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## Practice, Theory, and the War on Terror

Fred C. Zacharias

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# PRACTICE, THEORY, AND THE WAR ON TERROR

*Fred C. Zacharias\**

## ABSTRACT

*This Essay considers whether lawyers should offer legal advice that clients request and will pay for, even when giving that advice might facilitate wrongful behavior. As a vehicle for analyzing the issue, this Essay discusses memoranda written for the Administration of President George W. Bush by Deputy Assistant Attorney General John Yoo, who advised that the physically and psychologically abusive interrogation of enemy combatants in Afghanistan was, or might be, legally justifiable. This Essay is neither intended to critique or defend the legal analysis underlying the so-called “torture memos,” nor to serve as a referendum on Yoo’s political views. Rather, this Essay analyzes Yoo’s particular role as a lawyer and what effect it should have had on how he conducted his work.*

*This Essay has three goals. The torture scenario illustrates a complex ethical dilemma that attorneys sometimes face. It also demonstrates that the professional dilemma John Yoo confronted was, although extreme, not unusual. Finally, this Essay highlights the value of academic theory and debate in resolving the dilemma.*

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Though this Essay originally was not presented at the 2009 Randolph W. Thrower Symposium, it has been included as part of this issue of the *Emory Law Journal* because of its topical relevance. Professor Zacharias became ill in mid-2009 after this Essay was accepted for publication, and he died in November 2009, prior to its publication. At his earlier request, Professor Bruce Green, Louis Stein Professor, Director, Louis Stein Center for Law and Ethics, Fordham University School of Law, assisted in the subsequent editorial process. Professor Green expresses his great gratitude to the *Emory Law Journal* editors, especially Deepthy Kishore and Jeffrey Abrams, for their extraordinary patience, understanding, and assistance; to Doug Brewer, one of Professor Zacharias’s exceptional research assistants, for updating this Essay; and to Professor Peter Margulies for his thoughtful and generous editorial suggestions. Additionally, Professor Green takes this occasion to note Professor Zacharias’s outstanding body of scholarship, particularly on the subject of the legal profession, and to express gratitude for Professor Zacharias’s friendship and for the privilege of collaborating with him over the course of a decade.

*As a prescriptive matter, this Essay affirms the importance of distinguishing counseling from advocacy for purposes of defining lawyers' professional responsibilities. This Essay further concludes that counseling situations should themselves be differentiated into three categories—namely, those in which attorneys (1) advise clients who want to conform to existing regulations; (2) respond to client requests to identify and implement the best possible arguments in ongoing litigation; and (3) offer formal legal opinions for purposes other than helping clients conform to the law or advance litigation. The third category creates the most difficult ethical dilemmas, particularly in situations where a lawyer suspects that a client wishes to use an opinion to justify illegal or otherwise wrongful behavior. This Essay proposes a regulatory framework that would require lawyers to inquire into clients' motivations for requesting formal opinions, to discuss the merits of alternative client behavior, and sometimes to decline to participate in the representation.*

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## INTRODUCTION

In several now infamous legal opinions written for the Bush Administration,<sup>1</sup> John Yoo—a lawyer in the U.S. Department of Justice Office of Legal Counsel (OLC)—advised his principals that physically and psychologically abusive interrogation techniques used against enemy combatants in Afghanistan were, or might be, legally justifiable.<sup>2</sup> Because the Bush Administration used the memoranda as a basis for employing torture that violated most people’s sense of decency,<sup>3</sup> the Yoo memoranda have been subjected to heavy criticism in the press,<sup>4</sup> books,<sup>5</sup> and law review articles.<sup>6</sup>

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<sup>1</sup> References in this Essay to the Bush Administration refer to the Presidency of George W. Bush.

