and loan collapse, the corporate accounting fiasco that brought the 1990s tech stock boom to a crashing halt, and innumerable less prominent harms. But for sheer audacity and shock value, it is hard to top the attempt by elite United States government lawyers to evade domestic and international legal prohibitions on torture. The invasion of Afghanistan soon after the September 11th at-

† The title is, of course, a reference to the classic paper by H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

†† Associate Professor of Law, Cornell University. I am very grateful to Chris Schroeder and the Duke Program in Public Law for inviting me to attend the workshop on "Interrogation, Detention, and the Powers of the Executive," at Duke Law School on September 17, 2004. Workshop participants influenced my thinking on the torture memos in ways too numerous to record. Special thanks are owed to Marty Lederman, whose analysis of the memos at the "Balkanization" blog have been extraordinarily helpful. Versions of this paper were presented at the legal ethics colloquium at the University of Canterbury (New Zealand) Law School, and faculty workshops at St. John's and Cornell Law Schools. Thanks to John Barrett, Greg Cooper, Mark Drumbl, Susan Fortney, Steve Garvey, Jim Henderson, Toby Heytens, Bob Hockett, Doug Kysar, Kate Kruse, Bernadette Meyler, Trevor Morrison, Donald Nicolson, Liz Peck, Jeff Rachlinski, Charles Sampford, Steve Shiffrin, Detlev Vagts, and Rob Vischer for their helpful comments and discussions of these issues.

tacks resulted in the capture of numerous detainees with possible al-Qaeda affiliation, who might have possessed information on the organization's structure, personnel, or even plans for future terrorist attacks. The Bush administration was therefore faced with an urgent question regarding the limits to impose on the interrogation techniques used by military, FBI, CIA, and other government agents and civilian contractors. Officials in the Department of Defense (DOD) and advisers to the President naturally turned to lawyers to interpret and apply the domestic and international legal norms governing the treatment of prisoners.

The resulting memos, prepared by the Justice Department's Office of Legal Counsel (OLC), were leaked to the press and quickly dubbed the "torture memos." The memos consider a wide range of legal issues, from whether the Geneva Convention protections afforded to prisoners of war extend to suspected Taliban or al-Qaeda detainees to whether the President's power as Commander-in-Chief of the armed forces could be limited by a congressional act criminalizing mistreatment of prisoners. One of the most notorious memos concluded that certain interrogation methods might be cruel, inhuman, or degrading, yet fall outside the definition of prohibited acts of torture. The memo further concluded that even if an act were deemed torture, it might nonetheless be justified by self-defense or necessity. And even if an interrogation technique would otherwise be deemed wrongful, the President as Commander-in-Chief had the unilateral authority to exempt government actors from domestic and international legal restrictions on torture.¹

This is not legal analysis of which anyone could be proud. The overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the government memos was so faulty that the lawyers' advice was incompetent.² In

¹ See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Aug. 1 OLC Memo], in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

² *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005), available at <http://www.access.gpo.gov/congress/senate/senate14ch109.html> (follow "PDF" hyperlink for S. Hrg. 109-4) [hereinafter *Gonzales Confirmation Hearing*] (statement of Harold Hongju Koh, Dean, Yale Law School) ("[I]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read."); *LAWYERS' STATEMENT ON BUSH ADMINISTRATION'S TORTURE MEMOS* (Aug. 4, 2004), available at <http://www.afj.org/spotlight/0804statement.pdf> [hereinafter *LAWYERS' STATEMENT*]; Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, *WASH. POST*, June 20, 2004, at B3 (criticizing "stunning legal contortions" in the memos); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, *N.Y. TIMES*, June 25, 2004, at A14 (quoting Cass Sunstein's opinion that the legal analysis in the memos was "very low level, . . . very weak, embarrassingly weak, just short of reckless"); Ruth Wedgewood & R.

deed, after the news media disclosed the memos, the Bush administration immediately distanced itself from the analysis, disavowing the memos as “abstract,” “over-broad,” and even irrelevant, in some instances, to the policy decisions actually made by high government officials.³ Adding to the administration’s embarrassment, the memos began to leak to the press roughly contemporaneously with reports and photographic evidence of horrific abuses at Abu Ghraib. Subsequent investigation revealed dozens of cases of prisoner mistreatment at Abu Ghraib and Guantánamo Bay, as well as in Afghanistan, including five prisoner deaths during interrogations.⁴ After the reelection of President Bush, the Justice Department quietly issued a superseding analysis reversing its position on most of the issues contained in the most controversial memo, the August 1, 2002 memo from the head of the OLC to White House Counsel Alberto Gonzales.⁵

James Woolsey, Opinion, *Law and Torture*, WALL ST. J., June 28, 2004, at A10 (concluding that the memos “bend and twist to avoid any legal restrictions” on torture and ignore or misapply governing law). For an exceptionally strong reaction by an international law scholar and former military lawyer, see Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 811 (2005) (“Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.”).

³ See Amanda Ripley, *Redefining Torture: Did the U.S. Go Too Far in Changing the Rules, or Did It Apply the New Rules to the Wrong People?*, TIME, June 21, 2004, at 49, 49 (reporting that the White House considered the torture memos “abstract musings” rather than policy prescriptions); Press Briefing, Judge Alberto Gonzales, White House Counsel et al. (June 22, 2004), <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> [hereinafter Gonzales Briefing]. Even a defender of the majority of the administration’s interrogation practices called the August 1 OLC memo “terrifying” and “horrific,” described the definition of torture as “extremely narrow [and] hairsplitting,” and suggested that the memo was the “product of lawyers on a very heavy dose of testosterone.” See *Day to Day: Interview with Heather MacDonald* (NPR radio broadcast Jan. 24, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4464065>.

⁴ See THE INDEP. PANEL TO REVIEW DEP’T OF DEF. DET. OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS (2004) [hereinafter SCHLESINGER REPORT], in THE TORTURE PAPERS, *supra* note 1, at 908, 914; REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004) [hereinafter ICRC REPORT], in THE TORTURE PAPERS, *supra* note 1, at 383, 391–93.

⁵ See Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General 1–2 (Dec. 30, 2004) [hereinafter Superseding Memorandum] (noting that questions had been raised regarding the appropriateness of the memo’s analysis, and stating, “We decided to withdraw the August 2002 Memorandum”), <http://www.usdoj.gov/olc/dagmemo.pdf>. Notably, this superseding memo was issued without a public announcement—between the Christmas and New Year’s holidays—a few weeks prior to the Senate confirmation hearings on the nomination of former White House Counsel Alberto Gonzales for Attorney General. See also Jess Bravin, *U.S. Revamps Policy on Torture of War Prisoners: Legal Guidance Criticizes Aggressiveness of Old Rules, Redefines ‘Severe Pain’*, WALL ST. J., Dec. 31, 2004, at A1 (reporting that the new memo “sharply” scaled back the Bush administration’s previous legal position).

What accounts for the poor quality of legal reasoning displayed by the memos? It is difficult to credit the explanation that the authors themselves were incompetent, since they worked for agencies—such as the OLC—which traditionally employ some of the very best legal talent in the country. Rather, the explanation is that the process of providing legal advice was so badly flawed, and the lawyers working on the memos were so fixated on working around legal restrictions on the administration's actions, that the legal analysis became hopelessly distorted. For example, the drafting process included only proponents of broad executive power and unilateralism in foreign policy; it excluded lawyers from the State Department, who were associated with Secretary of State Colin Powell's more multilateral, internationalist approach.⁶ Significantly, the memoranda were not reviewed by attorneys in the Justice Department's Criminal Division or by career military lawyers with the Judge Advocate General Corps, who would have immediately recognized the erroneous analysis of the application of the Geneva Conventions.⁷ Finally, administration lawyers faced considerable pressure to think in a "forward-leaning" way, on the assumption that the September 11th attacks had created a kind of normative watershed.⁸ The result of this gerrymandered process was, not

⁶ See Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1; R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees: Justice Nominee's Hearings Likely To Focus on Interrogation Policies*, WASH. POST, Jan. 5, 2005, at A1.

⁷ See Golden, *supra* note 6; Neil A. Lewis, *Ex-Military Lawyers Object to Bush Cabinet Nominee*, N.Y. TIMES, Dec. 16, 2004, at A36; Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1 (suggesting that although military lawyers adamantly opposed the administration's approach to compliance with the Geneva Conventions, their concerns were ignored by top Defense Department lawyers); see also *Gonzales Confirmation Hearing*, *supra* note 2, at 152–54 (statement of Admiral John D. Hutson, President & Dean, Franklin Pierce Law Center).

A small but telling detail in the Superseding Memorandum is the statement that "[t]he Criminal Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below." See Superseding Memorandum, *supra* note 5, at 2. This seemingly minor detail gains significance in light of the observation that one of the most notable features of American foreign-policy fiascos, such as the Bay of Pigs Invasion and the escalation of the Vietnam War, is that they involved decision-making processes in which the desire to achieve unanimity within the group dominated over the motivation to make sound decisions. See IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982). The language in the Superseding Memo evidences that, at least where interrogation policy was concerned, a desire for unanimity dominated the Bush administration's decision-making processes, predictably leading to less-than-sound decisions. The administration's choice to exclude State Department, military, and Department of Justice Criminal Division lawyers from the process of developing interrogation policy was a disastrous decision, which led to the groupthink phenomenon of "in groups" of lawyers producing shoddy legal analysis.

⁸ See Golden, *supra* note 6; Smith & Eggen, *supra* note 6. The administration is quite taken with the idea that defense against terrorism is a "new paradigm" that justifies rethinking prevailing assumptions about international and domestic law. See, e.g., Memorandum from George Bush, President of the United States, to Dick Cheney, Vice President et al. (Feb. 7, 2002) [hereinafter Feb. 7, 2002 Bush Memorandum], in *THE TORTURE PAPERS*,

surprisingly, such glaringly deficient legal analysis that the administration distanced itself from it as soon as it was publicly disclosed.

This Article considers what one can say about the decision to engage in this analysis in the first place, and the way a lawyer ought to think about advising on such a morally fraught subject as torture. Specifically, I would like to analyze the situation of a lawyer asked by a client to render an opinion on the permissibility of conduct that strikes most people as a clear moral wrong, or to assist in structuring transactions or relationships to further the legal interests of the client where moral objections may be raised to the client's ends.⁹ The general issue here is not limited to the torture memos, or even to advising by government lawyers, but includes lawyers representing individuals and corporations that are engaging in moral wrongdoing and seeking legal advice on how to avoid the legal consequences of their actions.¹⁰ One of the central questions for legal ethics is the role that moral considerations should play in legal counseling and planning. Perhaps the advising process is fundamentally an instantiation of a "moral con-

supra note 1, at 134; Memorandum from Alberto R. Gonzales, Counsel to the President, to George Bush, President of the United States (Jan. 25, 2002) [hereinafter Jan. 25, 2002 Gonzales Memorandum], in *THE TORTURE PAPERS*, *supra* note 1, at 118; Gonzales Briefing, *supra* note 3.

⁹ The term "client" here conceals some complexity. Where federal government lawyers are concerned, the law of lawyering is nebulous regarding the identity of the client such lawyers represent. Indeed, courts and disciplinary agencies may regard a government lawyer's client as any of the following: a particular agency, an agency official, the executive branch of the government, the United States as a whole, or the public interest. See, e.g., Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 981-82 (1991); Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 L. & CONTEMP. PROBS. 65, 70-71 (1998) [hereinafter Lund, *President as Client*]; Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294-98 (1987). Specifically with regard to OLC lawyers, there is also controversy over how the lawyer's role should be understood, with positions arrayed on a continuum between litigation-style advocacy on the one hand and neutral, judge-style reasoning on the other. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376-77 (1993); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305-06 (2000). In terms of the client-identity question, however, it is generally settled that OLC lawyers in particular, as opposed to government lawyers in general, owe their loyalty and an obligation to render advice to an identifiable government official: namely, the President (although how independent that advice must be, and whether it can be slanted in the direction the President desires, is still a matter of some controversy). See Moss, *supra*, at 1316-17. Thus, when I use the term "client" in connection with the torture memos, I refer to the President and his top-level advisors.

¹⁰ Notably, however, lawyers representing clients who retain them to provide a defense against civil or criminal charges *after* the client is accused of wrongdoing are outside the scope of the issue here. There are numerous differences between advising on the legality of conduct *ex ante* and defending the client *ex post*, and the ethical constraints on the lawyer's representation vary considerably as a result. See generally W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. REV. 1167 (2005) [hereinafter Wendel, *Interpretation*] (arguing for this distinction).

versation,” as some have argued, so that morality should be the foremost consideration in the mind of the lawyer.¹¹ Alternatively, the lawyer’s counseling role might take place within a kind of “smaller moral world,”¹² in which morality is irrelevant to the legal issues being evaluated. In these two alternatives, the lawyer-client relationship is either fully moralized in the same way as a personal friendship, or is isolated entirely from the domain of morality by virtue of the institutional structures of the law and the legal profession.

Between these extremes of legal advising as essentially an ordinary moral interaction and an amoral domain of “pure” law, there is a middle ground in which moral norms can be incorporated into positive law, but in which the moral obligation to obey the law does not depend on the overlap between legal prescriptions and the demands of ordinary morality. This latter position best describes the relationship between law and morality in legal ethics. My broad claim, which I have defended elsewhere, is that lawyers acting in a representative capacity do not have an obligation to do right in the first-order moral terms that would otherwise apply to an all-things-considered evaluation of what one should do.¹³ Rather, lawyers have an obligation to do right with regard to the law. Lawyers may not treat the law instrumentally, as an obstacle to be planned around, but must treat legal norms as legitimate reasons for action in their practical deliberation. Compliance with the law means more than seeking to avoid sanctions—it entails an attitude of respect toward legal norms. Because citizens are obligated to treat the law as legitimate—and lawyers, as agents of their clients, cannot have any right to treat the law instrumentally that is greater than that of their clients—lawyers are prohibited from manipulating legal norms to defeat the substantive meaning of these norms. The torture memos are a perfect case study to illustrate the application of a general jurisprudential thesis about the locus of moral responsibility in lawyering, because they show how lawyers can commit a moral wrong vis-à-vis their obligation to serve as custodians

¹¹ See, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 66–67 (1994); Stephen L. Pepper, *Lawyers’ Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 190 (1999) (“When the gap between law and justice is significant, it ought to be part of the lawyer’s ethical responsibility to clarify to the client that he or she has a moral choice in the matter.”); Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1991); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987).

¹² This metaphor is borrowed from CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 296 (1996). ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980), advances a similar notion, analyzing role-differentiated morality in professional ethics in terms of creating a “simplif[ied] moral . . . universe,” *id.* at 23.

¹³ See generally W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004) [hereinafter Wendel, *Obedience*].

or trustees of the law, even while the law excludes recourse to first-order moral considerations in practical reasoning.

After briefly setting out in Part I the factual and legal context of the use of torture by American personnel, the Article addresses the normative contours of the lawyer's role, and particularly the points at which ordinary moral values can or should be infused into the lawyer-client relationship. Perhaps surprisingly, my claim is not that moral values are relevant to the lawyer's professional activities in the same way they would bear on the practical reasoning of an ordinary moral agent. Morality may be incorporated into law and lawyers may refer to moral considerations when giving advice, but fundamentally the moral constraints on a lawyer's representation of a client are given by the law.¹⁴ For this reason, Part II considers the reasons why law ought

¹⁴ Obviously, this account of the authority of law depends a great deal on the determinateness of legal rules; if the law were indeterminate or manipulable to a significant extent, it would be unable to perform its functions of resolving normative conflict and replacing first-order moral reasons with legal directives. A theory of legal interpretation is therefore a critical aspect of this theory of legal ethics. Outlines of this theory of interpretation will emerge in Parts II and III, and I have said a great deal about interpretation elsewhere. See Wendel, *Interpretation*, *supra* note 10, at 1172–73, 1187–99. Nevertheless, it may be helpful to briefly summarize here the interpretive methodology I set out in more detail elsewhere.

Legal texts underdetermine the meaning of all legal norms. There is no such thing as a text that is self-interpreting. These are general problems associated with the use of language to convey meaning, but they pose special difficulties in the ethical and jurisprudential contexts, because it is often possible to construct a facially plausible interpretation of a legal text that varies from the most plausible (and intended) interpretation. This feature of language makes it difficult for authorities to use words to direct conduct, because those citizens who are subject to the directives of authority may be able to manipulate the authorities' texts to effectively nullify their directives. But there is no reason to suppose that authorities issue directives that are extensionally identical with artificially formalistic readings of texts. "Authorities do not want to be understood literally. Authorities purport to govern, and complex, large scale, governance requires cooperation in the spirit of its goals, not strict adherence to the letter of its directives." Andrei Marmor, *The Immorality of Textualism*, 52 *LOY. L. REV.* (forthcoming 2005) (manuscript at 18, on file with author); see also Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 *CONST. COMMENT.* 297, 299 (1993) (arguing that, regarding constitutional interpretation, the Founders assumed that "the meaning of our legal texts would be discerned from the shared understandings of the profession that enforced them"). Interpretation must therefore be aimed at recovering the spirit, purpose, or normative background underlying a set of legal rules, not merely the meaning that the textual expression of these norms might plausibly bear. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 106 *COLUM. L. REV.* (forthcoming 2005) (manuscript at 12–13, on file with author), available at <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>.

This process of interpretation is dynamic and hermeneutic in nature, and requires a lawyer or judge to situate herself within an interpretive community of lawyers, judges, and scholars that is constituted by fidelity to law as a cooperative social enterprise. These interpretive communities have evolved meta-rules that constrain the exercise of interpretive judgment and differentiate artificial, abusive, and exploitive readings from legitimate ones. To put it in standard jurisprudential terms, the community's conventional practices converge to establish a rule of recognition, which permits community members and observers to critically evaluate the lawfulness of their activities. See H.L.A. HART, *THE CONCEPT OF*

to preempt the moral values that would otherwise play a role in practical reasoning, and concludes with an allegorical account of the role of law in achieving settlement of normative disagreement. Part III responds to the standard lawyers' argument that moral values do not inform the lawyer's advising and counseling role. The attempt to squeeze morality out of law relies on a rigorous variety of "exclusive" legal positivism that does not fit with and justify the actual practices of lawyers and judges who interpret and apply legal rules. Accordingly, the argument in this Part uses the theoretical debates over legal positivism as a basis for critiquing normative positions regarding the lawyer's role, and is therefore an attempt to make relevant what is often perceived as an arid debate in jurisprudence.¹⁵

Finally, because another way to exclude moral considerations from legal reasoning is to evade them altogether by relying on implausible hypotheticals like the ticking-bomb case, the task of Part IV is to show that these strategies are ineffective and that the normative questions must be confronted directly. The discussion of the ticking-bomb hypothetical demonstrates that the incorporation of morality by law is not a license to engage in fanciful speculation under the guise of applying ordinary moral values to legal problems. The moral analysis in this Part is intended to preempt any move by defenders of the OLC lawyers to claim that the administration's lawyers engaged in the moral analysis called for by the law, and that this analysis supported the administration's approach to the treatment of detainees. The OLC lawyers seem to have relied on the ticking-bomb case to free themselves from the constraint of morality incorporated into law. Because this "anything goes" conclusion was the result of a gross misapplication of moral reasoning to the applicable legal standards, a moral analysis of the ticking-bomb hypothetical is necessary to fully appreci-

Law 100-03, 116-17 (2d ed. 1994). The rule of recognition validates certain middle-level principles that can be used as criteria to differentiate reasonable from abusive interpretations. See Wendel, *Interpretation*, *supra* note 10, at 1214-18. Naturally, there may be plural, overlapping interpretive communities to which a lawyer might claim allegiance; the underlying account of the authority of law provides a basis for ruling some communities out as inappropriate, if they are not constituted by a commitment to what might be called "the immanent rationality of law." Cf. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 204-31 (1995) (arguing that interpretation should look to whatever rationality is immanent in a particular mode of ordering). A plurality of interpretations may be consistent with the underlying purposes of a regime of law and the textual expression of subsidiary legal norms—nothing in this account of interpretation is intended to imply that there is only one right answer to a legal question. Nevertheless, the community-based, broadly purposivist approach can rule out numerous facially plausible interpretations as illegitimate.

¹⁵ See Brian Z. Tamanaha, *Revitalizing Legal Positivism: The Shari'a and the Contemporary Relevance of the Separation Thesis* 1-4 (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 05-006, 2005), available at <http://ssrn.com/abstract=637184> (noting that it can be hard to see the relevance of legal positivism, given the esoteric nature of the debates in the theoretical literature).

ate the legal and jurisprudential mistakes made by the administration's legal advisers.

I

A BRIEF OVERVIEW OF THE TORTURE MEMO CONTROVERSY

The story of the legal analysis of torture begins with the invasion of Afghanistan following the September 11th terrorist attacks, which resulted in the capture of numerous prisoners suspected of affiliation with the Taliban or al-Qaeda. Although some of these detainees may have been eligible for punitive detention for violating international or U.S. criminal laws, the primary purpose for holding and questioning these prisoners was not to try and convict them in some tribunal. Rather, the goal of American officials was chiefly to acquire information that could be used to prevent a future terrorist attack. In particular, the capture of high-ranking al-Qaeda members such as Abu Zubaida, Mohamed al-Kahtani, and Khalid Sheikh Mohammed raised the possibility that American officials may have custody of individuals with extremely valuable "actionable intelligence," in the lingo of military intelligence officials.¹⁶

Intelligence personnel naturally made it a high priority to get these detainees to talk. Because many suspected militants had proven to be skilled at resisting traditional, noncoercive interrogation techniques such as promises of leniency in exchange for cooperation,¹⁷ American officials sought advice to see whether it would be legally permissible to use certain coercive techniques on "high value" captives.¹⁸ Specifically, CIA officials wanted to know whether their field

¹⁶ See, e.g., Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1 (noting that Khalid Sheikh Mohammed is "al Qaeda's alleged leader of terrorist operations against the U.S. and the suspected brains behind the 9/11 attacks"); Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11 (stating that "[t]here was a high confidence among military intelligence officials that Mr. Kahtani was a dangerous operative of Al Qaeda"); Smith & Eggen, *supra* note 6 (noting that the United States was "elat[ed] at the capture of al Qaeda operations chief Abu Zubaida," and that the CIA was determined to get information from him).

¹⁷ See SCHLESINGER REPORT, *supra* note 4, at 924 (reporting that authorities at Guantánamo requested approval of "strengthened counter-interrogation techniques" in response to "tenacious resistance by some detainees to existing interrogation methods"); Bravin & Fields, *supra* note 18 (stating that "U.S. authorities have found that traditional interrogation techniques have been ineffective on . . . prisoners" such as Khalid Sheikh Mohammed); Smith & Eggen, *supra* note 6 (noting that Abu Zubaida "refused to bend to CIA interrogation" and that the Agency was "determined to wring more from [him]").

¹⁸ See Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17. One memorandum, from the director of an interrogation team at Guantánamo Bay, sought approval for a variety of euphemistically named interrogation methods, including stripping detainees ("[r]emoval of clothing"), taking away their scriptures ("[r]emoval of all comfort items, including religious items"), hooding them, forcing them to remain in stress positions, shaving them, and threatening them with dogs

agents would be subject to criminal prosecution for using physically painful interrogation methods such as “waterboarding,” in which a detainee is strapped to a board and submerged until he experiences a sensation of drowning.¹⁹ Alternatively, the Agency sought guidance on the legality of techniques that do not require direct physical contact, such as depriving prisoners of sleep, forcing them to stand for extended periods of time or to assume stressful positions, bombarding them with lights or sound (including, bizarrely, repeating the Meow Mix cat food jingle for hours on end), and leaving them shackled for hours.²⁰

It appears that the CIA was perfectly willing to take off the gloves, so to speak, but was concerned with protecting its agents from future prosecution.²¹ The administration had already signaled its willingness to get as tough as necessary in order to prevent terrorist attacks.²² White House Counsel Alberto Gonzales repeatedly instructed lawyers

(“[u]sing detainees [sic] individual phobias”). See Memorandum from Lt. Col. Jerald Phifer, Director, J2, Joint Task Force 170, to General James T. Hill, Commander, Joint Task Force 170, Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), in *THE TORTURE PAPERS*, *supra* note 1, at 227–28.

¹⁹ See Michael Isikoff et al., *Torture's Path*, NEWSWEEK, Dec. 27, 2004/Jan. 3, 2005, at 54, 54; Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations*, *Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1; David Johnston et al., *Nominee Gave Advice to C.I.A. on Torture Law: Called Some Tactics Legal, With Limitations, and Said No to Others*, N.Y. TIMES, Jan. 29, 2005, at A1.

²⁰ See Lewis, *supra* note 16. The ICRC Report lists a variety of allegations of ill-treatment, including hooding, beating, stripping naked, parading naked before other detainees, holding in isolation in completely dark cells, handcuffing to cell bars naked or in uncomfortable positions, and humiliating sexually. See ICRC REPORT, *supra* note 4, at 392–93. A subsequent military report, which is classified except for its executive summary, described numerous “creative” and “aggressive” interrogation techniques employed at Guantánamo Bay, such as forcing a detainee to wear women’s underwear on his head, shackling detainees in awkward positions, forcing a detainee to parade around doing dog tricks while tied to a leash, and stripping male prisoners and forcing them to appear in front of female soldiers. See Josh White, *Abu Ghraib Tactics Were First Used at Guantanamo*, WASH. POST, July 14, 2005, at A1. The Executive Summary of the so-called Schmidt report, *Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility* (Apr. 1, 2005) [hereinafter Schmidt Report], is available at <http://balkin.blogspot.com/Schmidt%20Furlow%20report.pdf>. The report concludes that these techniques are abusive and degrading, but not contrary to the President’s directive to treat detainees humanely. See Feb. 7, 2002 Bush Memorandum, *supra* note 8, at 135.

²¹ See Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush: Aid Says President Set Guidelines for Interrogations, Not Specific Techniques*, WASH. POST, June 9, 2004, at A3 (quoting a former administration official as saying that “the CIA ‘was prepared to get more aggressive and re-learn old skills, but only with explicit assurances from the top that they were doing so with the full legal authority the president could confer on them’”); see also Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 112 (reporting testimony by the head of counter-terrorism operations for the CIA, who told congressional committees that “there was a ‘before 9/11’ and there was an ‘after 9/11.’ After 9/11, the gloves came off.”).

²² See, e.g., Ripley, *supra* note 3, at 50 (quoting Vice President Dick Cheney’s first post-9/11 interview, in which he stated it would be “vital for us to use any means at our disposal, basically, to achieve our objective”).

to try to be as “forward-leaning” as possible when considering how much latitude to give interrogators dealing with suspected terrorists.²³ Officials at various detention centers in the far-flung Gulag archipelago created by the administration had also indicated their cavalier attitude toward restrictions on their treatment of prisoners. One intelligence official believed he was permitted to authorize “a little bit of smacky-face,” which would be used to give “some extra encouragement” to tight-lipped al-Qaeda suspects.²⁴ Although it is not the case that security officials were willing to do anything at all during interrogations—no one has suggested threatening the families of suspected terrorists, for instance—it is nevertheless apparent that some American officials in the field had a strong interest in pushing the boundaries of acceptable interrogation techniques.

Requests for guidance from the CIA and the DOD set off a flurry of legal activity in Washington. One of the administration’s first decisions was to exclude detainees believed to be associated with the Taliban or al-Qaeda from the protection of the international norms regarding the treatment of prisoners of war.²⁵ Despite forceful objec-

²³ See, e.g., Isikoff et al., *supra* note 19, at 55.

²⁴ Bravin & Fields, *supra* note 16. Euphemisms like “smacky-face” are common in the apologetics of torture offered by the administration and its supporters. For example, Sen. Jim Talent (R-Mo.) said, “If our guys want to poke somebody in the chest to get the name of a bomb maker so they can save the lives of Americans, I’m for it.” *All Things Considered: Army Probes Deaths of Iraq, Afghanistan Detainees* (NPR radio broadcast Mar. 16, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4537927>. Despite this rhetorical strategy of minimization, investigations have not revealed only a few pokes in the chest, but beatings, sexual humiliation, prolonged shackling in painful positions, and deprivation of sleep, food, and water. See ICRC REPORT, *supra* note 4, at 392–93. Indeed, reports have come to light of prisoners being tortured to death while in U.S. custody. See Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at A1 (describing the deaths of two detainees in Afghanistan, which resulted from beatings by American service personnel); Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A1 (detailing the death of Iraqi Major General Abed Hamed Mowhoush, who died after being stuffed into a sleeping bag, bound with electrical wire, and beaten by American CIA and Special Forces personnel). The gross disparity between the abuse suffered at the hands of U.S. forces and the vocabulary used to describe it is a depressing footnote to the abuse scandals.

²⁵ See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Jan. 22, 2002), in THE TORTURE PAPERS, *supra* note 1, at 81, 81 (concluding that members of al-Qaeda and the Taliban were not covered by the laws of armed conflict). The relevant international treaties are the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III], as well as the protections contained in the so-called Common Article 3, which apply in all contexts covered by any of the four Geneva Conventions for the Protection of Victims of War. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108–20 (2004) (noting that “the official U.S. government position is that neither Taliban nor Al-Qaeda fighters qualify as POWs”); Paust, *supra* note 2, at 816–18. See generally *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT’L L. 820 (Sean D. Murphy ed., 2004) (summarizing the Bush administration’s memoranda on the status of detainees).

tions from Secretary of State Colin Powell,²⁶ White House Counsel Alberto Gonzales concluded that non-state terrorism is a “new paradigm” that “renders quaint” some provisions of the Geneva Conventions imposing limitations on the questioning of captured prisoners.²⁷ State Department Legal Adviser William Taft IV also challenged the arguments made by John Yoo in the OLC, which sought to avoid the Geneva Conventions by creating new classifications such as “unlawful enemy combatants” and the allegedly “failed state” of Afghanistan.²⁸

²⁶ See Smith & Eggen, *supra* note 6. Powell’s objections are succinctly presented in a memo to Alberto Gonzales. See Memorandum from Colin L. Powell, Sec’y of State, to Alberto R. Gonzales, Counsel to the President (Jan. 26, 2002), in *THE TORTURE PAPERS*, *supra* note 1, at 122, 122–25. According to sources at the State Department, Powell “hit the roof” when he read the analysis prepared by Justice Department lawyers. See John Barry et al., *The Roots of Torture*, *NEWSWEEK*, May 24, 2004, at 26, 31. The State Department’s Legal Adviser also objected to the decision not to apply the Geneva Conventions to the conflict in Afghanistan. See Memorandum from William H. Taft, IV, Legal Advisor to the State Dep’t, to Alberto R. Gonzales, Counsel to the President (Feb. 2, 2002) [hereinafter Feb. 2, 2002 Taft Memorandum], in *THE TORTURE PAPERS*, *supra* note 1, at 129, 129. In July 2005, a series of memos from high-ranking military lawyers in the services’ Judge Advocate Generals (JAG) Corps were declassified. See <http://balkin.blogspot.com/jag.memos.pdf> [hereinafter JAG Memos]. These memos raised a number of objections to the legal analysis put forward by the OLC lawyers. One recurring theme is that removing the protection of the Geneva Conventions from any category of detainees will jeopardize American service personnel in future conflicts. See *id.* The JAG Memos emphasize that the U.S. military has historically taken the moral high ground in its operational conduct, regardless of whether this conduct is reciprocated by the enemy. See *id.*

²⁷ Jan. 25, 2002 Gonzales Memorandum, *supra* note 8, at 119. The trouble with the “new paradigm” argument is that it is not entirely clear what makes 9/11 and global Islamist terrorism different from threats posed by other states. The administration cites the fact that al-Qaeda is a shadowy enemy that does not wear uniforms, targets civilians, and is dedicated to the destruction of the United States. See Gonzales Briefing, *supra* note 3. But this cannot be the complete justification. Otherwise the argument boils down to, “My enemy violates the law, therefore we are entitled to break the law, too.” (And, in any event, the argument is precluded by Common Article 1 of the Geneva Conventions, which provides that the duty to respect the law governing the treatment of detainees is not based on reciprocal compliance by the enemy. See Paust, *supra* note 2, at 815.) The suggestion that two wrongs make a right is precisely the opposite of accepting the rule of law. It is more characteristic of the excuse offered by dictatorships for curtailing human rights. Consider as an example this directive from Stalin:

“It is known that all bourgeois intelligence services use methods of physical influence against the representatives of the Socialist proletariat and that they use them in their most scandalous forms. The question arises as to why the Socialist intelligence service should be more humanitarian toward the mad agents of the bourgeoisie. . . .”

EDWARD PETERS, *TORTURE* 129–30 (2d ed. 1996) (quoting Stalin’s January 1939 telegram to the People’s Commissariat for the Interior). By contrast, consider the African National Congress’s (ANC’s) decision to abide by the Geneva Conventions in its struggle against the apartheid regime in South Africa. As ANC leader Oliver Tambo put it, the ANC wanted to show that it did not “take our standards from those of the enemy.” See MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 96–97 (2004) (internal citations omitted). The “new paradigm” argument needs to be more fully developed if the administration wishes to avoid “taking our standards from those of the enemy.”

²⁸ The extraordinary debate between State Department lawyers, headed by Taft, and lawyers at the Office of Legal Counsel, including John Yoo, Jay Bybee, and Robert De-

The culmination of this debate was a memorandum issued by President Bush, the most significant aspect of which was a determination that Common Article 3 of the Geneva Conventions did not apply to the conflict with the Taliban and al-Qaeda.²⁹ The memorandum was focused in this way because a domestic criminal statute, the War Crimes Act,³⁰ criminalizes grave breaches of the Third Geneva Convention on the treatment of prisoners of war as well as the provisions of Common Article 3.³¹ The President based this decision on the grounds that the conflict with al-Qaeda and the Taliban was not international in scope, that Taliban detainees were unlawful combatants, and that al-Qaeda was not a contracting party to the Geneva Conventions.³² The memorandum did state that “our values as a Nation . . . call for us to treat detainees humanely,” and that United States Armed Forces would follow the Geneva Conventions as a matter of policy.³³ (Note the conspicuous exclusion of the CIA from the President’s com-

lahunty, was revealed in an exchange of letters and memos, which are now publicly available. See Memorandum from William H. Taft, IV, Legal Advisor to the State Dep’t, to John C. Yoo, Deputy Assistant Attorney General (Jan. 11, 2002), in *Primary Sources: The Torture Debate*, NEW YORKER, http://www.newyorker.com/online/content/?050214on_onlineonly02 [hereinafter *Primary Sources*]; Letter from John C. Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, to William H. Taft, IV, Legal Advisor to the State Dep’t (Jan. 14, 2002), in *Primary Sources, supra*; Memorandum from William H. Taft, IV, Legal Advisor to the State Dep’t, to John C. Yoo, Deputy Assistant Attorney General (Jan. 23, 2002), in *Primary Sources, supra*; Letter from John C. Yoo, Deputy Assistant Attorney General, to William H. Taft, IV, Legal Advisor to the State Dep’t (Mar. 28, 2002), in *Primary Sources, supra*.

²⁹ See Feb. 7, 2002 Bush Memorandum, *supra* note 8, at 134 (claiming that the Geneva Convention applies only to state actors). This determination ignores the protection offered by customary international law, which extends Common Article 3 to detainees not otherwise covered by the Third or Fourth Geneva Conventions. See Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel’s 2002 Opinion Letter and International Law Against Torture*, 12 HUM. RTS. BRIEF 1 (2004); Paust, *supra* note 2, at 816–18. It also misconstrues the Fourth Geneva Convention, which protects civilians who do not belong to armed forces (presumably including the made-up category of “unlawful combatants”). See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; FRÉDÉRIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 13 (1987). A federal district court recently held that detainees alleged to be associated with the Taliban or with both the Taliban and al-Qaeda are protected by the Third Geneva Convention. See *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005). At any rate, the Geneva Conventions themselves require that any ambiguity in a detainee’s status (for example, whether he should be treated as a prisoner of war) must be resolved by a competent tribunal. See Geneva III, *supra* note 25, art. 5.

³⁰ 18 U.S.C. § 2441(c)(3) (2000).

³¹ “Grave breaches” are defined by the Geneva Convention as acts including “wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious bodily injury to body or health . . . or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” See Geneva III, *supra* note 25, art. 130.

³² Feb. 7, 2002 Bush Memorandum, *supra* note 8, at 134–35. For a thorough critique of the reasoning in this memo, see Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (2003).

³³ Feb. 7, 2002 Bush Memorandum, *supra* note 8, at 135.

mitment in this memo.)³⁴ The President's decision therefore shifted the source of constraint on how interrogations are conducted from the law to national values and, in effect, presidential grace.³⁵ With respect to the international law on the treatment of prisoners of war, presidential grace therefore became the only thing standing between intelligence officials' desire to ramp up the coercive treatment of detainees.

With the possibility of domestic legal prosecution for violating the Geneva Conventions seemingly out of the way, administration officials next sought legal advice on the applicability of any other domestic and international legal norms that would restrict the questioning of detainees captured in Afghanistan. Most troublesome were the 1984 Convention Against Torture³⁶ and the federal legislation implementing it.³⁷ The Convention and the federal statute are both stated in terms of "torture," suggesting by the principle of *expressio unius* that they do not prohibit something coercive but less than torture, like inhuman or degrading conduct.³⁸ Lawyers in the OLC therefore sought to construe the operative term, torture, as narrowly as possible. Torture is defined in the statute as an "act . . . specifically intended to

³⁴ See *id.*

³⁵ As the State Department Legal Adviser argued to Alberto Gonzales, it is important that the United States announce that it bases its conduct not just on policy preferences but on international law. See Feb. 2, 2002 Taft Memorandum, *supra* note 26, at 129.

³⁶ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Torture Convention]. The Convention covers all "persons" and is not limited to categories of detainees such as prisoners of war. See *id.* arts. 1, 3, and *passim*.

³⁷ See 18 U.S.C. §§ 2340–2340A (2000).