<sup>2</sup> Yoo actually drafted a series of interrelated memoranda—some signed by Yoo and others by his superior, Jay Bybee—addressed to various recipients, including the Counsel to the President, the General Counsel of the Defense Department, and others. Most of the memoranda are reproduced in KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005). Many of the positions espoused in the early memoranda are restated in a lengthy memorandum specifically addressing torture dated March 14, 2003, which was declassified after *The Torture Papers* was published. See Memorandum from John Yoo, Assistant Att’y Gen., OLC, to William J. Haynes II, Gen. Counsel to the Dep’t of Def. (Mar. 14, 2003), available at [www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf). (memo on Military Interrogation of Alien Unlawful Combatants Held Outside the United States). Because I will not parse the details of Yoo’s conclusions, I will refer to the body of Yoo’s work as the “Yoo memoranda.” I also will not consider memos that Yoo wrote addressing issues other than the potential torture of prisoners held in connection with the war on terror.

<sup>3</sup> See, e.g., Editorial, *Infamous Torture Memo*, NAPLES DAILY NEWS (Naples, Fla.), Apr. 3, 2008, at E4 (“The memo argues that the president’s inherent powers in wartime overrode any federal law or international treaty, raising in the layman’s mind the point, why bother to have laws and treaties?”); Editorial, *There Were Orders to Follow*, N.Y. TIMES, Apr. 4, 2008, at A22 (“The Yoo memo makes it chillingly apparent that senior officials authorized unspeakable acts and went to great lengths to shield themselves from prosecution.”); Editorial, *Torture: Beyond the Pale*, SEATTLE POST-INTELLIGENCER, Apr. 14, 2008, at B5 (“The fact that we torture suspects is unacceptable. That the White House reviewed and approved the techniques is beyond the pale.”).

<sup>4</sup> See, e.g., Lincoln Caplan, *Lawyers’ Standards in Free Fall*, L.A. TIMES, July 20, 2004, at B13 (“The so-called torture memo that has entered the public light is scandalizing.”); Andrew Cohen, *How to Write an Effective Torture Memo*, CBSNEWS.COM, Apr. 2, 2008, <http://www.cbsnews.com/stories/2008/04/02/opinion/courtwatch/main3988809.shtml> (“[T]he policy behind Yoo’s masterwork was as flawed as his implementation of it was deft. The mechanics were there. The soul and the conscience were not.”); David Cole, *Less Safe, Less Free*, SALON.COM, Nov. 19, 2004, <http://dir.salon.com/story/opinion/feature/2004/11/19/justice/index.html> (identifying the Yoo memoranda as a “guide to how to torture and get away with it”); Editorial, *Tortured Logic: An Infamous Memo Gets a Public Vetting—Five Years Too Late*, WASH. POST, Apr. 5, 2008, at A14 (“[I]t is nonetheless shocking to read what is an amalgamation of legal extremism and sloppy reasoning clearly meant to provide the president with justification to violate domestic and international prohibitions against torture.”); Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, available at <http://www.nybooks.com/articles/17230> (“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.”).

<sup>5</sup> See, e.g., HAROLD H. BRUFF, *BAD ADVICE: BUSH’S LAWYERS IN THE WAR ON TERROR* (2009) (contending that John Yoo, David Addington (former legal counsel and chief of staff to former Vice President Dick Cheney), and former Attorney General Alberto Gonzales should be disciplined for their breach of

Even Yoo's successors in the Department of Justice have joined in this criticism.<sup>7</sup> What has not been fully analyzed, however, is the particular position John Yoo was in as a lawyer and what that meant for how he should have conducted his work.

This Essay will focus on that question and the broader issue of whether lawyers should offer legal advice that clients request—and will pay for—even when giving that advice might encourage wrongful behavior.<sup>8</sup> Because Yoo's specific conduct proved so controversial, however, there is a risk that any observations about the torture memoranda will divert the reader from this Essay's target points. This Essay is not intended to be another critique or defense of Yoo's legal analysis<sup>9</sup> or a referendum on Yoo's political views.<sup>10</sup> Rather, this Essay pursues three separate goals.

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professional ethics because there is a clear chain of cause and effect between the advice in the memos and some of the abuses that occurred during interrogations); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 142–51 (2007) (former OLC director criticizing the legal analysis in Yoo's torture memoranda and explaining his reasons for withdrawing Yoo's memoranda).