³⁸ This interpretation is bolstered by the Convention itself, which refers to "other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture." See Torture Convention, *supra* note 36, art. 16. Note, however, that Common Article 3 of the Geneva Conventions does prohibit "outrages upon personal dignity, in particular, humiliating and degrading treatment," which presumably includes acts such as forcing detainees to perform dog tricks while wearing a leash. See Schmidt Report, *supra* note 20. As discussed above, customary international law would certainly apply Common Article 3 to Taliban and Iraqi detainees. See *supra* note 29. Common Article 3, which covers "armed conflict not of an international character," arguably applies to suspected al-Qaeda members as well, if the term "not of an international character" is understood to refer to armed conflict not between states. Justice Department lawyers John Yoo and Robert Delahunty argued that Common Article 3 covers only civil wars fought primarily within the territory of a state, as opposed to conflicts between a state and a transnational terrorist organization. See Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Dep't of Def. General Counsel (Jan. 9, 2002), in THE TORTURE PAPERS, *supra* note 1, at 38, 44–45. In response, international legal scholars have cited the authoritative commentary to the Geneva Conventions, which supports a broader reading. Under this more expansive interpretation, a non-international armed conflict *excludes* only "'mere act[s] of banditry or . . . unorganized and short-lived insurrection[s].'" See Jinks, *supra* note 32, at 24 (quoting I COMMENTARY ON GENEVA CONVENTION 50 (Jean S. Pictet ed., 1952) (alterations in original)).

inflict severe physical or mental pain or suffering,”³⁹ and severe pain and suffering is further defined as the prolonged harm caused by one of several enumerated acts.⁴⁰ By focusing on the specific-intent requirement and the element of severe pain or suffering, the lawyers created an implausibly restrictive definition of torture: “[T]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.”⁴¹ Despite the plain meaning of the statutory language to the contrary, burning detainees with cigarettes, administering electric shocks to their genitals, hanging them by the wrists, submerging them in water to simulate drowning, beating them, and sexually humiliating them would not be deemed “torture” under this definition.

The lawyers drew support for this narrow definition from an unlikely source, namely several federal statutes defining an “emergency condition” for the purpose of obtaining health care benefits.⁴² Not only do these statutes have nothing to do with torture, but the syntax of the statutory text shows that the OLC lawyers got the interpretation backwards. For example, one statute defines an emergency condition as one

manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson . . . could reasonably expect the absence of immediate medical attention to result in . . . (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.⁴³

The statute is plainly not setting out a definition of severe pain in terms of organ failure or dysfunction, but using severe pain as one symptom among many—including organ failure or dysfunction—which might reasonably lead a prudent layperson to conclude that a person is in need of immediate medical attention.⁴⁴ A lawyer conscientiously applying the plain meaning rule could not in good faith conclude that severe pain is limited to cases threatening organ failure or dysfunction.⁴⁵ The lawyers also downplayed cases arising under stat-

³⁹ 18 U.S.C. § 2340(1) (2000).

⁴⁰ *Id.* § 2340(2).

⁴¹ Aug. 1 OLC Memo, *supra* note 1, at 183.

⁴² *Id.* at 176.

⁴³ *See, e.g.*, 42 U.S.C. § 1395w-22(d)(3)(B) (2000).

⁴⁴ The Justice Department later reconsidered its interpretation and, tucked away in a footnote, admitted that the health care statutes “do not . . . provide a proper guide for interpreting ‘severe pain’ in the very different context of the prohibition against torture.” *See* Superseding Memorandum, *supra* note 5, at 8 n.17.

⁴⁵ *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 144–45 (1995) (stating the “plain meaning” rule, which is that courts must assign ordinary meaning to statutory language whenever such meaning is clear).

utes in more closely analogous contexts, such as the Torture Victim Protection Act (TVPA).⁴⁶ The TVPA also defines torture in terms of severe pain and suffering and has acquired a sizeable body of case law interpreting the severity standard.⁴⁷ The memo did cite the TVPA, but labors to distinguish cases tending to show that severe pain can result from acts that do not necessarily threaten permanent organ failure or dysfunction.⁴⁸ For example, in one case brought under the TVPA, the lawyers for a former prisoner held by Bosnian Serbs insisted that the episode constituted torture only because all of the acts taken together created severe pain and suffering.⁴⁹ Other cases demonstrate that the courts are willing to treat individual acts as torture; the OLC lawyers, however, buried these cases in an appendix to the memo.⁵⁰ This is typical of the OLC lawyers' mode of analysis, which is to rely on formalistic and narrow constructions of legal rules, divorced from their context and other sources of meaning.

If anything, the OLC lawyers did an even worse job of analyzing the available defenses to a criminal prosecution for violating the federal statute implementing the Torture Convention.⁵¹ The memo's conclusion, that the standard criminal law defense of necessity could justify what would otherwise be prohibited torture, fails both by virtue of the specific principles of interpretation applicable in the area of international humanitarian law and by ordinary criminal law standards. For one thing, the Torture Convention itself contains a clear nonderogation provision, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war . . . or any other public emergency, may be invoked as a justification of torture."⁵² This provision is entirely in keeping with the international law prohibiting tor-

⁴⁶ 28 U.S.C. § 1350 (2000).

⁴⁷ See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 789, 790–93 (9th Cir. 1996) (finding torture where the victim was subjected to beatings, electric shocks, sleep deprivation, and extended solitary confinement); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64–66, 68 (D.D.C. 1998) (concluding that beatings, threats of death, and playing Russian roulette can constitute torture).

⁴⁸ See Aug. 1 OLC Memo, *supra* note 1, at 191–96.

⁴⁹ *Id.* at 193 (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)).

⁵⁰ See *id.* at 214–17.

⁵¹ See *id.* at 207–213.

⁵² Torture Convention, *supra* note 36, art. 2(2). The nonderogation provision does not apply to "other forms of cruel, inhuman or degrading treatment." *Id.* art. 16(1). Although the August 1, 2002 memo does not make this point perfectly clear, part of the motivation for defining torture narrowly, and then making a case for the justification of necessity, might be to come within the safe harbor of justified cruel, inhuman, or degrading treatment. Common Article 1 of the Geneva Conventions, however, is commonly understood as creating gap-free coverage in all circumstances of armed conflict, and as making the Geneva Conventions nonderogable even in cases of alleged necessity. See Paust, *supra* note 2, at 814–15. Thus, the small coverage gap in the Torture Convention is irrelevant to the question of whether norms of international humanitarian law generally preclude inhuman, degrading, or humiliating treatment.

ture, which was a reaction to the attempt by states to justify torture by defining a category of *crimen exceptum*—crimes so dangerous to society that extraordinary measures for the investigation and prosecution of these crimes should be permitted.⁵³ The attempt throughout the memo (and the administration's pervasive rhetoric about new paradigms) is simply beside the point in light of the design of international antitorture law. The nonderogable nature of the prohibition on torture is the unequivocal rejection of the OLC's position. Ironically, there is a plausible argument that necessity may be preserved as a defense *for individuals* in domestic criminal law, despite the nonderogable nature of the prohibition on torture *by states*,⁵⁴ but the lawyers failed to make it.

As for domestic criminal law on necessity, there is no acknowledgment anywhere in the memo of the extremely rare circumstances under which necessity can successfully be invoked as a defense.⁵⁵ Dudley and Stevens were sentenced to death for killing and eating the cabin boy, Richard Parker,⁵⁶ and a criminal law treatise cites numerous cases similarly rejecting the necessity defense.⁵⁷ One could imagine, though, circumstances in which a court might apply the necessity defense to justify conduct that would otherwise be criminal. Suppose an Air Force commander was communicating with the pilot of an armed F-16 fighter, which had intercepted a civilian airliner that had gone seriously off course and failed to respond to repeated attempts to contact it by radio. If the commander knew with certainty that the plane was American Airlines Flight 11, with Mohammed Atta at the controls, bound for the North Tower of the World Trade Center,⁵⁸ it would be difficult to envision a court not permitting the officer to assert the defense of necessity in response to prosecution for ordering the destruction of the airplane.⁵⁹ (It is perhaps even more difficult to envision a prosecutor exercising discretion to charge the commander.)

The memo's analysis is so vague and open-ended, however, that it is difficult to find the logical stopping point. The authors seem to

⁵³ See PETERS, *supra* note 27, at 6; see also Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT'L CRIM. JUST. 785, 787 (2004).

⁵⁴ Gaeta, *supra* note 53, at 789–90.

⁵⁵ See Aug. 1 OLC Memo, *supra* note 1, at 298 (making the conclusory assertion that “under the current circumstances the necessity defense could be successfully maintained”).

⁵⁶ R. v. Dudley, 14 Q.B.D. 273, 287–88 (1884). See generally A.W. BRIAN SIMPSON, *CANONICALISM AND THE COMMON LAW* (1984).

⁵⁷ WAYNE R. LAFAYE, *CRIMINAL LAW* § 5.4(c), at 479–81 (3d ed. 2000).

⁵⁸ For what we know in hindsight about the flight of American 11, see THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1–2, 4–7, 18–21, 32 (2004).

⁵⁹ See Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 333 (1989).

have in mind a case like the Air Force commander, but they do not limit their analysis to that case. Rather, by talking loosely and generally about necessity, they invite interrogators to conclude that their conduct may be justified. The error here is not strictly a jurisprudential one; the OLC lawyers acknowledge that moral considerations (such as the balance of harms) are relevant to interpreting the law. The fault in the reasoning instead lies in the careless extension of the ticking-bomb hypothetical to the far more mundane scenarios actually confronting investigators, in which there are no background facts to suggest a substantial likelihood that a given detainee is likely to have critical, time-sensitive information.

The Justice Department's superseding memo modifies many of the flawed positions of the administration's lawyers, although in a convoluted way it refuses to back down on the legal theory that the President, as Commander-in-Chief, has the legal authority to suspend the obligations of international law, and the legislative and judicial branches are powerless to intervene.⁶⁰ An optimist might regard this

⁶⁰ See Superseding Memorandum, *supra* note 5, at 2. The Superseding Memorandum calls the discussion of separation of powers in the August 1, 2002 memo "unnecessary" in light of "the President's unequivocal directive that United States personnel not engage in torture." See *id.* Actually, the President's official directive, as opposed to the public statement cited in the memo, applies only to military personnel. See Feb. 7, 2002 Bush Memorandum, *supra* note 8, at 135. This distinction leaves open the possibility that the administration anticipates using executive power to resist investigation or prosecution of CIA officials for violations including torture, rendition, and disappearances (detainees who suffer the latter are referred to as "ghost detainees").

Rendition—i.e., the transfer of protected detainees to another country—likely plays a substantial role in the administration's attempts to extract information from detainees. See, e.g., Don Van Natta Jr., *U.S. Recruits a Rough Ally To Be a Jailer*, N.Y. TIMES, May 1, 2005, at A1. The administration's rendition of detainees to countries that are less hesitant to use torture, and thus more likely to get detainees to talk, has long been an open secret. Press reports of a secret rendition program have relied on detainees' accounts of being captured and flown to countries like Afghanistan, Syria, and Egypt, as well as the flight logs of two airplanes—a Gulfstream business jet and a 737 airliner—whose registrations had been altered, and whose flight plans accorded perfectly with the detainees' accounts. See, e.g., *id.*; Michael Hirsh et al., *Aboard Air CIA*, NEWSWEEK, Feb. 28, 2005, at 32; Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1; Scott Shane, *Detainee's Suit Gains Support from Jet's Log*, N.Y. TIMES, Mar. 30, 2005, at A1. Effectively confirming these reports, an American official was quoted in the *Washington Post* as saying, "We don't kick the shit out of [suspected terrorists]. We send them to other countries so that they can kick the shit out of them." Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1. Subsequent news reports indicate that President Bush signed a secret directive permitting the CIA to transfer detainees to countries with notoriously lax scruples against torture. See Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at A1. Presumably, this secret directive relies on the President's alleged authority as Commander-in-Chief to suspend American treaty obligations, which would otherwise prohibit rendition.

Rendition is prohibited by the Fourth Geneva Convention regardless of the motive for the transfer. See Geneva IV, *supra* note 29, art. 49. The Torture Convention prohibits rendition if there are substantial grounds for believing that the person is in danger of being subjected to torture. See Torture Convention, *supra* note 36, art. 3. The Senate's

development as a small victory for the rule of law. A slightly more cynical interpretation would be that the administration backed down only because its reasoning process was exposed to public scrutiny. No one can know for sure, of course, but it seems likely that the August 1, 2002 memo would have been drafted in a very different way if its authors had known they would be called upon to defend their analysis in public. This likelihood tends to vindicate my view that a lawyer's responsibility toward the law, in advising clients, should be understood from the hypothetical standpoint of an impartial observer.

There is nothing necessarily wrong with advancing creative arguments as long as they are clearly identified as such, with weaknesses and counterarguments candidly noted. But an interpretation that one could not advance with some measure of pride and satisfaction in front of an impartial, respected lawyer or judge is an erroneous interpretation. A lawyer violates her obligation of fidelity toward the law by basing advice or structuring a transaction on the basis of such a reading of the law. In addition, a lawyer who does not flag creative and aggressive arguments as such violates her fiduciary duty to her client by providing purportedly neutral advice without the caveat that the lawyer's interpretation may not accurately represent the applicable law. As the jurisprudential argument of the following sections will demonstrate, this is the reason that the administration lawyers are properly subject to moral criticism for their role in advising on torture.

ratification of the Torture Convention was made conditional on the understanding that the term "substantial grounds" in Article 3 is equivalent to a "more likely than not" standard. See U.S. Reservations, Declarations, and Understandings to the Convention Against Torture, 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990), available at the University of Minnesota Human Rights Library <http://www1.umn.edu/humanrts/usdocs/tortres.html>. Note that even subject to the Senate's understandings, the Torture Convention standard is not "knowledge" that the person will be subject to torture, so U.S. authorities cannot turn a blind eye to the human rights records of the countries to which they render detainees. The administration apparently believes, however, that if a destination country verbally assures the administration that the detainee will not be tortured, it is "more likely than not" that the country—no matter how poor its human rights record—will not torture the detainee. See Dana Priest, *CIA's Assurances on Transferred Suspects Doubted: Prisoners Say Countries Break No-Torture Pledges*, WASH. POST, Mar. 17, 2005, at A1. Given the well-documented human rights abuses in many transferee countries, these verbal assurances may be a sham. An Arab diplomat likened the process to "[d]on't ask, don't tell," and even one CIA officer admitted the assurances are "a farce." *Id.* As a matter of domestic law, rendition to a country in which there are substantial grounds for believing that the person will be subject to torture is against government policy. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-761, 2681-822 (1998). This policy statement is backed up by regulations prohibiting the removal of an alien to a country in which it is more likely than not that the alien will be subject to torture. See 8 C.F.R. § 208.18 (2005).

II

MORAL REASONS TO RESPECT THE LAW

A. The Authority of Law

Some may object that this argument is a wrong turn—an evasion of the moral issue or an attempt to sanitize the horror of torture by treating it as just another jurisprudential puzzle. Shouldn't the response to allegations of torture at Guantánamo Bay and Abu Ghraib be to condemn torture in the strongest possible terms, as grave moral evil? Surely it is parochial or even obtuse to second-guess the parsing of statutes prohibiting torture when

[w]e live in times where it is no longer abhorrent to express the need to apply electricity to the genitals of a prisoner or tear out his fingernails or keep him for days on end in a cage and blindfolded, if that will save our skin, protect our children, foster our security.⁶¹

It seems that the last thing we should be doing is contemplating legalizing or regularizing torture, instead of working for its abolition. But consider the persistence of belief by thoughtful people—and not just following the September 11th attacks—that in some cases torture may be a lesser evil,⁶² or that exercising political leadership in times of danger sometimes means acting with a degree of ruthlessness that would be unacceptable in ordinary morality.⁶³ On the other hand, some nations have faced crises of 9/11 magnitude without resorting to torture. For example, British authorities declined to torture a recalcitrant detainee during World War II, despite the fact that the country was still reeling from a terror bombing campaign (they called it “strategic” bombing then) which had killed 42,000 civilians.⁶⁴ Similarly, the High Court of Israel prohibited its state security service from using coercive techniques, such as stress positions and bombarding detain-

⁶¹ Ariel Dorfman, *Foreword: The Tyranny of Torture: Is Torture Inevitable in Our Century and Beyond?*, in *TORTURE: A COLLECTION* 3, 5 (Sanford Levinson ed., 2004).

⁶² See, e.g., IGNATIEFF, *supra* note 27, at 20.

⁶³ See generally, e.g., THOMAS NAGEL, *Ruthlessness in Public Life*, in *MORTAL QUESTIONS* 75 (1979); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160 (1973). In opinion journals and scholarly articles, Judge Posner has expressed the view that no one should be in a position of public responsibility who doubts that in certain extreme cases torture would be permissible. See Richard A. Posner, *The Best Offense*, *NEW REPUBLIC*, Sept. 2, 2002, at 30 [hereinafter Posner, *Best Offense*]; Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra* note 61, at 291, 295. Officials concerned with maintaining their own moral purity might “keep their hands clean at the expense of the good, perhaps even the survival, of the rest of us.” DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 13 (1987).

⁶⁴ See James Meek, *Nobody Is Talking*, *GUARDIAN* (U.K.), Feb. 18, 2005, at 2 (book review); see also A.W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (1992) (reviewing the history of the British government's detention of “enemy aliens,” and considering the case as an instance of the problem of a liberal democracy confronted by a grave threat to its security).

ees with loud music, even in light of the deaths of hundreds of Israeli civilians in terrorist attacks.⁶⁵

Further uncertainty arises because, even taking as given the prohibition on torture in international and domestic law, “torture” is still a term that must be not only defined but also differentiated from cruel or degrading treatment, “torture lite,”⁶⁶ or morally permissible interrogation techniques that make the detainee uncomfortable or anxious.⁶⁷ Perhaps sufficiently dangerous times call for political action that respects international humanitarian law, but nevertheless permits certain aggressive questioning techniques, particularly as applied to detainees who are likely to be highly placed within a terrorist network. One could imagine, counterfactually, an Israeli court decision that the security forces could not employ torture, but that hooding suspects or forcing them to assume uncomfortable positions did not constitute torture. One might disagree with the decision, but it would appear to be within the range of beliefs that a reasonably morally sensitive person might endorse in appropriate circumstances. Again, the relevant moral domain here is the ethics of occupying a public office, entrusted with protecting the safety of citizens. There may be good reasons to believe that actions are justifiable in this domain that would not be permissible for individuals acting outside this institutional context.⁶⁸

Considering these normative questions shows that, at least in some cases, reasonable people can disagree in good faith about what morally ought to be done when a suspected terrorist—who may possess information that could be used to prevent the murder of thousands of innocent people—is captured.⁶⁹ While we can have careful and productive debates about these cases, the fact remains

⁶⁵ H.C. 5100/94 Public Comm. Against Torture v. Israel [1999] IsrSC 53(4) 817, 845. Although it is impossible to compare evils quantitatively, it is worth observing that the deaths of 121 Israeli civilians during an eighteen-month period of the Intifada represents a per capita casualty rate that exceeds the approximately 2,700 civilian deaths in the attack on the World Trade Center by about twenty-five percent. See Peter Beaumont, *Hamas Threat over Killing of Key Bomber*, GUARDIAN (U.K.), July 2, 2002, available at <http://www.guardian.co.uk/israel/Story/0,2763,747642,00.html>; CBS News: *Poor Info Hindered 9/11 Rescue* (CBS television broadcast May 18, 2004), available at <http://www.cbsnews.com/stories/2004/05/18/terror/main618174.shtml>. The comparison is meant to suggest only that, even if the 9/11 attacks are regarded as some kind of normative “moment,” other nations facing comparable watershed moments have reached different conclusions regarding the permissibility of torture.

⁶⁶ This term is used by Alan Dershowitz and others in reference to practices employed by American interrogators at Abu Ghraib and Guantánamo. See Alan M. Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION, *supra* note 61, at 257, 264.

⁶⁷ IGNATIEFF, *supra* note 27, at 20.

⁶⁸ See BERNARD WILLIAMS, *Politics and Moral Character*, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980 54 (1981).

⁶⁹ The question here arises in the context of what Henry Shue calls “interrogational” torture—that is, torture aimed at extracting information, as opposed to punishing the pris-

that it is crucial for law enforcement and intelligence officials on the ground to have practical guidance.⁷⁰ It is not sufficient to state at a high level of abstraction that torture is a grave violation of human rights, or that it is a *jus cogens* norm in international law (i.e., a peremptory norm that is deemed universally binding and not subject to derogation).⁷¹ Military and civilian interrogators need to know whether a technique in question, such as keeping detainees awake for extended periods of time or forcing them to stand in uncomfortable positions, constitutes prohibited “torture.” They cannot answer these questions simply by engaging in moral reasoning, because that reasoning produces indeterminate results. A shared need therefore arises for the provisional settlement of this normative controversy. The law provides a fair means of resolving normative conflict and, as such, is entitled to respect by citizens, officials, and lawyers. It enables all citizens to reach at least provisional agreement on a common course of action, despite persistent and deep moral disagreement. To put it another way, law is a “nonutopian social construction[] for controlling social conflict within modern societies.”⁷²

An example from Joseph Raz may help illustrate how the need for provisional settlement can give rise to a reason for regarding a directive as authoritative over the domain of practical reasoning.⁷³ Suppose two commercial parties are having a dispute over whether one party performed in accordance with her contractual obligations.⁷⁴ Both parties believe the balance of reasons favors her, but they are at an impasse in their negotiations. In order to continue with a valuable commercial relationship, the parties need to have a final settlement of the dispute that has temporarily halted their dealings. Unable to resolve their conflict, they agree to submit an issue to an arbitrator. By consenting to have the dispute decided by the arbitrator, the parties

oner, obtaining a confession, or intimidating political opponents of the regime. See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 133–35 (1978).

⁷⁰ See ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 306 (1988) (“[T]he moral problems faced by agents in marginal and ambiguous situations always take them beyond the reach of universal principles and general theories”); HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* 271–79 (1994).

⁷¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987). *Jus cogens* norms cannot be affected by treaties (or, a fortiori, reservations taken thereto). See *id.* § 331 cmt. e. For U.S. court decisions stating that the prohibition on torture is *jus cogens*, see, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305–06 (S.D.N.Y. 2003).

⁷² GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 5 (2004).

⁷³ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41–42 (1986) [hereinafter RAZ, *MORALITY OF FREEDOM*].

⁷⁴ See *id.*

agree that the arbitrator's decision will supersede any of the reasons they had previously, and will create a new reason for action that is binding, regardless of the parties' beliefs prior to the decision.⁷⁵ They do this because they share an interest in resolving the dispute fairly, and because they are unable to do so acting by themselves. The intervention of a legal authority is required to enable them to continue with a mutually beneficial course of dealing.

One of the key insights of this theory of authority is that the arbitrator's judgment replaces reasons that the parties had prior to the authoritative directive being issued, but it does not override their will or coerce them in any way.⁷⁶ The reason is not that the parties gave their consent, as one might think. Rather, the consent of the parties is itself explained by a deeper reason—the desire of the parties to get beyond an impasse and resolve a conflict that has hindered their mutually beneficial cooperation. The parties share an interest in working together and fairly settling disputes that divide them. This reason, which motivated them to consent to the arbitration procedure, is the basis for the binding effect of the arbitrator's decision. The decision is based on reasons that already apply to the parties, namely the desire to cooperate.⁷⁷ At the same time, the reasons are independent of the content of the parties' beliefs—that is, each party agrees to abide by the arbitrator's decision even if it is unfavorable to that party, and even if the party fervently believes that he should have prevailed in the arbitration.⁷⁸ Ingeniously, this conception of authority builds on one set of reasons the parties have—the desire for cooperation—while not depending on the reasons about which the parties disagree.

The law as a social institution can be generalized from Raz's arbitrator example.⁷⁹ It arises from the need of individuals to settle jointly on one course of action—call it A or B—for some collectivity of citizens despite disagreement over whether to pursue A or B. Naturally some goods can be obtained strictly in private, so one citizen can pursue A and another B. However, many goods, such as health care, education, and the protection of safety and property, can be realized only by cooperation with others, so every person has an interest in working together with other members of the society in order to satisfy her

⁷⁵ See *id.* at 42.

⁷⁶ See *id.*

⁷⁷ Raz calls this the "dependence thesis." See *id.* at 47.

⁷⁸ See *id.* at 38–39.

⁷⁹ Raz himself does not believe that this justification of authority can be used to support a general obligation to obey the law, even in a basically just society. In his view, governments have limited technical expertise—and no moral expertise—so citizens do not do better at realizing their prepolitical interests by deferring to government directives, except in certain cases. See *id.* at 78. My argument should therefore be understood as one based on Raz's, but which goes beyond what Raz would accept.

desires for these goods.⁸⁰ Disagreement threatens this common project by miring cooperative activity in controversy, either over the end to be achieved or the means by which it should be achieved. In one common scenario, one citizen's pursuit of A interferes with another's pursuit of B, and there is a conflict between these two projects. For example, if two citizens are neighbors, and one has a cement plant (A) and the other has a farm (B), the cement plant interferes with the farm, and the farm interferes with the cement plant.⁸¹ If these two individuals want to carry on their farming and cement-producing activities, they must coordinate their claims of rights. Alternatively, individuals may agree to undertake a common project, which has either A or B characteristics. For example, everyone may agree on the need to cooperate to develop sources of energy and policies regulating the use of natural resources, but may disagree over whether to emphasize conservation (A) or exploration for new resources (B). Paralysis over the choice between A and B threatens the common interest of all, so citizens share an interest in resolving the disagreement between A and B and getting on with their energy-consuming activities.

In many cases, citizens might reasonably conclude that both A and B are consistent with the demands of morality. There are several explanations for this situation. First, it may be the case that the choice between A and B is largely an empirical one, within a context of widely shared normative beliefs.⁸² For example, there might be broad agreement that reducing poverty is desirable, but justified disagreement over whether free-market or state-based solutions are more effective at reducing poverty. Second, we exist in conditions of moderate scarcity and limited benevolence—what Hume called the “circumstances of justice.”⁸³ In the circumstances of justice, individuals seek to maximize the satisfaction of their own interests, constrained by some degree of concern for others. The result of this struggle is conflict over the distribution of goods among citizens. Third, A and B may be incompatible but reasonable alternatives because of moral pluralism. Perhaps our moral concepts are not parts of a unified whole but fragments of the various religious and secular traditions that have historically informed our reflection on questions of value and character.⁸⁴

⁸⁰ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 149, 154–56, 231–33, 248–51 (1980).

⁸¹ Cf. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 877 (N.Y. 1970) (enjoining “the defendant cement company from continuing the discharge of dust particles upon its neighbors’ properties unless, within 18 months, the cement company abated this nuisance”).

⁸² See JEREMY WALDRON, *LAW AND DISAGREEMENT* 176–80 (1999).

⁸³ See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 21–23 (1996).

⁸⁴ See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* (1988).

Even if the genealogical explanation does not account for pluralism, there may nevertheless be a diversity of human goods, capabilities, comprehensive views, prima facie obligations, or what have you, and no higher-order master value that can be used to construct rankings or priorities among these basic units of value.⁸⁵ Finally, one might make the argument that there is no universally valid standpoint from which to undertake normative evaluation.⁸⁶ Whatever the source of our disagreement, epistemological humility in political philosophy might underwrite a kind of ethics of procedure, in which government officials defer to the results of fair procedures for resolving normative conflict.⁸⁷

The important point is that deliberation and debate alone will not settle whether A or B should be done. Moreover, these conditions mean that much normative disagreement is in good faith; people are not simply maneuvering in the public domain to grab the biggest piece of the pie for themselves (although of course this happens), but are often motivated by the belief that their proposed rules for social ordering are those most likely to maximize social well-being. This question then arises: Given that people can reasonably disagree about the rules that should be adopted governing social living, and given that each person's views about the rules should be treated with respect and that no one's views should be arbitrarily accorded greater weight, what sort of regulatory mechanism ought to be established to permit people to live together in peace, while facilitating the cooperation that is necessary to the realization of basic human goods or capabilities? Such a mechanism is necessary to achieve what I have been referring to as a substantive *settlement* of moral disagreement, by which I mean not only termination of the dispute, but the construction of a normative framework that is sufficiently thick to serve as the basis for evaluation.

The claim that the law possesses legitimate authority is the claim that a citizen should regard legal directives *as such* as reasons for action, and should not conduct an all-things-considered moral evaluation of the permissibility of performing the action the law demands or refraining from doing something the law prohibits.⁸⁸ Citizens do

⁸⁵ See, e.g., WILLIAM A. GALSTON, LIBERAL PLURALISM 5–6, 28–35 (2002); W.D. ROSS, THE RIGHT AND THE GOOD 19–47 (1930); Isaiah Berlin, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY 1, 1 (Henry Hardy ed., 1991); Thomas Nagel, *The Fragmentation of Value*, in MORTAL QUESTIONS 128, 128–41 (1979).

⁸⁶ For a sophisticated version of this argument, see NICHOLAS RESCHER, PLURALISM: AGAINST THE DEMAND FOR CONSENSUS 76–78 (1993).

⁸⁷ See WALDRON, *supra* note 82, at 175. Geoffrey Miller argues that “an agency attorney acts unethically when she substitutes her individual moral judgment for that of a political process which is generally accepted as legitimate.” See Miller, *supra* note 9, at 1294.

⁸⁸ See RAZ, MORALITY OF FREEDOM, *supra* note 73, at 27–29.

more than acquiesce to a demand that they obey—they regard themselves as being rightfully required to obey. This is different from a recognitional conception of authority, in which the directives of an authority give rise to a reasonable belief that one ought to perform the action commanded.⁸⁹ The advice of experts has recognitional authority, in that the advice does not affect the underlying balance of reasons for action. For example, a doctor might tell her patient that she ought to quit smoking because it would be better for her health. The directive to stop smoking does not alter the reasons for action that the patient had before consulting with the physician—he always wanted to improve his health, but sought the doctor’s advice on the best strategies for becoming healthier. Legal directives, by contrast, do alter the balance of underlying reasons, by replacing the reasons for action an agent may have had previously.

In a democracy this process of achieving settlement must take into account the fundamental value of equality, and must acknowledge that no citizen’s views should count more than others in deciding on common rules for social cooperation. The emphasis is therefore on finding a fair procedure to resolve normative disagreement, not necessarily on finding the right answer. Substantive criteria, such as the justice of a law, protecting the rights of individuals, or the “best possible constructive interpretation”⁹⁰ of a legal system, are too contestable in a pluralistic society to serve as standards of legitimacy. Moreover, the public-choice critique of legislation shows that the product of deliberation by legislative bodies is nothing resembling laws enacted in the public interest, but are instead the spoils of fights among interest groups.⁹¹ One might worry, however, that even procedural criteria such as fairness and representativeness are just as contestable in a pluralistic society as substantive criteria of justice.

I am not naive about what actually goes on in legislatures, and it is not part of my argument for the authority of law that the lawmaking process actually “gets it right,” in the sense of producing reasonable, public-spirited laws.⁹² As I have argued elsewhere, standards of proce-

⁸⁹ See *id.* at 29.

⁹⁰ See RONALD DWORKIN, *LAW’S EMPIRE* 228, 230, 255 (1985).

⁹¹ See, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 (1986) (“Too often the [political] process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve.”); William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 568–69 (2000) (book review).

⁹² This project belongs to the realm of nonideal political theory, which does not assume general compliance with moral norms but instead asks what a given person or institution should do in light of the failure of others to do what they are required to do. See LIAM MURPHY, *MORAL DEMANDS IN NONIDEAL THEORY* (2000); JOHN RAWLS, *A THEORY OF JUSTICE* 2, 11, 26, 39, 46, 53–59 (1971).

dural fairness need only be satisfied, not optimized.⁹³ This means accepting a certain amount of interest group rent-seeking, the influence of money on election campaigns, and the resulting logrolling and compromises. In a large-scale, complex, pluralistic, decentralized society, it seems inevitable that people will rely on indirect mechanisms, like interest groups and politically motivated donations, to express preferences regarding legislation. These processes in turn are susceptible to some degree of corruption, but it is a mistake to think that we could eliminate corruption entirely. At some point the process may become so rotten that it is essentially a kleptocracy. In those circumstances, citizens may be justified in concluding that the process of self-governance through law is no longer serving its social function of providing a provisional settlement of normative disagreement that is at least minimally respectful of the competing positions held by individuals. The threshold for concluding the legal process is illegitimate must be set fairly high, however, in order to avoid having the process of resolving normative conflict become crippled by normative conflict over procedural fairness.

One way around the public-choice debate might be to imagine an idealized deliberative situation in which a group of people face the need to cooperate to achieve some collective end, but disagree in moral terms, either about the end itself or about the means by which it should be achieved. If the picture of the law's authority offered here is plausible in the stylized setting, then we can at least accept this model of authority *in principle*, and then focus on how much deviation from these ideal procedures can be tolerated. With that in mind, the following parable illustrates how this kind of disagreement can arise and how the law can provide provisional settlement of normative conflict.

B. A Just-So Story

To illustrate how this conception of the authority of law would work in the context of the law governing morally problematic practices like torture, we can tell a fanciful story about how the law might evolve. This is not an invisible-hand explanation; I am not claiming that the law has actually evolved in this way. Rather, the story is more in the nature of a fable, similar to the stories found in economics textbooks to illustrate the development of money or the banking system. It explains the authority of law not as a matter of its historical pedigree, but on the basis of its normative attractiveness. The story goes like this: Imagine a small group of people who have banded together to form a mutual protection association—a kind of Nozickean mini-

⁹³ Wendel, *Obedience*, *supra* note 13, at 410.

mal state.⁹⁴ The association's purpose is to regulate the use of force within certain territorial borders and to protect the rights of people living in the territory. The state is minimal in the sense that it aims, to the greatest extent possible, to avoid interfering with the liberty of its citizens. Because citizens of the minimal state respect human rights and autonomy, they are concerned above all to avoid coercion by one group of citizens who subscribe to an idiosyncratic set of values, but who happen to have access to the levers of state power.

We begin with the baseline of the minimal state as a response to the challenge of philosophical anarchism. Philosophical anarchism proceeds from a Kantian theory of human nature in which people are fundamentally autonomous beings, responsible for making moral judgments about how they ought to act.⁹⁵ When the state demands that people do something or refrain from doing something, it interferes with autonomy—the moral right to deliberate, make decisions, and take responsibility for one's actions. Although an anarchist is unwilling to concede that the state has a moral right to rule in most cases, if it is possible to construct a minimal state which is preferable to anarchy, one would be justified in regarding the demands of that state as legitimate. A minimal state, sometimes called the "night-watchman" state, is one that responds to certain basic demands that all citizens share, most notably the protection of citizens against violence, committed either by fellow citizens or outsiders to the territorial jurisdiction of the state.⁹⁶

Within the borders of our minimal state, a problem has arisen. Agents of a shadowy transnational movement have infiltrated, with the goal of toppling the government, and with a commitment to using all available means to wage this war, including the murder of civilians. Suspected infiltrators are occasionally captured, raising the possibility that they may divulge information that could be used to prevent a future attack.⁹⁷ The suspects are fanatically devoted to their cause, and have proven resistant to traditional psychological techniques, such as promises of lenience in exchange for cooperation or good-cop-bad-cop routines, designed to elicit information. Some experienced interrogators therefore wonder whether there may be a limited

⁹⁴ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 88–119 (1974).

⁹⁵ See R.P. Wolff, *The Conflict Between Authority and Autonomy*, in AUTHORITY 20–30 (Joseph Raz ed., 1990).

⁹⁶ NOZICK, *supra* note 94, at 26–27.

⁹⁷ As discussed previously, the questions to the OLC about the extent of legal restrictions on torture were prompted by a similar situation: CIA investigators interrogating Abu Zubaida, a high-ranking al-Qaeda member, were unable to break his resistance; thus, they asked whether they could step up the level of coercion and use tactics like "waterboarding," which makes its subjects feel like they are drowning. See *supra* notes 18–21 and accompanying text.

role for “stress and duress techniques” such as forcing prisoners to stand for hours in awkward positions, depriving them of sleep, hooding them, or bombarding them with lights or sound. The question of whether these techniques are permitted is passed upward through the ranks of security service officials, who fall into disagreement about the right answer.⁹⁸ All do agree that the threat is real, that some detainees may possess valuable information, that the state’s commitments to respect human rights and autonomy should not be abandoned in the state’s effort to defend itself, and that it is essential to decide the issue on the basis of general principles instead of leaving the resolution to the ad hoc discretion of interrogators. It has proven difficult, however, to agree on what exactly should be done, in practical terms.

One group of officials, the reluctant realists, feels that “torture lite” may be permissible, but is concerned to draw clear boundaries around the category of permitted techniques. (There is of course disagreement within the reluctant realist faction over which techniques should be considered permissible.) A different group, the hard-liners, would be willing to go beyond torture lite, as long as there was sufficient reason to believe that a detainee had information that could be used to prevent a future attack. (A sub-camp of the hard-liners follows Alan Dershowitz in believing that an impartial magistrate should make this determination and issue a warrant.) A small but vocal group, the dirty-handed politicians, believe that torture is generally wrong, but that it may occasionally be used in pursuit of a worthy end, in which case it should be engaged in with extreme reluctance, because the ordinary moral reasons prohibiting torture are not overridden by the public interest in security.⁹⁹ Some form of torture lite, in this view, may “remain morally disagreeable even when politically justified.”¹⁰⁰ The dirty-handed group differs from the hard-liners and the reluctant realists in maintaining that torture and torture lite are morally wrong, not *prima facie* permissible under these circumstances; in their view the evaluation of the acts as wrong persists despite compelling reasons to engage in them despite their wrongfulness.¹⁰¹ The last group, the

⁹⁸ The hypothetical proceeds from the point of view of government officials, because the question addressed in this Article is the responsibility of lawyers with respect to the law. The theory of authority set out here is general and actually begins with the obligation of citizens to comply with legal norms. The government officials in the hypothetical, as well as lawyers in the principal sections of this Article, act in a representative capacity and have duties toward the law that are derivative of those of citizens.

⁹⁹ See WILLIAMS, *supra* note 68, at 58–60.

¹⁰⁰ *Id.* at 62.

¹⁰¹ This position strikes many philosophers as deeply confused, although its proponents maintain that moral monism, in which all moral dilemmas have only one right answer, is itself deeply confused. There is no way to do justice to the richness of this debate here. For contributions to it, see, e.g., CHRISTOPHER W. GOWANS, *INNOCENCE LOST: AN EXAMINATION OF INESCAPABLE MORAL WRONGDOING* (1994); *INCOMMENSURABILITY, INCOMPA-*

humanitarians, is appalled that the subject of torture is even on the table for discussion, and wants to make a clear commitment never to violate the rights of detainees. (The reluctant realists respond that the scope of detainees' rights is exactly what is at issue in the debate.) The lieutenant of the security forces in charge of counterinsurgency activities begins to pester officials for guidelines, but they are no closer to reaching agreement. What should be done about this problem?