<sup>6</sup> See, e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1455–56 (2005) (arguing that the legal analysis was categorically flawed); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 36–40 (2008) (endorsing earlier commentator's criticism that "Yoo's interpretations . . . amounted to 'torturing the law'"); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 348 (2007) ("There can be no doubt that the Torture Memo was horribly flawed legal analysis."); Ofer Raban, *Dissecting the Torture Memos* 3–4 (working paper, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1404105](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404105) (discussing, among other issues, John Yoo's questionable redefinition of § 2340's criminalization of "pain or suffering" to in fact mean pain and suffering (emphasis added)); Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1210 (2007) (criticizing the memos' failure to refer to the Inter-American Court of Human Rights's jurisprudence on rendition, the opinions of the International Criminal Tribunals for the former Yugoslavia and Rwanda interpreting the Geneva and Torture Conventions, or case law of the International Court of Justice); Michael E. Tigar, *What Lawyers, What Edge?*, 36 HOFSTRA L. REV. 521, 536 (2007) (stating that Yoo's conduct "dishonored our most basic principles"); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005) ("[T]he legal analysis in the government memos was so faulty that the lawyers' advice was incompetent."); Ellen Yaroshesky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563, 567 (2007) ("[T]he 'Torture Memo' made arguments that dodged every significant piece of domestic and international law that might limit cruelty and even torture.").

<sup>7</sup> See Memorandum from Daniel Levin, Acting Assistant Att'y Gen., OLC, to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), available at [http://www.humanrightsfirst.org/us\\_law/etn/pdf/levin-memo-123004.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/levin-memo-123004.pdf) (memo on Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, withdrawing the Yoo opinion on behalf of OLC).

<sup>8</sup> This Essay focuses on the ordinary lawyer who, within limits, has no personal objective of promoting unlawful behavior. Lawyers who serve the express function of enabling illegality, such as advisors to organized crime, present a different set of issues.

<sup>9</sup> See, e.g., *Hearing on the Nomination of Alberto R. Gonzales as Att'y Gen. of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2005) (statement of Harold Hongju Koh, Dean of Yale Law

First, in describing the torture scenario, this Essay illustrates a special kind of ethical dilemma that lawyers sometimes face. It will not analyze the merits of the torture memoranda's legal analysis or seek to influence the reader's perspectives on the propriety of Yoo's behavior. This Essay's observations are simply intended to underscore the complexity of the position in which OLC attorneys found themselves.<sup>11</sup>

This Essay's second purpose is to demonstrate that, although the OLC dealt with a unique factual situation involving government torture tactics, the ethical dilemma its attorneys faced is not unusual. Practicing lawyers confront it all the time. Again, this Essay will not resolve the overall issue of how lawyers should respond—though it will offer some thoughts on that issue and propose a standard governing the provision of formal legal opinions. But initially, at least, this Essay merely emphasizes that the problem is widespread.

This Essay's third, and perhaps most significant, endeavor is to illustrate how academic scholarship and legal practice interrelate. It is an old saw within

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School) (commenting that a Yoo memorandum regarding torture was “perhaps the most clearly erroneous legal opinion I have ever read”); Kenneth Roth, *Why the Current Approach to Fighting Terrorism is Making Us Less Safe*, 41 CREIGHTON L. REV. 579, 580 (2008) (“[T]orture, at least in the original John Yoo torture memos, was basically defined out of existence.”); Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9, 12 (2005) (“[T]he threshold of what constitutes torture under international law is much lower than what has been submitted by the Office of Legal Counsel.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005) (“[T]he defense of torture is . . . shocking as a jurisprudential matter.”); cf. Stuart Streichler, *Mad About Yoo, or, Why Worry About the Next Unconstitutional War?*, 24 J.L. & POL. 93, 94, 94 n.10 (2008) (describing Yoo as having “reoriented the constitutional debate over going to war” and citing authorities commending Yoo’s book supporting broad executive power during war time).

<sup>10</sup> See BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 51 (2008) (stating that Yoo and others “harbored open ambitions—quite separate from and long predating the war on terrorism—to restore executive prerogatives that, in their judgment, had eroded in the post-Watergate era”); Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1307 (2006) (“The principal drafter of the memo was OLC Deputy Assistant Attorney General John Yoo, a law professor [who] . . . had already developed his own unusual views of the President’s Commander-in-Chief power as extremely broad, and of international treaties as having less binding force than commonly thought.” (footnote omitted)).

<sup>11</sup> Yoo himself has never conceded the existence of any ethical dilemma; he has always claimed both that his legal analysis was accurate and that the government’s interrogation tactics were appropriate. See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDERS ACCOUNT OF THE WAR ON TERROR*, at vii–viii (2006) (stating that the Bush Administration’s policies concerning, *inter alia*, interrogation tactics, were “the result of reasonable decisions, made by thoughtful people in good faith” and arguing that the subsequent official withdrawal of the author’s memoranda regarding interrogation tactics “was really just about politics”); *id.* at 180 (defending the OLC opinions and describing the critics as “misreading the law”). For purposes of this discussion, however, this Essay assumes that, deep down, Yoo may have had some doubts or, hypothetically, that an ordinary lawyer in his shoes would have had doubts.

the bar that the work of academics, developed in an ivory tower, adds little to the resolution of real problems lawyers face. But at least in the area of professional responsibility, that proposition does not hold true. By the end of this Essay, the reader should appreciate the value of academically-developed theory intended to help practitioners understand and more effectively address the ethical problems they face on a day-to-day basis.<sup>12</sup>

## I. THE PROFESSIONAL DILEMMA CREATED BY THE TORTURE INQUIRY

Although John Yoo's memoranda are public and have been criticized extensively, the circumstances surrounding their creation and Yoo's thought processes will likely be subject to ongoing examination. Subsequent developments will continue to cast light on Yoo's professional conduct. In August 2009, U.S. Attorney General Eric Holder appointed a special prosecutor to investigate alleged CIA interrogation abuses,<sup>13</sup> and the Obama Administration released the 2004 CIA Inspector General Report on the CIA's implementation of the "enhanced interrogation" methods advocated by John Yoo's memos.<sup>14</sup> On February 19, 2010, the Office of Professional Responsibility (ORP) released its evaluation of Yoo and Bybee's conduct.<sup>15</sup> The report found that the memos written by Yoo and Bybee "fell short of the standards of thoroughness, objectivity, and candor that apply to Department of Justice lawyers," and that both lawyers committed professional misconduct when they failed to "exercise independent legal judgment and render thorough, objective, and candid legal advice."<sup>16</sup> However, the OPR findings were

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<sup>12</sup> This Essay does not suggest that scholars know more than practitioners; the opposite is often true. However, it assumes that practicing lawyers typically do not have the luxury of time to ruminate about broad policy questions. Scholarship can fill this void by helping practitioners identify the hard issues, especially where questions of legal ethics and professionalism are involved.

<sup>13</sup> See Carrie Johnson, *Prosecutor to Probe CIA Interrogations Attorney General Parts with White House in Approving Preliminary Investigation*, WASH. POST, Aug. 25, 2009, at A5; see also Carrie Johnson, *Probe of Alleged Torture Weighed: White House Has Resisted Inquiry*, WASH. POST, July 12, 2009, at A1 (noting that the appointment of a criminal prosecutor would set the "stage for a conflict with administration officials who would prefer the issues remain in the past").

<sup>14</sup> See Peter Finn, Joby Warrick & Julie Tate, *CIA Report Calls Oversight of Early Interrogations Poor; "Improvised, Inhumane" Techniques Were Result*, WASH. POST, Aug. 25, 2009, at A1.

<sup>15</sup> Eric Lichtblau & Scorr Shan, *Report Faults 2 Authors of Bush Terror Memos*, NY TIMES, Feb. 20, 2010, at A1.