One approach, of course, is to decide (expressly or tacitly) not to decide until there is consensus. Unless consensus can be expected in the near future, however, the decision to await consensus is tantamount to ratifying the status quo. In our hypothetical case there is no preexisting law on the treatment of detainees, but if there has been precedent permitting or forbidding a certain interrogation technique, the indecision of political officials will, in effect, convert that precedent into the official position with respect to the new situation. Another option is to keep talking. It may be the case that further debate will continue to clarify the issues in dispute, narrow the range of disagreement, and suggest different outcomes.¹⁰² Even the most enthusiastic proponents of deliberative democracy, however, do not claim it is possible to reach agreement in all cases; they claim only that institutional changes may make democracy more deliberative by enhancing the quality of moral discussion among citizens and officials.¹⁰³ In the hypothetical, a small group of officials responsible for security are already engaging in moral reasoning. If an impasse occurs, it may not be due to lack of mutual respect among those deliberating, but instead to structural features of moral reasoning. Ethical pluralists believe that moral reasoning engages different types of values, responds to different concerns, and seeks to satisfy multiple competing obligations.¹⁰⁴ Moral questions, by their nature, do not tend to have right answers that can be achieved if only the participants in a discussion persevere for long enough.

The result of this kind of persistent, good-faith disagreement is the inability to engage in cooperative social action, in this case the

RABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1990); James Griffin, *Are There Incommensurable Values?*, 7 PHIL. & PUB. AFF. 39, 56 (1977); Edmund Pincoffs, *Quandary Ethics*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 92 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983). I mention the debate over incommensurable values and inevitable wrongdoing simply as an example of a normative position that could be offered as a response to the problem of terrorism.

¹⁰² See, e.g., GUTMANN & THOMPSON, *supra* note 83, at 223–25.

¹⁰³ *Id.* at 358.

¹⁰⁴ See generally, e.g., Robert Audi, *Intuitionism, Pluralism, and the Foundations of Ethics*, in MORAL KNOWLEDGE AND ETHICAL CHARACTER 32 (1997).

effective defense of the citizenry.¹⁰⁵ Because all citizens share an interest in working together to achieve that end, they have a reason to prefer some procedural mechanism for resolving the disagreement to the inaction that results from the attempt to secure agreement based on deliberation. The goal of that procedure is to construct a normative framework that can be used to generate premises in a practical syllogism for officials who act in the name of society as a whole. In our hypothetical, the citizens' representatives are struggling to craft a response to a threat to national security, while maintaining their respect for rights, dignity, and autonomy. Reasonable people can disagree about the appropriateness of tradeoffs to be made between security and dignity; certainly societies have historically reached dramatically different resolutions of this fundamental question. The role of the lawmaking process is not to settle the moral issue permanently as a moral matter. Rather, it is to reach a provisional settlement that works well enough, for now, to accomplish the end in view. We can imagine our group finally becoming frustrated with deliberation and saying, in effect, "We need to do *something*, so each group should propose a statute regulating police interrogations, which we can then debate and put to a vote." Once that vote is held, the product of legislation is entitled to respect as an achievement—people disagreeing in good faith have done the best that they could to settle on a resolution of competing rights and values in a way that is respectful of the parties to the discussion.¹⁰⁶

After this settlement has been accomplished, it is incumbent upon government officials, citizens subject to its directives, and lawyers who interpret the law not to "unsettle the settlement" by reintroducing contested moral values as a basis for action. Suppose in our hypothetical the legislation that resulted from the democratic process prohibits any physical contact with detainees but permits investigators to deprive them of sleep or repeatedly play the Meow Mix jingle. If an officer with the security forces sincerely believes that slapping a prisoner, or kicking a chair out from underneath him, might make the interrogation more effective and would not constitute a sufficiently severe violation of the prisoner's dignity, he is nonetheless prohibited from taking that belief into account in deciding how to act.¹⁰⁷ The reason for this prohibition is not that his belief is incorrect or his balancing of the relevant values is faulty. Indeed, the officer's all-things-considered moral judgment may be superior to the action com-

¹⁰⁵ See generally Stephen Utz, *Associative Obligation and Law's Authority*, 17 *RATIO JURIS* 285 (2004) (arguing that associative obligations can arise from the need for rapid coordination of efforts within shared activities or projects).

¹⁰⁶ WALDRON, *supra* note 82, at 108–09.

¹⁰⁷ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 17–23 (1979) [hereinafter RAZ, *THE AUTHORITY OF LAW*].

manded by the law in a given case. But lawmakers have already made a decision on the matter, which stands for a decision of society as a whole, and must be respected as the product of a process that is the best way to deal fairly with persistent uncertainty and debate over moral questions such as the one the officer faces. For the officer to proceed on the basis of his own, all-things-considered judgment would be ethical solipsism—an act of disrespect to fellow citizens, whose views on the matter are equally worthy of being taken seriously.¹⁰⁸ People disagree about how best to accomplish the shared goal of defending the territorial integrity of the state and protecting the bodily security of citizens, while respecting the human rights of detainees. Because they all agree that some solution must be adopted, in the name of society as a whole, that solution must be regarded as authoritative; to deny this would be tantamount to denying the existence of the predicament that made the legal settlement necessary in the first place.¹⁰⁹

III CRITIQUE OF THE STANDARD LAWYERS' DEFENSE OF THE MEMOS

When the controversy over the torture memos hit the newspapers, talk shows, and weblogs in the summer of 2004, a predictable and almost scripted drama played out. On one side were critics expressing shock and horror that government lawyers had actually considered the law against torture in a methodical, legalistic manner.¹¹⁰ On the other side were defenders of the lawyers who attempted to put

¹⁰⁸ The contrary situation is not the precise mirror image, in terms of the moral wrongfulness of action. Suppose the law flatly prohibits making physical contact with detainees, but a lawyer advises the officer that he can kick a chair out from under a prisoner, reasoning that because the physical contact was not direct it is not prohibited by law. Any first-year torts student would recognize this reasoning as erroneous, on the authority of *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955), so the lawyer violated her second-order moral obligation to treat the law with respect and not exploit apparent loopholes. In addition to this violation, the lawyer can be charged with the first-order moral violation inherent in assisting the commission of a violation of the detainee's rights. Thus, where lawyers willfully manipulate legal norms to create an apparent permission for their clients to commit morally wrongful conduct, the complete moral evaluation of the lawyer's actions may vary depending on the seriousness of the first-order moral values that would be replaced by the law, if the law had been properly interpreted. I am grateful to Steve Shiffrin for pointing out this possibility.

¹⁰⁹ See Utz, *supra* note 105, at 302 (arguing that the justification of authority in a case like this "resembles the moral compulsion to embrace a means when one has already chosen an end that can best be achieved by that means").

¹¹⁰ A powerful example of this view is found in Anthony Lewis, *Making Torture Legal*, N.Y. REV., July 15, 2004, at 4, 4 ("The memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison."). See also Soc'y of Am. Law Teachers, Position Statement, Use of Torture in the War on Terror (July 16, 2004), <http://www.saltlaw.org/positionstorture.htm> (referring to the memos as "morally bankrupt").

a benign interpretation on the memos. “[S]tandard fare, routine lawyerly stuff,”¹¹¹ sniffed two law professors who found the entire controversy overblown. The argument that the OLC lawyers did nothing wrong should sound familiar to anyone who has spent much time hanging around with lawyers, for it is simply a version of the standard argument for the separation of legal and moral considerations. Without an argument for separation, the OLC lawyers would seemingly be subject to criticism based directly on the morality of torture. That is, to the extent that moral reasons prohibit engaging in or assisting acts of torture, these lawyers would have failed to comply with those reasons. Thus, lawyers attempt to deflect this kind of moral criticism by appealing to an argument establishing the necessary separation between the domain of moral reasons that would otherwise apply, and the domain of reasons that should be considered by lawyers acting in their professional capacity. The administration’s lawyers and their defenders must be understood as trying to counter two lines of criticism: (1) arguments internal to the law of warfare, such as those briefly reviewed in Part I; and (2) arguments that advising on a morally problematic subject in a narrow, “legalistic” manner are a violation of the ethics of lawyering.

As professional responsibility scholars widely recognize, the attempt to counter arguments based on ordinary moral principles have a common structure.¹¹² The actor (in this case, the OLC lawyers) shows that there are duties and institutional excuses (for example, an exemption from considering the moral issues relating to torture) that are necessary to the proper functioning of the role occupied by the actor. The role, in turn, is justified because it is essential to the proper functioning of a larger institution of which it is a part. So, a government lawyer would claim that exclusion of certain considerations, like morality or policy, is necessary to providing legal advice that is not entangled with those considerations. The provision of this “pure” legal advice is, in turn, necessary to the proper functioning of the institution of the executive branch of government. An alternative approach might build on the model of legal authority discussed in Part II, and contend that the law’s claim to authority necessarily precludes reference to moral principles that might otherwise govern the lawyers’ conduct. Thus, it is of utmost importance to the moral evaluation of the lawyers in this case that we clarify the relationship between the authority of law and the role of lawyers. My claim, to

¹¹¹ Eric Posner & Adrian Vermeule, Opinion, A “Torture” Memo and Its Tortuous Critics, WALL ST. J., July 6, 2004, at A22.

¹¹² ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 51–58 (1999); GOLDMAN, *supra* note 12, at 31–32; DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 129–37 (1988).

emphasize, is that the reasons for treating the law as an authority in the domain of practical reasoning do not support the standard lawyers' defense.

Here is a brief schematic overview of the standard lawyers' defense, which will be fleshed out in more detail in the following discussion. The argument attempts to show that lawyers cannot provide reliable legal advice if they attempt to incorporate moral considerations into the advice they give their clients. This conclusion is established if one of three conditions is satisfied:

1. Exclusive positivism premise: It is possible to ascertain the law applicable to the client's situation without reference to moral considerations.
2. Moral imperialism premise: Advising on moral issues would either interfere with the lawyer-client relationship or distort the lawyer's interpretation of the law.
3. Libertarian premise:¹¹³ Lawyers would overstep the boundaries of their role if they attempted to prevent their clients from acting in a way that the law permits, even if the action is close to the boundary between legality and illegality. In the context of government lawyering, effective functioning of the executive branch demands that government officials be able to act right up to the point where their conduct transgresses legal boundaries. Particularly where national security is at stake, it would be bad if officials were overcautious and acted timidly because of an unjustified fear of legal liability.

The response below to these three premises shows a variety of avenues for incorporating moral values into law, despite the separation between law and morals that is a necessary aspect of the law's claim to legitimate authority. The separation is not absolute, but it is important to notice the point at which moral values enter the process of making and interpreting law. The standard lawyers' argument does contain a grain of truth, which is that lawyers are not permitted to make all-things-considered moral judgments about all facets of the work they perform in a representative capacity. This does not mean, however, that morality is completely squeezed out of law, as the following discussion shows.

A. The Exclusive Positivism Premise

The most sophisticated jurisprudential argument for the standard lawyers' defense would rely on the nature and function of law to establish a necessary separation between law and morality. The conceptual position known as "positivism" maintains that the existence and con-

¹¹³ See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 27, 30-37 (1998).

tent of legal rules can be determined without resort to moral argument—that is, that law and morality are analytically separable.¹¹⁴ As I will argue, the separability of law and morals does not mean that moral values can never be incorporated into law.¹¹⁵ In this kind of “inclusive” positivism,¹¹⁶ moral values can become part of law—a “social fact” in jurisprudential terms—to the extent they play a role in the conventional practices of judicial reasoning.¹¹⁷ Classic examples include the Eighth Amendment’s prohibition on cruel and unusual punishment, the requirement of good faith and fair dealing in contract law, and the reasonableness standard in negligence. These terms all refer to moral values, which have significance apart from law and can be used to give content to legal norms. But in an important sense these incorporated moral terms are still separate from legal reasons, in that it is not necessary to ascertain the *truth* of these moral princi-

¹¹⁴ RAZ, THE AUTHORITY OF LAW, *supra* note 107, at 45–52 (“Since it is of the very essence of the alleged authority that it issues rulings which are binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in . . . justificatory argument.”); Joseph Raz, *Authority, Law, and Morality*, [hereinafter Raz, *Authority, Law, and Morality*] in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 194, 205–06 (1994); *see also* Jules L. Coleman, *Negative and Positive Positivism* [hereinafter Coleman, *Negative and Positive*], in MARKETS, MORALS AND THE LAW 3, 5 (1988) (“The separability thesis is the claim that there exists at least one conceivable rule of recognition . . . that does not specify truth as a moral principle among the truth conditions for any proposition of law.”); Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *The Concept of Law* 355, 356–57 (Jules Coleman ed., 2001) [hereinafter Coleman, HART’S POSTSCRIPT] (“[A]ll positivists accept . . . [that] what the law *is* and what the law *ought* to be are separate questions . . .”).

¹¹⁵ Raz argues that one should be careful with the term “incorporation” of morality into law. *See* Joseph Raz, *Incorporation By Law*, 10 LEGAL THEORY 1, 14 (2004). In some cases, a court or administrative agency may have discretion to consider X, and if X is a moral principle, the law doesn’t “incorporate” X just by reiterating that an official may take X into account; in that instance, the law is merely being perfectly clear that X is not excluded. *Id.* For Raz, the important thing is the nonexclusion of morality by law, since we are all bound by morality in any event. *Id.* at 16–17. This seems like an awkward way of conceptualizing the process of referring to moral values in legal reasoning, but Raz is the most prominent proponent of so-called “exclusive” positivism, so it is important for his broader theory that he not recognize the incorporation of morality into law. *See infra* notes 134–144 and accompanying text. A more critical interpretation is that Raz is fighting a rearward action against the more attractive theory of inclusive positivism.

¹¹⁶ W.J. Waluchow, *Inclusive v. Exclusive Positivism*, in INCLUSIVE LEGAL POSITIVISM 80, 81–82 (1994) (“On this view, which [shall be termed] inclusive legal positivism, moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws.”). Equivalent terms are “soft” and “incorporationist” positivism.

¹¹⁷ *See* Coleman, *Negative and Positive*, *supra* note 114, at 16; Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 1, 16–19 (Robert P. George ed., 1996) [hereinafter THE AUTONOMY OF LAW]; E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 495 (1977); David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 415 (1977) (book review). The term “inclusive” is taken from Waluchow. *See supra* note 116.

ples in order to determine whether a proposition of law incorporating them is actually part of the law in a given legal system.¹¹⁸ Criteria for legal validity that included the truth of moral standards would be unable to coordinate action in the face of disagreement, but criteria that could be applied in a content-neutral manner would be able to facilitate the coordination function of law because it would not be necessary to resolve the disagreement in order to ascertain the legal validity of a given norm. Discerning the *legal* validity of a norm would be a matter of locating it in the sources specified by the relevant rule of recognition,¹¹⁹ and would not require an independent moral argument.

This general definition of positivism does not entail a strict exclusion of moral reasons from the domain of legal reasoning. In the contemporary literature, the form of positivism that permits some entanglement between moral and legal reasons is known as “soft,” “inclusive,” or “incorporationist” positivism.¹²⁰ Inclusive positivists believe that moral principles may be a feature in a legal system in the sense that they are identified as part of law by the rule of recognition, as long as there is a conventional practice among officials of making decisions with reference to moral criteria. Consider, for example, the necessity defense to criminal liability, which was one of the reasons asserted as a justification for torture in the torture memos.¹²¹ In its conventional form, the necessity defense applies when an actor chooses to preserve a higher valued good at the expense of a lesser valued good.¹²² But it is impossible to talk intelligibly about a choice of evils without having some conception of the social values of various

¹¹⁸ Jules Coleman, *Authority and Reason*, in *THE AUTONOMY OF LAW*, *supra* note 117, at 287, 292; Coleman, *Negative and Positive*, *supra* note 116, at 4 (“[T]he authority of the rule of recognition is a matter of its acceptance by officials rather than its truth as a normative principle. . . .”); Raz, *Authority, Law, and Morality*, *supra* note 114, at 205–06 (observing that laws reflect “the judgment of the bulk of the population on how people in the relevant circumstances should act”). Note further that positivists do not claim that law and morality are actually *separate*, only that they are in principle analytically *separable*. MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 114 (1999).

¹¹⁹ H.L.A. HART, *THE CONCEPT OF LAW* 94–95, 100 (2d ed. 1994). The rule of recognition specifies binding criteria for legal officials to use in deciding whether a given norm is a rule that is part of a legal system.

¹²⁰ For examples of inclusive positivism, see Waluchow, *supra* note 116; Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, 4 *LEGAL THEORY* 381 (1998); and Soper, *supra* note 117. Hart accepted inclusive positivism in the posthumously published Postscript to *The Concept of Law*. See H.L.A. Hart, *Postscript*, in HART, *supra* note 119, at 237, 247–48 [hereinafter Hart, *Postscript*]. For an application in the context of the legal prohibition on torture, see also Waldron, *supra* note 14, at 55 (“[T]hose who oppose these various kinds of brutality . . . often . . . oppose and criticize these practices using moral resources drawn from *within* the legal tradition . . .”).

¹²¹ Aug. 1 OLC Memo, *supra* note 1, at 207–09.

¹²² LAFAVE, *supra* note 57, § 5.4(a). The OLC lawyers used this formulation of the necessity defense. See Aug. 1 OLC Memo, *supra* note 1, at 208 (postulating that “under the . . . circumstances [presented by terrorist threats] the necessity defense could be success-

goods, and in order to make this determination, a legal official (as well as a citizen subject to the law) must reach out beyond the law, as it were, into the domain of ordinary morality. Application of the *legal* defense of necessity requires *moral* reasoning: "The actor and the court that judges him must know what is good and bad, beneficial and harmful, and it [sic] must know comparatively what sorts of things are worse than others."¹²³

Indeed, the August 1 memo belies the standard lawyers' defense by providing moral advice. Apparently the memo's authors themselves do not accept the exclusive positivism premise. The moral analysis is straightforwardly consequentialist: Terrorists associated with al-Qaeda are reputed to be developing weapons of mass destruction, which they intend to use to inflict massive casualties. A detainee might possess information that could help prevent an attack. Therefore, "any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack."¹²⁴ Leaving aside for a moment the plausibility of the scenario in which any given detainee has information that could be used to prevent an attack capable of inflicting massive casualties,¹²⁵ the memo's necessity defense analysis slips naturally into a familiar mode of moral reasoning, in which the actor simply balances the good and bad consequences associated with various options, and selects the option that maximizes the resulting amount of good over bad.¹²⁶ One could critique the analysis either from within consequentialism (for not giving sufficient weight to the long-run societal harms associated with torture, for instance)¹²⁷ or by deploying a different mode of moral reasoning such as the Kantian notion of respecting persons as ends in themselves. But the important thing about these arguments is that they incorporate moral reasoning by reference into the domain of law.

We can further illustrate the failure of the standard lawyers' argument by considering the law governing lawyers' advising function, and a couple of fanciful variations on it. The state bar disciplinary rule in effect in most jurisdictions specifies the lawyer's role in counseling clients as follows:

fully maintained in response to" accusations that government policies violated statutory bans on torture).

¹²³ Moore, *supra* note 59, at 286 (emphasis omitted).

¹²⁴ Aug. 1 OLC Memo, *supra* note 1, at 208–09.

¹²⁵ This scenario will be revisited in Part IV when the "ticking bomb" hypothetical is discussed.

¹²⁶ See, e.g., Thomas Nagel, *War and Massacre*, in *MORTAL QUESTIONS* 53, 55 (1979) (discussing the utilitarian approach to analyzing torture).