<sup>16</sup> Office of Prof'l Responsibility, Dep't of Justice, Report: Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 251, 260 (2009), available at <http://www.nytimes.com/2010/02/20/us/politics/20justice.html?ref=todayspaper>. In the report, Yoo's professional misconduct is categorized as "intentional" while Bybee's is described as having acted in "reckless disregard of his duty." *Id.* at 260.

rejected in a memorandum written by Associate Deputy Attorney General David Margolis.<sup>17</sup> The Margolis memo acknowledges that the Yoo and Bybee memos have “significant flaws” but concluded that the flawed legal reasoning does not constitute professional misconduct.<sup>18</sup> Thus, Margolis refused to authorize OPR to refer its findings to the state boards where Yoo and Bybee are licensed.<sup>19</sup> The inconsistent evaluations within the Department of Justice invite further debate about how to characterize Yoo’s professional conduct.

Further, Jose Padilla brought suit against John Yoo for the deprivation of his constitutional rights and the violation of his civil rights stemming from Yoo’s creation of the torture memos and their subsequent use by the Bush Administration.<sup>20</sup> The district court refused to dismiss the lawsuit,<sup>21</sup> and Yoo appealed.<sup>22</sup> Additionally, Yoo’s legal memos have received international attention, most notably in Spain where an investigative judge considered bringing criminal charges against high-level Bush Administration officials.<sup>23</sup>

Some of the written criticism of John Yoo explicitly or implicitly assumes that he was asked some variation of the question of whether it is lawful to

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<sup>17</sup> Memorandum from David Margolis, Associate Deputy Att’y Gen., Dep’t of Justice, to Att’y Gen. 2 (Jan. 5, 2010), available at <http://www.nytimes.com/2010/02/20/us/politics/20justice.html?ref=todayspaper>.

<sup>18</sup> *Id.* at 2, 67–69.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> Karen Gullo, *Yoo, Bush Administration Lawyer, Must Face Torture Lawsuit*, BLOOMBERG.COM, June 12, 2009.

<http://www.bloomberg.com/apps/news?pid=20601087&sid=avT0.R96jAFI> (“Padilla claims that Yoo’s memos led to a system under which he was subject to coercive interrogations and cruel and unusual punishment while being denied his right to an attorney, access to courts, freedom of religion and due process.”).

<sup>21</sup> *Id.* (noting that Yoo is responsible for the foreseeable consequences of his conduct and “specific designation as an enemy combatant does not automatically eviscerate all of the constitutional protections afforded to a citizen of the United States”). However, Peter Margulies asserts that the Yale Project, a student body representing Jose Padilla, drafted a poorly worded pleading that lacks “consistency, clarity, and concreteness.” Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 410 (2009). Mr. Margulies notes that Padilla’s pleading ignores the fact that Yoo’s memo only addresses the treatment of detainees held outside of the United States, and Padilla was detained at all times within the United States. *Id.* Also, the pleading’s claim that Yoo “fostered” an imminent threat against Padilla and his family is too vague of a standard to impose upon Yoo, especially considering Yoo’s advice clearly prohibits such threats. *Id.* at 411.

<sup>22</sup> Bob Egelko, *UC Law Professor to Appeal Prisoner Suit Ruling*, S.F. CHRON., July 14, 2009, at A5.

<sup>23</sup> On April 29, 2009, Spain’s Baltasar Garzón, an investigative judge, opened an inquiry into six former White House officials who he said gave legal cover for torture at Guantanamo. Al Goodman, *Spanish Judge Orders Guantanamo Probe*, CNN.COM, Apr. 29, 2009, <http://www.cnn.com/2009/WORLD/europe/04/29/spain.court.guantanamo/index.html>. However, Spain’s Attorney General, Candido Conde-Pumpido, rejected any attempts to bring criminal charges against U.S. officials for their roles in the John Yoo memos. *Spain Rejects U.S. ‘Torture’ Probe*, BBC NEWS, Apr. 16, 2009, <http://news.bbc.co.uk/2/hi/europe/8002262.stm>.

torture enemy combatants in Afghanistan.<sup>24</sup> This Essay asks the reader to suppose, for purposes of exploring Yoo's role and responsibilities, that the question Yoo addressed<sup>25</sup> resembled something like one of the following<sup>26</sup>: Option 1: "Would it be legal for us to engage in torture?";<sup>27</sup> option 2: "Can we make a plausible legal argument that we may torture (or can our agents avoid liability for torturing) enemy combatants?";<sup>28</sup> or, finally, option 3: "Do

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<sup>24</sup> See, e.g., Tigar, *supra* note 6, at 533, 536 (stating that Yoo's "words were designed to be, and were, acted upon" and that "advice given in secret that directly counsels unlawful violence seems clearly to fall outside any arguable protection").

<sup>25</sup> Yoo's memos analyzed the torture statute, 18 U.S.C. § 2340(1) (2006), which prohibits imposition of "severe physical or mental pain or suffering" and implemented the Convention Against Torture. See Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1(1), U.N. GAOR, 39th Sess., 93d plen. mtg., U.N. Doc. A/Res/39/46 (Dec. 10, 1984). One of the criticisms that has been leveled against Yoo is that he interjected his own policy judgments regarding the appropriateness of torture and that he may mistakenly have assumed that his superiors wanted him to find a justification for torture even if the law did not support it. See *supra* notes 4–6. See also Scott Horton, *Which Came First: Memos or Torture?*, L.A. TIMES, Apr. 21, 2008, at A15 ("It increasingly appears that the Bush interrogation program was already being used before Yoo was asked to write an opinion. . . . The question becomes, was Yoo giving his best effort at legal analysis, or was he attempting to protect the authors of the program from criminal investigation and prosecution?"); Walter Shapiro, *Parsing Pain*, SALON.COM, Feb. 23, 2006, <http://www.salon.com/news/feature/2006/02/23/yoo/> ("Another theory is that Yoo gave way to amoral careerism—this was the way that Dick Cheney and Don Rumsfeld wanted al-Qaeda captives to be questioned and it was up to the Justice Department to concoct a fig-leaf legal rationalization."). It may well be that Yoo's assigned task was not clearly stated—for example, that he was simply asked for a legal opinion about some unusual interrogation techniques without specific reference to "torture" or to particular legal limitations and that Yoo defined the precise question for himself. However, for purposes of the inquiry in this Essay, I ask the reader to make the probably unrealistic assumption that Yoo confronted a carefully crafted question that sought legal support for torture despite the prohibitions in the Geneva Convention and other law.

<sup>26</sup> For the most part, the OLC torture memoranda do not explicitly respond to a precise question, but rather noted that the OLC was asked for a general evaluation of particular aspects of the law. Thus, for example, a memorandum drafted by Yoo and signed by Jay Bybee stated: "You have asked our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan." Memorandum from Jay S. Bybee, OLC, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002), *reprinted in* GREENBERG & DRATEL, *supra* note 2, at 81 (memo on Application of Treaties and Laws to al Qaeda and Taliban Detainees). To the extent one or the other memorandum did respond to a specific question, however, I assume for purposes of this Essay that the question left room for interpretation about the clients' desires or intent.

<sup>27</sup> John Yoo characterizes the main question he addressed as "What is the meaning of 'torture' under the federal criminal laws?." YOO, *supra* note 11, at 172. However, OLC was also asked both broader and more specific questions, including ones about its "views concerning the effect of international treaties and federal laws on the treatment of [detained] individuals." Memorandum from Jay S. Bybee, *supra* note 26, at 81. Additionally, OLC was asked whether "federal criminal laws of general applicability [apply] to properly-authorized interrogations of enemy combatants undertaken by military personnel in the course of an armed conflict." Memorandum from John Yoo, *supra* note 2, at 1.