¹²⁷ See *id.* ("An exceptional measure which seems to be justified by its results in a particular conflict may create a precedent with disastrous long-term effects.").

Rule 2.1: In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.¹²⁸

While this rule suggests a separation between law and morality, it still permits the lawyer to refer to moral factors to the extent they are relevant to the client's situation. But it does not resolve the jurisprudential question of whether this separation is necessary. Examining two hypothetical variations on the rule brings the question of whether there is a strict separation between law and morality sharply into focus:

Hypothetical Rule 2.1, Variation A: In rendering advice, a lawyer may refer only to law and not to other considerations such as moral, economic, social, and political factors.

Hypothetical Rule 2.1, Variation B: In rendering advice, a lawyer may refer to considerations such as moral, economic, social, and political factors, but only to the extent they are relevant to interpreting the law.

Variation A is plausible only if exclusive positivism is true—that is, if it is possible to give legal advice without referring to “other considerations” such as moral reasons. If exclusive positivism is not true then Variation A becomes incoherent, because it calls upon lawyers to do something impossible—namely, to interpret the law without reference to the very factors that bear on legal interpretation. Variation B is therefore a concession to inclusive positivism. It permits a lawyer to provide advice that makes reference to moral considerations, as long as those considerations are relevant to the interpretation of law and are not simply extralegal moral reasons that the lawyer thinks important. Variation B prohibits the lawyer only from offering “freestanding” advice—that is, giving advice on moral, economic, social, and political factors that do not bear on the application of legal rules to the client's situation.

The prior discussion of the necessity defense shows that only Variation B can account for how lawyers actually render legal advice. Further examples may be given, such as the rule governing police investigations, which establishes that a search may be unreasonable if the procedure “shocks the conscience.”¹²⁹ This rule shows inclusive positivism in action. The legal standard incorporates a moral notion to flesh out the concept of an unreasonable search, but the rule is still positivistic in the sense that it can be identified using non-moral criteria. A present-day judge asked to rule on whether a police practice shocks the conscience would not be undertaking any freestanding moral evaluation using only her capacity as a deliberating moral

¹²⁸ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).

¹²⁹ *Rochin v. California*, 342 U.S. 165, 172 (1952).

agent. Rather, the judge would refer to numerous decisions interpreting the “shocks the conscience” test, which could probably be distilled into a series of principles or criteria that have the status of law since they are conventionally referred to in the justification of legal decisions. The analysis of the relevant legal standard, from the point of view of either a judge or a lawyer, makes reference to moral notions as they have been incorporated into law. Morality has not been squeezed out of law, but is instead an integral part of it. Thus, on what Ronald Dworkin would call the dimension of “fit,” inclusive positivism (and Variation B) is a more plausible account of how lawyers give advice about the law and how judges render legal decisions.¹³⁰

In order to derive a normative “ought” from the descriptive “is,” it is necessary to show that inclusive positivism would be a better approach to law than its competitors, such as exclusive positivism or a natural-law account. This argument would work on Dworkin’s dimension of “justification,”¹³¹ showing that inclusive positivism is better with respect to the values associated with having law at all, as opposed to a different kind of system of social control.¹³² These values include not only familiar *Rechtstaat* virtues like predictability and stability, but also the sense that law is a valuable social practice that accomplishes some useful end.¹³³ By extension, an argument within legal ethics would attempt to show that legal advising that incorporates moral values is the better approach with respect to the reasons for having lawyers. Obviously, if one purpose of having lawyers is to enable clients to plan their conduct around the possibility of legal sanctions, lawyers must be permitted to make reference to values that will play a role in the decision-making process of judges. But the role of lawyers can be further connected with the role of law. If one of law’s objectives is to enable citizens to act together, as a society, despite persistent moral conflict, then the duties of lawyers must be understood derivatively as furthering this end of law. Thus, insofar as lawyers interpret and ap-

¹³⁰ RONALD DWORKIN, *LAW’S EMPIRE* 228, 230 (1985). Parenthetically, I do not contend that all “departments” of law incorporate morality to the same extent—in other words, inclusive positivism does not imply a strongly transsubstantive thesis about the moral content of law. There are numerous dryly technical domains of law which are relatively insulated from moral considerations. Even these domains can incorporate standards—not necessarily moral—from outside the law to the extent necessary to give them sense and structure. The law of taxation, for example, is often regarded as quintessentially amoral, but the interpretation of tax legislation and regulations often makes use of economic concepts (such as whether there is a business purpose for a particular transaction) in order to determine whether the tax treatment sought by the taxpayer will be upheld by the IRS. See Wendel, *Interpretation*, *supra* note 10, at 1212–15.

¹³¹ DWORKIN, *supra* note 131, at 231.

¹³² See Jeremy Waldron, *Normative (or Ethical) Positivism*, in Coleman, HART’S POSTSCRIPT, *supra* note 114, at 411.

¹³³ *Id.* at 424.

ply the law to their clients' problems, they are required not to interfere with the law's capacity to coordinate activity.

Nearly enough has been said to warrant rejecting the exclusive positivist premise in the standard lawyers' defense, but there is one remaining hurdle. Joseph Raz has offered a powerful conceptual (and possibly also normative) defense of exclusive positivism, based on the picture given in Part II of the authority of law, and we must consider that argument before accepting inclusive positivism as the better approach.¹³⁴ Raz's argument begins with the conceptual claim that law, by its very nature, purports to be practically authoritative for those subject to it.¹³⁵ Further, it is in the nature of any authority that its directives do not simply stand alongside other reasons for action, to be evaluated and weighed by actors; rather, authoritative directives *replace* the reasons on which they depend.¹³⁶ By way of example, if a passenger and I are disagreeing about whether a certain road is a shortcut on the route from Ithaca to New York City, we can resolve our disagreement by looking at a map. The message communicated in graphic form by the map does not become merely another reason, counting in favor of my position or the passenger's. Instead, the map's statement becomes the only reason on which we act. This is a point about what it means for something to be an authority—the only way to acknowledge something as an authority is to take it to be a reason for action which replaces the underlying reasons, which Raz refers to as “dependent” reasons.¹³⁷ It does not matter whether my passenger thought the road was a shortcut because it headed off in a southerly direction, or whether he thought he had driven on it in the past. If we continued to consider those sorts of reasons after consulting the map, we would be treating the map as something other than an authority.

Additionally, and of utmost significance to the Razian argument in support of the law's claim of authority, it must be possible to identify an authoritative directive without reference to the underlying reasons that had formerly counted for or against the competing positions.¹³⁸ Again, this is a necessary aspect of treating a person or

¹³⁴ Raz, *Authority, Law, and Morality*, *supra* note 114. It is not clear whether Raz's argument is purely conceptual or whether it contains an implicit normative dimension—i.e., that it is a good thing to have an institution called law that has authority in the way he describes. See Waldron, *supra* note 132, at 432 n.66. I have made an extended Razian-style argument that is both conceptual and normative, so I think there is a great deal of normative significance in Raz's theory of authority. See Wendel, *Obedience*, *supra* note 13. If Raz insists that he is offering a purely conceptual argument, my position should simply be understood as working out a normative view that I believe is consistent with Raz's theory.

¹³⁵ Raz, *Authority, Law, and Morality*, *supra* note 114, at 215.

¹³⁶ *Id.* at 211–13.

¹³⁷ *Id.* at 212.

¹³⁸ *Id.* at 218.

institution as an authority. In order for the directive of an authority to be useful (“serviceable,” as Raz puts it), it must be possible for subjects of the authority to ascertain the content of the directive without running through all the competing reasons for action they might have had in the absence of the directive.¹³⁹

From these points about the logical preconditions of authority, Raz derives the force of his argument against the use of moral reasons to determine the content of legal directives. Take a simple example: Suppose a landowner is trying to decide whether the law requires him to put up a fence around his yard to prevent children from entering his property where they may be injured by his irascible dog. It would not be particularly helpful to know that the law of torts seeks to deter socially unreasonable conduct and to prevent unreasonable interferences with the interests of others, but to do so with a minimum of interference with the actor’s autonomy.¹⁴⁰ These are the moral reasons that underlie the law of torts, but there may be considerable uncertainty about how they apply to any particular set of facts. Moreover, at a level of abstraction below these very general moral considerations are more specific policies that point in different directions. On the one hand, the landowner is in a better position, as compared with a child, to prevent harm from the dog. On the other hand, putting up a fence would be expensive and would interfere with the landowner’s freedom to use his land as he sees fit.¹⁴¹ If the law said no more than “refrain from unreasonable interferences with the rights of others,” it would be useless in guiding action.¹⁴² But suppose that upon doing a little legal research, the landowner discovers a statute providing that “the owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person.”¹⁴³ This statute is much more suited to guiding action than the general moral principle that one ought to refrain from interfering unreasonably with the interests of others. Although the landowner must still decide whether he would rather spend the money on the fence or accept the risk that the dog will bite a child, at least the legal consequences of his decision are now clear. This clarity comes from identifying “the law” with certain *sources*, such as cases and statutes, whose

¹³⁹ *Id.* at 219.

¹⁴⁰ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984).

¹⁴¹ *Id.* at 399–400.

¹⁴² *Cf.* Raz, *Authority, Law, and Morality*, *supra* note 114, at 215 (arguing that the law cannot function as an authority if its subjects must work out what a morally just law would be as part of the process of identifying legal directives).

¹⁴³ This text is taken from Wis. STAT. § 174.02(1)(a) (2004), although many jurisdictions have similar statutes imposing strict liability on dogowners.

content can be determined by social facts alone, without resort to moral argumentation.¹⁴⁴

Raz questions whether inclusive positivism can satisfy the conditions necessary for law to successfully claim legitimate practical authority.¹⁴⁵ Under inclusive positivism's "pedigree" standard, judges are permitted to incorporate moral norms by the rule of recognition specifying the domain of law.¹⁴⁶ This permission is a contingent fact about Anglo-American legal systems, but it is a social fact nonetheless. The question is whether this social fact of incorporation somehow detracts from the law's claim of authority. Returning to the necessity defense to criminal liability for engaging in acts of torture, one might argue that the law fails to provide guidance to its subjects, because at the crucial moment the law punts the question to the domain of morality—which is precisely where all of the important questions are contested. Critically, however, the social fact that constitutes the pedigree of a legal norm is not an objectively true moral judgment, but is instead the *belief* by the relevant legal official in a moral judgment. In the case of necessity, there is a difference between these two would-be sources of law:

(A) The harm associated with torturing a suspected terrorist outweighs the expected benefit of the information that may result from the interrogation, given the uncertainty that the detainee has valuable information and the unreliability of information obtained through torture.

(B) *In analogous cases, decisions by judges interpreting the necessity defense show that a court is likely to conclude that the harm associated with torturing a suspected terrorist outweighs the expected benefit of the information that may result from the interrogation, given the uncertainty that the detainee has valuable information and the unreliability of information obtained through torture.*

Raz's authority argument assumes that incorporation of moral standards will always take the form of (A), where the *validity* of a moral judgment is a criterion of that judgment being a proposition of law. Like the case of the landowner who was required to figure out on his own whether an unfenced yard was an unreasonable interference with the rights of others, the authority of law would indeed be undermined if those subject to it could revisit the underlying moral dispute and reengage in the controversy over the necessity of torture in a par-

¹⁴⁴ Raz, *Authority, Law, and Morality*, *supra* note 114, at 195, 215.

¹⁴⁵ See Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, in Coleman, HART'S POSTSCRIPT, *supra* note 114, at 271, 274–75 (“Raz concludes that for law to be capable of legitimate authority, it must be possible to identify the existence and content of a legal norm without recourse to the dependent reasons justifying it.”).

¹⁴⁶ See Hart, *Postscript*, *supra* note 120, at 247, 264–65; Philip Soper, *Searching for Positivism*, 94 MICH. L. REV. 1739, 1752–54 (1996) (book review).

ticular case.¹⁴⁷ But the italicized text in (B) locates the source of law not in a true moral judgment about the necessity of torture, but in the beliefs and practices of judges issuing opinions in which they consider the necessity of torture. As Jules Coleman puts it, the relevant rule of recognition might contain a clause that refers to “some noncontentful characteristic of moral principles.”¹⁴⁸ The authority of law would be undermined by a rule of recognition that made moral truth a criterion of legality, at least if we understand the rule of recognition epistemically, because our disagreement about moral truth would lead to the inability of officials to identify the law reliably.¹⁴⁹

At some point, though, surely a judge's decision is based on morality itself and not on a previously incorporated moral judgment. The chain of judicial decisions must end somewhere, with a kind of moment of Ur-Incorporation in which the judge made reference not to some other judge's beliefs (which are social facts), but to her own beliefs about morality, which are exactly the sorts of things that would undermine the authority of law if pervasively made a part of conventional legal interpretation. In these marginal cases, Hart would say that a judge is engaged in lawmaking (which he calls the exercise of discretion) rather than in legal interpretation, and that there simply was no law on the relevant question prior to the initial act of judicial creativity.¹⁵⁰ In that case, the judge's duty is to make the best moral judgment she can and candidly admit that she is acting as a quasi-legislator. The judge's decision does not “thereby convert morality into pre-existing law,”¹⁵¹ but it fills in a gap where the law previously did not exist. From that point forward, however, there is law on point, and subsequent judges will be appealing to the social fact of the previous judge's decision—not to the soundness of the previous judge's moral reasoning—as support for their conclusion that the law on point is such-and-such. Thus, the law can fulfill the action-guiding function that is characteristic of any practical authority.

¹⁴⁷ See Raz, *Authority, Law, and Morality*, *supra* note 114, at 203–04.

¹⁴⁸ Coleman, *Negative and Positive*, *supra* note 114, at 16.

¹⁴⁹ *Id.* at 20. For this reason, the incorporation of morality into law cannot take the form of principles as Dworkin understands the term, for the somewhat idiosyncratic reason that identifying a Dworkinian principle requires determining whether it is required by the best constructive interpretation of political acts by a community. There are good reasons to think there is no such thing as legal norms that are identified as such on the basis of both content and pedigree considerations. See Andrei Marmor, *The Separation Thesis and the Limits of Interpretation*, 12 CAN. J.L. & JURIS. 135, 144–47 (1999). I have written elsewhere about principles incorporating moral norms that are conventionally made a part of the practice of legal argument. See Wendel, *Interpretation*, *supra* note 10, at 1204–05. It is worth emphasizing that I do not understand the ground of principles in precisely the same way Dworkin does, because I agree with Hart in thinking that pedigree criteria are sufficient to identify principles as part of the law.

¹⁵⁰ Hart, *Postscript*, *supra* note 120, at 254, 272–73.

¹⁵¹ *Id.* at 254.

B. The Moral Imperialism Premise

If the law plainly states that X is illegal and the client wants to do X, the lawyer's obligation is clear—a lawyer may not counsel or assist a client in violating the law.¹⁵² In most interesting cases, of course, the law does not “plainly” say anything, and interpretation is required to ascertain the content of legal norms. In some instances, this interpretation may make reference to moral principles. Part III.A established that there is all the difference in the world between a lawyer advising a client, “X is legal, but it's a rotten thing to do,” and the lawyer giving advice about the decision-making practices of legal officials, e.g., “In order to figure out whether X is legal, we have to engage with the moral questions that are sure to be on the judge's mind, and which will influence the way she interprets the [statute, treaty, etc.]” The second case involves the lawyer advising on law *as law*, which by its nature incorporates moral considerations in certain cases. The lawyer's advice depends on moral reasons only to the extent they are likely to figure into an interpretation of law by a legal official. In the first case, by contrast, the lawyer is offering what I have called “freestanding” moral advice, in the sense that the moral considerations are not relevant to interpreting the governing law.¹⁵³

The moral imperialism premise asserts that freestanding moral advice would somehow interfere with the lawyer-client relationship. Depending on the context, this interference can occur for a variety of reasons. Perhaps the client feels intimidated by the lawyer and may be talked out of a course of action that is within the client's legal rights and that the client would prefer, but which strikes the lawyer as morally wrong. In this way, moral counseling might interfere with the client's autonomy, which is protected as both a moral value and as one of the central policies underlying agency law.¹⁵⁴ It is important, however, not to equate the client's right to determine the ends of the representation with a putative “right” to be insulated from moral criticism. Unless the lawyer bullies or deceives the client into changing her mind about the ends of the representation, there is nothing wrong with *persuading* the client to give up a planned course of action. In ordinary moral life people are free to seek to change one another's minds. People do not give up this permission when they act in a professional capacity, as long as they respect their client's authority as principal to make final decisions regarding ends. Analogously, the client retains the authority to decide whether to settle a civil case,¹⁵⁵ but

¹⁵² MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1992).

¹⁵³ See *supra* notes 131–32 and accompanying text.

¹⁵⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1992); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmts. b–c (2000).

¹⁵⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1) (2000).

this does not mean the lawyer is forbidden to try to persuade the client not to accept a settlement offer that the lawyer believes could be bettered through further litigation. The lawyer-client relationship is apparently designed to incorporate freestanding advice of all kinds, as long as lawyers do not overstep their legal authority.

A different sort of critique is that freestanding moral advice is appropriate only in a very different type of relationship, like a friendship, in which the participants in the conversation share a thick set of values.¹⁵⁶ The lawyer-client relationship in a pluralist society is characterized by the possibility that the participants in a moral dialogue might actually have little in common, in terms of a shared foundation of values—or “‘comprehensive doctrines’ of the good life,” to use the Rawlsian term.¹⁵⁷ The fact of pluralism, without more, cannot be used to squeeze out freestanding moral advice from the attorney-client relationship because an attorney remains a moral agent when acting in a professional capacity. Thus, if it would be prima facie obligatory or permissible for an ordinary moral agent to advise on the moral consequences of another’s actions, it remains obligatory or permissible for a lawyer to do so unless it would otherwise interfere with the client’s rights.¹⁵⁸ Pluralism may make moral counseling more difficult. Yet as long as there is an overlapping consensus as to common values that may be deployed in practical reasoning, it is not impossible. In any event, even if pluralism means that freestanding moral advice may not be accepted by the client, it does not make it inappropriate in the lawyer-client relationship.

Notably, the law governing lawyers recognizes a qualified permission to give freestanding moral advice. As stated above, the most prevalent state bar disciplinary rule governing the lawyer’s advising function permits a lawyer to refer to “other considerations such as moral, economic, social and political factors” when rendering advice.¹⁵⁹ This rule creates a permission to give moral advice, but one might argue for the stronger position that some lawyering roles carry with them a *requirement* of giving moral advice.¹⁶⁰ In the context of private lawyering, corporate lawyer Elihu Root is credited with the well-known aphorism that “half the practice of a decent lawyer consists

¹⁵⁶ See Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran’s Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L. REV. 1, 5 (1995).

¹⁵⁷ See Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 984 (1995).

¹⁵⁸ See *id.* at 1001–02.

¹⁵⁹ MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002).

¹⁶⁰ See, e.g., Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 693 (2004); Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 365 (2005).

in telling would-be clients that they are damned fools and should stop.”¹⁶¹ The problem of the relationship between legal and moral values within the lawyer-client relationship is a complex one in a democracy, because the lawyer-client relationship is itself part of a larger structure of institutions that performs certain functions within a democratic political order. The democratic legitimacy of law could be impaired by unelected officials who attempt to subvert the product of the electoral process.¹⁶² Nevertheless, the situation of government lawyers is often thought to require freestanding moral advice as well, by virtue of the government lawyer’s obligation to serve the public interest.¹⁶³

The particular lawyering role at issue in the torture memo controversy—namely, that of attorney-adviser in the OLC—is associated with a strong tradition of providing impartial legal advice that does not necessarily seek to advance the position of the administration currently in power.¹⁶⁴ Commentators who criticize the OLC lawyers for analyzing torture in terms of “cool legal abstractions” have in mind a picture of lawyers providing candid moral and policy advice, even if it runs counter to the administration’s interests.¹⁶⁵ A statement of best practices for the OLC—signed by several former OLC heads, along with numerous deputies and attorney-advisers—emphasizes that the legal advice provided by the OLC should be “accurate and honest,” even where the office’s advice “will constrain the administration’s pursuit of desired policies.”¹⁶⁶ Unsurprisingly, this is not the only view expressed by former OLC lawyers about the office’s role. Some have criticized the office for being too cautious and conservative where a more aggressive legal interpretation would have furthered the admin-

¹⁶¹ See 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938) (internal quotations omitted).

¹⁶² Indeed, this is the usual argument against “activist” judges; democratic majorities may oppose, for example, legalized abortion, school desegregation, or same-sex marriage, but judges can override that will through “creative” lawmaking under the guise of impartial interpretation of the Constitution.

¹⁶³ See, e.g., Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers’ General Duty To Serve the Public Interest*, 42 BRANDEIS L.J. 13, 16 (2003); Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 239 (2000). But see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-387 (1994) (rejecting suggestion that government lawyers have heightened duties of candor and fairness, as compared with private lawyers, in noncriminal contexts).

¹⁶⁴ See, e.g., Michael C. Dorf, *The Justice Department’s Change of Heart Regarding Torture: A Fair-Minded and Praiseworthy Analysis That Could Have Gone Still Further*, WRTT, Jan. 5, 2005, <http://writ.findlaw.com/dorf/20050105.html>.

¹⁶⁵ The critical comment quoted in the text is from the distinguished legal journalist Anthony Lewis. See Lewis, *supra* note 110, at 6.

¹⁶⁶ See WALTER E. DELLINGER ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 1 (2004), available at <http://www.americanconstitutionsociety.org/OLCGuidelinesMemo.pdf>.

istration's political agenda.¹⁶⁷ Others believe the relationship between OLC lawyers and executive branch officials is the same as the private attorney-client relationship, at least with respect to the ethical obligations the lawyers owe while acting as counselors.¹⁶⁸

Resolving this debate over the normative contours of the lawyer's role is similar to settling on the correct theory of law—it is a matter of fit with existing practice and justification in terms of the values that underlie the practice. On the dimension of fit, our mythology of lawyering undeniably celebrates lawyers who were motivated by moral principles to resist the exercise of power by political officials. Archibald Cox is still regarded as a person of exemplary professional character for refusing to fire the special prosecutor who had sought the Nixon tapes. More dramatically, the Nazi lawyers who were executed for advising that Russian prisoners should be treated humanely are now memorialized as heroes, while “no one visits the graves of those who acted contrary to their legal advice and were later hanged at Nuremberg.”¹⁶⁹ There does not appear to be a comparable narrative celebrating lawyers as amoral instrumentalists. Considerations of fit would incline toward accepting the requirement of providing candid advice to clients, unless there is a powerful argument on the dimension of justification for precluding freestanding moral advice. That justification must establish that maintaining the lawyer-client relationship as a morality-free zone is a good thing.

I tend to believe that most lawyers who subscribe to the moral imperialism premise do not reject morality as such, but adopt a moral argument for a strongly adversarial conception of the lawyer's role. In the context of government lawyering, the argument might be for a division of moral labor in which elected and appointed officials make broad moral and policy judgments and the lawyers act (for moral reasons) as champions of the administration's policies. In their role as advocates, lawyers should not be hemmed in by moral qualms about the administration's policies because those policy-level decisions are committed to a different institutional actor.¹⁷⁰ This story has a great

¹⁶⁷ See, e.g., Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 353–54 (1993).

¹⁶⁸ See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 448–459 (1993) (“Nor does the Attorney General's role as legal advisor to the heads of other departments require abandoning the analogy with a private lawyer.”).

¹⁶⁹ Bilder & Vagts, *supra* note 160, at 695. Strictly speaking, von Moltke and other German lawyers who attempted to defend the laws of war were not executed for giving legal advice, but for being associated with Claus von Stauffenberg, who attempted to assassinate Hitler. I am grateful to Detlev Vagts for clarifying this point. Nonetheless, the import of this comparison remains: Speaking truth to power can be a heroic and dangerous act for lawyers.

¹⁷⁰ Toby Heytens suggested a related reason to prohibit freestanding moral advice by executive branch lawyers: It is perfectly reasonable to permit the President to select advis-

deal of plausibility, but it ignores both the special institutional role of lawyers as custodians of law and the role of law in pushing back against the energy of officials who seek to aggrandize the government's power. As Justice Souter observed in *Hamdi v. Rumsfeld*, "In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty . . . is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security."¹⁷¹ It is no coincidence that the lawyers who gave erroneous advice to the administration were themselves proponents of a strong executive, insulated from checking by the legislative and judicial branches. Whatever the attractiveness of a strong executive as a political matter, it is difficult to square this conception of separation of powers with a theory of law that permits it. The reason is that for a decision to count as *lawful*, as opposed to merely being in the executive's interest, it must comply with certain internal criteria such as generality, publicity, consistency, and clarity.¹⁷² If the government seeks to act under law (because it seeks the legitimacy or prestige of lawful action), then it may not be able to be as energetic as it desires.

Although it is possible to criticize the OLC lawyers on a theory of *government-lawyers'* ethics, I believe the critique of the torture memos is general, and applies to all lawyers, public and private. The reason is that the grounds for the criticism are furnished by the law itself, not by considerations specific to any particular lawyering role. Consider, for example, an argument raised by a high-ranking lawyer in the Navy JAG Corps:

[W]hile we may have found a unique situation in [Guantánamo Bay] where the protections of the Geneva Conventions, U.S. statutes, and even the Constitution do not apply, will the American people find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values?¹⁷³

ers on the basis of their expertise and seek their assistance in formulating and implementing policy. One may grant that lawyers, economists, scientists, and so on have expertise that may be useful to the President, but it is less plausible to believe that there are experts in moral decision-making, whose advice the President should consult. Even if one believes that there are moral experts—ministers, rabbis, or (doubtfully) Randy Cohen from the *New York Times*—there is no reason to believe that government lawyers are among these moral experts.

¹⁷¹ 542 U.S. 507, 124 S. Ct. 2633, 2655 (2004) (Souter, J., concurring). Justice Souter's argument echoes that of Edward Peters, who notes that historically torture has flourished when its administration was detached from the judiciary and handed over to the executive of a "vastly more energized state whose administrative powers overshadow both legislature and judiciary." PETERS, *supra* note 27, at 130.

¹⁷² LON L. FULLER, *THE MORALITY OF LAW* 33–94 (2d rev. ed. 1969).

¹⁷³ JAG Memos, *supra* note 26.

This argument appears to rest on freestanding moral advice, offered in terms of how the American people might react upon discovering that the administration had created a law-free zone at Gitmo. But the argument is susceptible to an alternative interpretation, namely that the law, properly interpreted, prohibits the creation of a law-free zone. Regardless of what this lawyer intended, we can conclude that a lawyer would be ethically obligated to offer this advice if it is the case that a reasonable, impartial lawyer would conclude that the administration's arguments regarding Guantánamo Bay were faulty.

In this way, the ethical critique of the OLC lawyers is independent of their role. Any lawyer is prohibited from advising a client that the law permits something when it does not.¹⁷⁴ Naturally, legal prohibitions are not always perfectly clear; ambiguity and uncertainty exist with respect to interpretations of most reasonably complex legal regimes. Two points are nevertheless important to emphasize: First, lawyers' ethical norms in counseling and advising contexts can be calibrated to some level of certainty with respect to the offered advice. For example, in order for a taxpayer to employ an "advice of counsel" defense to an IRS assessment of a penalty for under-reporting tax liability, the taxpayer must rely in good faith on a professional tax adviser's analysis that "unambiguously concludes that there is a greater than 50 percent likelihood that the tax treatment of the item will be upheld if challenged by the Internal Revenue Service."¹⁷⁵ Second, as the tax shelter example illustrates, these norms are moderately transsubstantive. Both the tax adviser and the government lawyer are ethically obligated to provide legal advice that respects the legal settlement of contentious moral issues. The reason the OLC lawyers are properly subject to moral criticism (and potentially professional discipline) is not that they misunderstood the norms of their specific legal role, but that their interpretation of the law is flawed.

C. The Libertarian Premise

An interesting and subtle argument for permitting lawyers to advise on morally wrongful conduct is that given the realities of the situation, it is probably going to occur anyway, but its occurrence would be less harmful if it were brought under the supervision of courts. This is the crux of Alan Dershowitz's proposal to permit torture only pursuant to a warrant issued in response to a stringent showing of necessity

¹⁷⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

¹⁷⁵ Treas. Reg. §§ 1.6662-4(g)(B), 1.6664-4(c).

in the most extraordinary circumstances.¹⁷⁶ Dershowitz clearly states that he is opposed to torture as a normative matter and would like to see its use minimized, but he believes it occurs regardless of our moral criticism of it.¹⁷⁷ Thus, he argues that if it is going to occur anyway, it is better that it occur subject to some transparency, standards, and accountability provided by judicial review, rather than occurring secretly and lawlessly.¹⁷⁸ In this manner, a democracy would confront a dirty-hands or choice-of-evils situation in an open, candid way, rather than pretending the problem doesn't exist or that only a few bad apples are responsible.¹⁷⁹

As Sanford Levinson pointed out in a related context, this sort of approach has the advantage of sounding practical, realistic, and hard-nosed instead of naive and "moralistic."¹⁸⁰ Instead of banning outright any conduct that might conceivably be deemed torture, the law might seek to draw bright lines around the prohibited conduct, create strict penalties for unauthorized crossing of the line, and grant permission to engage in the prohibited conduct only in extremely rare circumstances. If this sort of regime were adopted, the libertarian premise would have some plausibility. A client might wish to seek the permission of a judge to cross the line into prohibited conduct, and would need to know when to approach the judge for a warrant. Because the judge issuing the warrant has the final say over whether it is permissible to engage in the conduct, a lawyer who refused to advise the client on the location of the line would, in essence, assume the judge's gatekeeper role. As applied to government lawyers, this critique cautions against a lawyer substituting her own policy preferences for those of the head of an executive branch agency, or of the President. Even if the lawyer believes she is acting in the best interests of the public, the public interest is so indeterminate that the lawyer would, in effect, be exercising unreviewable discretionary power.¹⁸¹

The strongest argument against the proposal to regularize torture and make it subject to legal constraints is not an objection to the liber-

¹⁷⁶ See ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 470–77 (2002); ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 158–63 (2002) [hereinafter DERSHOWITZ, *WHY TERRORISM WORKS*].

¹⁷⁷ See Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 277 (2003) [hereinafter Dershowitz, *The Torture Warrant*].

¹⁷⁸ See *id.* at 278–79.

¹⁷⁹ *Id.*; see also IGNATIEFF, *supra* note 27, at 8 (arguing that "necessity may require us to take actions in defense of democracy which will stray from democracy's own foundational commitments to dignity" but insisting that the process be "kept under the adversarial scrutiny of an open democratic system").

¹⁸⁰ Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2029 (2003) (internal citations omitted).

¹⁸¹ See Lund, *President as Client*, *supra* note 9, at 77.

tarian premise as such. Rather, the argument is that any kind of legal regulatory regime—with its procedures, officials, standards, and precedents—tends to have its own peculiar rationality, which is not easily kept within prescribed boundaries. Thus, the project of drawing bright lines and making torture extremely rare is bound to fail. Metaphorically, legal systems tend to become Dr. Frankenstein's monster, and escape the control of their well-intentioned creators. Or, to use a different metaphor, legally warranted torture under only highly exceptional circumstances tends to metastasize into pervasive, state-sponsored violence.¹⁸² For example, in the response of French colonial officials to the uprising in Algeria, torture

started as a police method of interrogation, developed into a military method of operation, and then ultimately turned into a clandestine State institution which struck at the very roots of the life of the nation.¹⁸³

The power of this response derives from the insight that the very thing that makes torture warrants appealing is also what makes them so dangerous. By subjecting something so immoral to legal process constraints, we in effect legitimate it.¹⁸⁴ Once it is legitimated in a narrow context, it is then open to subsequent actors to analogize a new situation to the core of permissible immorality.¹⁸⁵ By gradual evolution, something that was once utterly forbidden can become accepted and normal.¹⁸⁶ In Senator Daniel Patrick Moynihan's famous phrase, the law "defines devianc[e] down."¹⁸⁷

Dershowitz's argument proceeds from the empirical assumption that a military or civilian official might, in sufficiently exigent circumstances, make the all-things-considered moral judgment that he should torture a suspect in order to obtain information that would save many lives. The point about legitimation suggests that even if the individual's decision were morally justified (and this is, of course, de-

¹⁸² See Shue, *supra* note 69, at 143.

¹⁸³ PIERRE VIDAL-NAQUET, *TORTURE: CANCER OF DEMOCRACY—FRANCE AND ALGERIA 1954–62*, at 15 (Barry Richard trans., 1963).

¹⁸⁴ See, e.g., Posner, *Best Offense*, *supra* note 63, at 28 (offering a similar argument regarding the legitimation of torture, noting that "[h]aving been regularized, the practice will become regular").

¹⁸⁵ See, e.g., *id.* ("If rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules.").

¹⁸⁶ Henry Shue observes that there is "a considerable danger . . . that whatever necessary conditions were specified, any practice of torture once set in motion would gain enough momentum to burst any bonds and become a standard operating procedure." Shue, *supra* note 69, at 141. Of course, this is ultimately an empirical question, and those who disagree with Shue argue that the metastasis of torture is more likely if decisions are left to the ad hoc discretion of low-level interrogators, rather than being regularized by the legal process. See Dershowitz, *The Torture Warrant*, *supra* note 177, at 290–91.

¹⁸⁷ See Daniel P. Moynihan, *Defining Deviancy Down: How We've Become Accustomed to Alarming Levels of Crime and Destructive Behavior*, 62 AM. SCHOLAR 17 (1993).

batable), this justification would never extend to a state that wished to regularize and legitimate torture. Criminal law theorist Sanford Kadish has written that "while a person may justifiably use cruel methods to obtain information in certain extraordinary situations, a state may not justifiably so provide in its law, but must rather maintain a flat and unqualified ban against such measures."¹⁸⁸ If it turns out that the official's decision to torture the suspect did, in fact, lead to the location of the bomb in Times Square, for example, undoubtedly the legal system would find some way to avoid or mitigate the punishment. A prosecutor may decide not to prosecute the official, a judge may throw out the charges on a technicality, the jury may nullify the charges, or the President may grant clemency. That decision would probably be the right one *ex post*, but that does not mean that the principle underlying the decision should be built into the law *ex ante*.¹⁸⁹ To put it another way, in the terms of Meir Dan-Cohen's famous article, we would design very different rules if the rules followed by tribunals (decision rules) could be isolated from a very different set of rules regulating the actions of persons subject to the law (conduct rules).¹⁹⁰ Under this strategy of "acoustic separation," the law could evaluate conduct on a case-by-case basis, without creating adverse behavioral incentives.¹⁹¹ Although for policy reasons the law might absolutely forbid cannibalism, a judge might nevertheless show compassion to individuals rescued after spending weeks in a lifeboat.

¹⁸⁸ Sanford H. Kadish, *Torture, the State and the Individual*, 23 *ISR. L. REV.* 345, 347 (1989).

¹⁸⁹ For this reason it would be extremely dangerous to advise *ex ante* on the possibility of *ex post* presidential pardon or prosecutorial discretion. The very attempt to play on prosecutorial discretion might be just the factor that convinces a prosecutor *not* to decline to prosecute. The prosecutor might conclude that discretionary nonprosecution is warranted where the actor believed himself to be faced with a choice of evils, between violating the law against torture and failing to prevent a catastrophic harm. The possibility of legal punishment might make the actor think long and hard about whether this was really a sufficiently serious emergency, and whether torture was really necessary to prevent it. But the actor would not be facing a similar choice of evils if he believed that he would not face prosecution, and might therefore be more cavalier in trying to resolve the dilemma of breaking the law or failing to prevent a serious harm. The *ex ante* reasoning process from the point of view of the actor, incorporating the assumed *ex post* reasoning of the prosecutor, would become an infinitely iterated game, resembling the famous "Sicilian logic" from the movie, *The Princess Bride*.

Now, a clever man would put the poison into his own goblet, because he would know that only a great fool would reach for what he was given. I am not a great fool, so I can clearly not choose the wine in front of you. But you must have known I was not a great fool, you would have counted on it, so I can clearly not choose the wine in front of me.

THE PRINCESS BRIDE (MGM/UA Studios 1987). I am grateful to Toby Heytens for raising the problem of building in legal advice concerning retrospective discretionary decisions not to punish the conduct.

¹⁹⁰ See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 625-30 (1984).

¹⁹¹ See *id.* at 641.

Without acoustic separation, however, it would become too easy to reason by analogy from the rare case of justified wrongdoing to other cases in which the circumstances did not create a justification.¹⁹² Perhaps the precedent of excused cannibalism might tempt would-be murderers to kill people for less compelling reasons. Furthermore, in the absence of acoustic separation, the threat of legal punishment tends to make individuals stop and consider very seriously whether the reasons for their actions are in fact sufficiently weighty to warrant violating the law.

A different version of the argument against the libertarian premise challenges the premise directly, by denying that the relationship between citizens and the law is such that a citizen is entitled to walk right up to the line separating legality from illegality, as long as he does not overstep. To put the point another way, when the law regulates in some domains, it properly creates fuzzy boundaries rather than bright lines. The reason for this is that people ought to avoid some forms of conduct altogether, rather than trying to calibrate their actions carefully with respect to formal legal prohibitions. Jeremy Waldron offers an excellent example: "Someone for whom the important question is 'How much may I flirt with my student before it counts as harassment?' is already poorly positioned with regard to the concerns underlying harassment law."¹⁹³ We would say of someone who tries to walk right up to the boundary of actionable harassment that he simply misunderstands what it means to comply with anti-harassment rules. Even if he manages to avoid legal sanctions in a particular case, he has still not truly "complied" with the law. There is an attitude toward law associated with the notion of compliance, and it is not self-evident that the proper attitude is to regard the law only as a potential source of costs.

The attitude that the law is relevant to practical reasoning only insofar as it imposes penalties for action is a relic of the command-sanction concept of law, associated with John Austin, which was thoroughly discredited by Hart.¹⁹⁴ As Hart famously argued, legal rules have an "internal aspect," meaning that people subject to the requirements of law exhibit a critical reflective attitude toward it—citizens properly regard the law's demand for obedience as legitimate, and accept criticism for deviation from legal standards as justified.¹⁹⁵ In the context of the torture memos, the administration argues that law-

¹⁹² See Gaeta, *supra* note 53, at 792 ("[O]nce it is expressly accepted that necessity does legally justify torture under such extreme situations as those described in the ticking-bomb paradigm, necessity could be successfully pleaded for any act of torture.").

¹⁹³ Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 535–36 n.66 (1994).

¹⁹⁴ See HART, *supra* note 14, at 18–25.

¹⁹⁵ See *id.* at 55–57.

yers should adopt a “forward-leaning” attitude toward law, and not be too quick to conclude that the law prohibits certain conduct.¹⁹⁶ It is true that lawyers should not be hyper-cautious, but one can lean only so far forward without rejecting the ideal of a “government of laws, not of men.” As David Luban has argued, the legal reasoning in the torture memos suggests that the lawyers regarded the law only as a fig leaf, or as a way of providing cover for administration officials who had already made up their minds about what they wanted to do.¹⁹⁷ Moreover, if my claim about the authority of law is correct, the forward-leaning attitude toward the law becomes a forward-leaning attitude toward morality, because the law is legitimate only insofar as it enables citizens to settle on a provisional collective position with respect to some contested moral issue. This is the attitude of an “amoralist,” who demands to know why he should care about being moral at all.¹⁹⁸ Rather than being a way to respect the moral value of autonomy, the libertarian premise is actually a reflection of systematic disrespect for morality.

My argument is not that a lawyer must always offer the most conservative legal advice or, metaphorically, handle the law with kid gloves. There are many mechanisms within the law for pushing the boundaries or seeking change. In the context of litigation, lawyers are permitted to take aggressive stances toward the law, subject to the requirements that the position not be frivolous, that any contrary authority be disclosed, and that the lawyer make no misstatements of law or fact.¹⁹⁹ Some measure of aggressiveness is permissible in litigation because of the checking mechanisms built into the adversary system, such as an impartial referee, rules of evidence and procedure, and, of course, a well-prepared adversary. Similarly, certain kinds of administrative proceedings, such as SEC filings, are accompanied by procedural checks to insure against the corrosive effect of excessive lawyer creativity. In transactional representation, however, these checks and balances are absent, and the lawyer in effect assumes the role of judge and legislator with respect to her client’s legal entitlements. If a government lawyer says, for example, that the President has the authority as Commander-in-Chief to suspend the obligations of the United States under various international treaties, then for the purposes of that act, the lawyer’s advice is the law. If the lawyer’s advice is errone-

¹⁹⁶ See *supra* note 23 and accompanying discussion.

¹⁹⁷ See David Luban, *Liberalism and the Unpleasant Question of Torture* 37 (2005) (unpublished manuscript, on file with author).

¹⁹⁸ See BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 3 (1972).

¹⁹⁹ See MODEL RULES OF PROF’L CONDUCT R. 3.1 (2002) (stating that a lawyer shall not take positions that lack an adequate basis in law and fact); *id.* R. 3.3(a)(2) (stating that a lawyer shall not knowingly fail to disclose adverse authority); *id.* R. 3.3(a)(1) (stating that a lawyer shall not knowingly make misstatements of law or fact).

ous, the consequences for the government could be disastrous, but only if they are discovered. Secrecy, combined with an aggressively “forward-leaning” stance toward the law, essentially creates an unaccountable legislature within the executive branch.²⁰⁰ Rather than assisting the client to comply with the law, the government lawyers in this case simply abandoned the ideal of compliance altogether in favor of their own, custom-built legal system.

IV

DUCKING THE QUESTION: TICKING BOMBS AND INEFFECTIVE TORTURE

The debate over the torture memos revealed an interesting strategy of evasion, with respect to the relationship between law and morality. The strategy was to deny the immorality of torture in all cases. Here we encounter that shopworn trope, the ticking-bomb hypothetical.²⁰¹ In this fanciful case, the police have in custody a member of a terrorist cell that has planted a nuclear device somewhere in Manhat-

²⁰⁰ As a kind of normative heuristic for evaluating interpretation, one might ask whether a lawyer would have taken the same position if he knew that the legal advice would become public. It is significant that the details of many of the structured finance transactions employed by Enron were obfuscated to the point that it was impossible for investors and analysts to figure out exactly what was going on. See Wendel, *Interpretation*, *supra* note 10, at 1224. As a result, no impartial observer could subject the transactions to the kind of critical scrutiny they received at the hands of the bankruptcy examiner. In an ideal world, the lawyers might have evaluated the legality of the transactions using this hypothetical standpoint: Assume a bankruptcy court will order an independent examination of these transactions—are we still committed to our conclusions? Similarly, the OLC lawyers might have asked themselves whether they would give the same advice if they knew their memos would be published on the Office’s website (or leaked to the press) and picked apart by scholars with expertise in the relevant areas of law. If they had proceeded with that attitude, I suspect the analysis would look much different.

One might object that the lawyers in the torture controversy are unlike the Enron lawyers in that—as executive branch officials—they are part of an institution that is charged with the responsibility of interpreting treaties, and—specifically as OLC lawyers—they work for an office that has traditionally been accorded substantial authority as an interpreter of the law applicable to government officials. See Moss, *supra* note 9, at 1306. As discussed in Part III.B, I believe this objection creates a false dichotomy between government lawyers who, on some accounts, are held to be “neutral expositors” of the applicable law, *see id.* at 1306–09, and private lawyers who bear no such quasi-judicial responsibility. As I have argued in connection with the Enron case, all lawyers purporting to give advice on the content of the law, and on how a client ought to act in conformity with the law, are bound to give advice within a range of reasonable interpretations that might be adopted by an impartial judge. There is no reason to believe that this responsibility varies according to the identity of the client, because it is the content of the law, not the nature of the client, which constrains the advice given by the lawyer. It may be the case that certain executive branch lawyers have special interpretive responsibilities, but this observation only *heightens* the duty that would otherwise exist, even for lawyers representing private clients. I am grateful to Jeff Rachlinski for raising this issue.

²⁰¹ See, e.g., DERSHOWITZ, *WHY TERRORISM WORKS*, *supra* note 176, at 140–42; Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 (2000). The Schlesinger report actually frames its ethical analysis (tucked away in

tan or some other large city. The prisoner knows the location of the bomb and, significantly, the police know he knows this. The weapon will go off within a short period of time unless its location is revealed and the bomb squad is dispatched to defuse it. The example works by generating an intuition—"of course it would be morally permissible to torture the captive in that case"—from which a more general principle is supposed to follow. The hypothetical also generates a kind of meta-intuition, which is that we should not be so naive as to believe that bare-knuckles tactics will never be required to combat terrorism.²⁰²

But note the rhetorical effect of the hypothetical: Because we concede the permissibility of torture in the ticking-bomb case, we are allegedly committed to endorse other practices, such as shipping captives off to countries like Egypt and Pakistan where they will be tortured,²⁰³ employing severely coercive techniques like "waterboarding" and sleep deprivation, and dispensing with due process protections for captives. The argument apparently works on some kind of sliding scale: The farther we get away from the actual ticking-bomb scenario, the less secure the permission for outright torture by U.S. officials. But as long as the case resembles the ticking-bomb hypothetical, we may be justified in engaging in "torture lite," rendition of prisoners to less scrupulous police forces, and so on.

The persistence of the ticking-bomb story is one of the surprising aspects of the debate on torture, given its well-known limitations. The ticking-bomb case is clearly extraordinary, both in terms of the scale of destruction it threatens—hundreds of thousands of deaths—and of the certainty with which all the actors view the information in their possession.²⁰⁴ Henry Shue's critique is classic:

The proposed victim of our torture is not someone we suspect of planting the device: he *is* the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated.

. . . The torture will not be conducted in the basement of some small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being kept informed; and a

an appendix) around the ticking-bomb hypothetical. See SCHLESINGER REPORT, *supra* note 4, app. H.

²⁰² See, e.g., Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION, *supra* note 61, at 229, 230.

²⁰³ As discussed above, this practice of "rendition" is a clear violation of international humanitarian law. See *supra* note 60.

²⁰⁴ See, e.g., Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1497 n.58, 1501-03 (2004); Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, in TORTURE: A COLLECTION, *supra* note 61, at 299, 304.

priest and doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer.²⁰⁵

Not only does this description not cover the overwhelming majority—if any—of actual known cases of torture, it exists in splendid isolation from other law enforcement practices. It does not trickle down into local police forces, investigations of past crimes, attempts to prevent comparatively less serious harms, and questioning of suspects on the basis of speculative connections to threatened acts. It denies the possibility of the very harm that is most likely to result, namely, a “torture culture” in which bureaucratic rationality works to eliminate any single person as the locus of moral responsibility.²⁰⁶

Most importantly, the ticking-bomb hypothetical does not take account of the imperfect information with which government personnel always operate. Many different detainees end up in police stations, with a varying degree of knowledge about, and complicity in, terrorist plots, many of which are only in the preliminary planning stages. Reports are just now starting to trickle out from innocent people who have been caught up in the administration’s extraordinarily open-ended “war on terrorism.”²⁰⁷ The victims of torture in these cases are not conspirators with their fingers on the trigger of a nuclear bomb, but people who happened to be in the wrong place at the wrong time. Consider, for example, the Canadian citizen of Syrian origin who was picked up at JFK Airport, solely on the basis of having been placed (apparently for no good reason) on a watch list of suspected terrorists.²⁰⁸ After being questioned for several days in the United States, he was summarily shipped off to Syria as part of a secret and illegal program of “extraordinary rendition.”²⁰⁹ In Syria, he was beaten until he could stand the pain no longer. He was finally released after pressure from the Canadian government. Knowledgeable observers estimate that approximately 150 people may have been rendered to

²⁰⁵ Shue, *supra* note 69, at 142.

²⁰⁶ Luban, *supra* note 197, at 26.

²⁰⁷ In some estimates, between seventy and ninety percent of persons detained in Iraq were arrested by mistake. See ICRC REPORT, *supra* note 4, at 388.

²⁰⁸ See Mayer, *supra* note 21. The Canadian government has established a Commission of Inquiry to investigate this incident, with which the U.S. government has refused to cooperate. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, <http://www.ararcommission.ca/eng/index.htm> (last visited Oct. 2, 2005).

²⁰⁹ Mayer, *supra* note 21. For discussion of the (il)legality of rendition, see *supra* note 60.

countries such as Syria, Egypt, Morocco, Jordan, and Uzbekistan, all of which are known to use torture.²¹⁰

Those who attempt to use the ticking-bomb hypothetical to argue for permissible torture in some cases point to events like the thwarted attempt of an al-Qaeda cell to bomb western airliners over the Pacific.²¹¹ But at the time the interrogation of the captured suspect began, Philippine intelligence officials did not know of the plot, or that the captive had information that could prevent it.²¹² They simply tortured him because he was believed to be part of al-Qaeda, and fortuitously they discovered information that enabled them to unwind the bombing plot. Even if torture revealed the information, the justification for torture in that case is entirely *ex post*, and therefore has no applicability to the vast majority of cases in which it is not known *ex ante* whether a given detainee has useful information. Taking the real case, not the ticking-bomb hypothetical, as our starting point yields a very different conclusion, one which hardly anyone would be prepared to accept—namely, that anyone who potentially *may* have information that *could* lead to the prevention of a terrorist attack may be tortured. Real cases also introduce other complications from the real world, such as the fact that torture is not generally carried on with the minister of justice and a doctor standing nearby; rather, it is untrained yahoos from reserve companies of military police acting without supervision who actually end up conducting interrogations. The removal of these inconvenient bits of reality is what makes the ticking-bomb hypothetical so unsatisfying as a tool for engaging in normative analysis. And it is an independent reason for maintaining a strong prohibition on anything approaching torture: “The distance between the situations which must be concocted in order to have a plausible case or morally permissible torture and the situations which actually occur is, if anything, further reason why the existing prohibitions against torture should remain”²¹³

While the ticking-bomb case is used to counter the argument that torture is never acceptable, opponents of torture have their own evasion of the difficult moral questions: the prudential argument that interrogational torture should not be practiced because it never yields

²¹⁰ Peter Beinart, *Outsourcing*, NEW REPUBLIC, May 31, 2004, at 6, 6; Mayer, *supra* note 21.

²¹¹ See Posner, *Best Offense*, *supra* note 63, at 28; Doug Struck et al., *Borderless Network of Terror: Bin Laden Followers Reach Across Globe*, WASH. POST, Sept. 23, 2001, at A1.

²¹² Additionally, two Philippine journalists who investigated the case reported that the information on the plot was actually recovered from a computer in the suspect's apartment, not divulged under torture. See Meek, *supra* note 64 (citing the report of Marites Vitug and Glenda Gloria).

²¹³ Shue, *supra* note 69, at 143.

useful information.²¹⁴ The trouble with this argument is that it may not be true in all circumstances; there may be a subset of cases in which torturing a suspect does produce information that enables authorities to thwart a terrorist attack. Journalist Mark Bowden, in a provocative article in the *Atlantic Monthly*, describes a case from Israel in which “coercive interrogation” caused a suspect to reveal a plot to kidnap students at a religious school; security forces captured the would-be terrorists and saved the children.²¹⁵ Similarly, Seymour Hersh, in his book *Chain of Command*, relates the story of how Jordanian secret police managed to neutralize Abu Nidal’s organization, which had threatened King Hussein; the Jordanians threatened to kill family members of suspected Abu Nidal associates, which resulted in the organization becoming fragmented and ineffective.²¹⁶ On the other hand, many experienced interrogators would agree with the statement of a former FBI investigator, who retired from the Bureau after conducting some early post-9/11 questioning of al-Qaeda members, that American investigators got bad information out of one suspect because “they beat it out of him. You never get good information from someone that way.”²¹⁷ Furthermore, as the number of detainees increases, the likelihood decreases that any given subject of interrogation has useful information that could be extracted by any means.

Although I have critiqued both the ticking-bomb hypothetical and the claim of torture’s ineffectiveness, it is worth emphasizing that the moral debate over torture is not all, or even predominantly, indeterminate. There are large areas of moral consensus about a number of issues. The morality of rounding up small children completely at random and torturing them just for fun is not open to question, except by a lunatic. On the other hand, reasonable people can disagree about the morality of an act when the example is changed, and can disagree about how much it must change before the moral analysis reaches a different conclusion. Imagine the question posed as follows:

If the authorities have custody of A and know B based on information whose reliability is established by C, and believe that using technique D on the detainee is likely to prevent harm E, is the conduct permissible?

²¹⁴ See, e.g., Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 *CARDOZO L. REV.* 1513, 1521 (2003).

²¹⁵ See Mark Bowden, *The Dark Art of Interrogation*, *ATLANTIC MONTHLY*, Oct. 2003, at 51, 65–66.

²¹⁶ SEYMOUR HERSH, *CHAIN OF COMMAND: THE ROAD TO ABU GHRAIB* 83–84 (2004).

²¹⁷ Mayer, *supra* note 21; see also David Ignatius, ‘Rendition’ Realities, *WASH. POST*, Mar. 9, 2005, at A21 (“[I]n 30 years of writing about intelligence, I’ve never encountered a spook who didn’t realize that torture is usually counterproductive.”).

Variable A ranges from “some poor schnook who was in the wrong place at the wrong time in Afghanistan” all the way up to someone like Khalid Sheikh Mohammed; Variables B and C can vary quite a bit depending on the status of the detainee; Variable D includes everything from innocuous techniques like playing good-cop-bad-cop or subjecting the detainee to the Meow Mix theme to the most sadistic torture methods devised; and Variable E can include battlefield intelligence that might help American commanders battle the Iraqi insurgency or even the location of the proverbial ticking atomic bomb in Times Square.²¹⁸

Once the question is made more complicated by introducing these variables, it becomes much more difficult to reach agreement by using reasoning alone. From the point of view of a citizen, who is bound by morality to make an all-things-considered decision, there is no alternative but to engage in this reasoning process. But political matters involving the norms which society as a whole should follow do not involve citizens reasoning in isolation from others. Instead of thinking, “What should I do?,” a member of society considering a political issue is thinking, “(1) what do I think about what *we* should do, and (2) what should we do?” Conscientious citizens have views about the first question, i.e., what do I think we should do about such-and-such, but that view is not preclusive of the views of others in public debate. The possibility of conflict among multiple answers to the first question means that the answer to the second question cannot be derived straightforwardly from the first. The deliberations of a citizen with respect to the second question must take into account the views of others, and must accord sufficient respect to those views. Engaging in this reasoning process “in one head,” so to speak, is impossible. Or, at the very least, it is very likely the case that there are procedures by which the interests of others can be taken into account in a much more effective way, as compared with an individual citizen trying to reason her way through a political decision on her own. For these reasons, the story about the authority of law presented in Part II cannot be evaded by appealing to reasons that are the subject of good-faith disagreement.

CONCLUSION

At bottom, the vice of the torture memos is the ethical solipsism of lawyers who sincerely believed they were right, despite the weight of legal authority against their position. Academic defenders of the administration cite the works of “dynamic young constitutional scholars”

²¹⁸ Cf. Shue, *supra* note 69, at 137, 141 (listing stringent necessary conditions that would have to be satisfied if interrogational torture were ever to be justified).

whose views are better than those that have carried the day in the Supreme Court, Congress, and the forum of international treaty negotiation.²¹⁹ No matter how brilliant these scholars are, their views are not the law. They have not been adopted by society, pursuant to fair procedures, as a resolution of the moral issue. Lawyers functioning in a representative capacity have no greater power to act on the basis of an all-things-considered moral judgment than do their clients. If clients are bound by the law, then lawyers are bound to advise them on the basis of the law, not on the basis of the lawyer's own judgment about what the best "forward-leaning" social policy would look like. Criticizing the administration's lawyers for their lack of fidelity to law is not an evasion of the moral horror of torture. It is a recognition of the moral entitlement of the law to respect, and a critique of the separate act of wrongdoing perpetrated by lawyers who deny the authority of law.

Although the ticking-bomb hypothetical is wildly implausible, it is only fair to conclude by asking the hardest possible question:²²⁰ Suppose an FBI agent captured Mohammed Atta before September 11, 2001, knew all of the relevant facts beyond a reasonable doubt, and knew that Atta possessed information that would enable security officials to unwind the terrorist plot. Would it be permissible to torture Atta or send him to another country to be tortured? Of course. Even a strong critic of torture like Henry Shue says that there is "no way to deny the permissibility of torture in a case *just like*" the ticking-bomb scenario.²²¹ To the extent that an actual case departs from the facts of the ticking-bomb hypothetical, however, the justification for employing torture must be an argument by analogy, based on the balance of harms in the ticking-bomb case *plus* arguments about how far it is reasonable to generalize from that case. In other words, the moral issue in the ticking-bomb case becomes an issue of the lawfulness of the practice of torture. Under existing law, it is impossible for torture to be made lawful. If, in a true emergency, a government official made a decision to torture Mohammed Atta—a decision that saved thousands of lives—we should regard that action as justified disobedience. In that case, legal institutions would no doubt find some way to avoid prosecution or mitigate the punishment. It is important that we continue to maintain that the act was unlawful, however, even though it

²¹⁹ Posner & Vermeule, *supra* note 111. One lesson of history is that intelligence alone is no guarantee against catastrophically flawed decision-making. President Kennedy's top advisers were renowned for their brilliance, yet they blundered into the Bay of Pigs debacle and, when many of them carried over into the Johnson administration, grossly miscalculated the risks of escalating U.S. intervention in Vietnam. See JANIS, *supra* note 7, at 35–36, 109–20.

²²⁰ Ignatius, *supra* note 217.

²²¹ Shue, *supra* note 69, at 141.

may be excusable under circumstances of extreme duress. Nothing general follows from the permissibility of torture in a fantastic case. The unethical quality of the government lawyers' advice in the so-called war on terrorism was seeking to fit torture within the law rather than defending the law, by interpreting it correctly, to deem that torture is always outside it.