<sup>28</sup> One memorandum specifically addressed this question, noting that "under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A." Memorandum from Jay S. Bybee, OLC, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in*

we have a reasonable chance to win in court—assuming we are willing to take the matter all the way up to the Supreme Court—either on the argument that torture is legal or on the argument that the Executive Branch gets to decide whether it is lawful to engage in such activity (at least in war time)?”<sup>29</sup>

Note the important differences in the various client approaches to framing the issue. The first option asks the lawyer for practical advice based on the weight of existing legal authority: What should we do? The second also asks the lawyer to evaluate the legal precedents, but it invites the lawyer to research and analyze the law to maximize the client’s ability to carry out specified objectives. The third approach is much more complicated. It calls upon the lawyer to speculate about whether the client can at least justify its policy position if the client is willing to risk losing in court and whether the existing law might change so as to favor the client’s position given the realities of a fluid Supreme Court.<sup>30</sup>

All three questions are, in theory, legitimate.<sup>31</sup> They do not demand that the lawyer prostitute his judgment or participate in illegal conduct. But some of the questions signal that the attorney should not let personal moral inclinations color his evaluation of the law.

What was interesting about the initial reaction to publication of the torture memoranda was the almost universal outrage—including outrage from a segment of the practicing bar that went public about its concerns.<sup>32</sup> One can

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GREENBERG & DRATEL, *supra* note 2, at 173 (memo on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A); *cf.* GOLDSMITH, *supra* note 6, at 23 (noting that the OLC opinions written by Yoo “gave counterterrorism officials the comfort of knowing that they could not easily be prosecuted later for the approved actions”).

<sup>29</sup> Joseph Margulies, *The Right to a Fair Trial in the War on Terror*, 10 GONZ. J. INT’L L. 57, 61 (2006) (arguing that OLC was “charged with a mission, and that was to build a legal regime that lets interrogators torture prisoners if they want to. It was a policy judgment for which there was a legal construct supporting it.”).

<sup>30</sup> *Cf.* Memorandum from Jay S. Bybee, *as reprinted in* GREENBERG & DRATEL, *supra* note 28, at 207 (stating that even for interrogations that violate § 2340A, criminal liability could potentially be avoided and the interrogations justified through “criminal law defenses of necessity and self-defense”).

<sup>31</sup> *But see* Markovic, *supra* note 6, at 349 (“[W]hether or not Yoo and Bybee wrote the memorandum in good faith, the enterprise in which they were involved—providing legal cover for the abuse of detainees—was morally hazardous.”).

<sup>32</sup> *See* Lawyers’ Statement on Bush Administration’s Torture Memos from Bruce Ackerman et al. to President George W. Bush et al., at 2 (2004) [hereinafter Lawyers’ Statement], *available at* <http://physiciansforhumanrights.org/library/documents/non-phr/lawyers-statement-on-bush.pdf> (statement signed by approximately 135 judges, bar leaders and other lawyers condemning the lawyers involved in the Yoo memoranda as having “failed to meet their professional obligations”); *see also* AM. BAR ASS’N, AMERICAN BAR ASSOCIATION REPORT TO THE HOUSE OF DELEGATES (2004), *reprinted in* GREENBERG & DRATEL, *supra*

attribute the media and lay reaction to sensationalism, politics, and the public's general sense of morality. But the response from practitioners was a bit surprising because lawyers tend to be a fairly client-oriented and cynical bunch. They usually consider satisfying a client to be professional conduct.

The outrage of at least some of the practitioners might be explained by two natural assumptions. The first is that, as a government lawyer, John Yoo owed a special obligation to serve "justice" and "the law."<sup>33</sup> His activities therefore should not have been calculated simply to satisfy his superiors' desires.

Second, the critics may implicitly have assumed that, because Yoo was a government lawyer, his situation was unique.<sup>34</sup> They perhaps sensed that the ethical dilemma Yoo faced does not arise in ordinary practice. To the extent that lawyers typically do not confront the same moral questions, it was risk-free for these practitioners to offer an opinion condemning Yoo.

The assumptions mentioned above may have been "natural," but they would also have been misguided. To understand why, one has to parse the assumptions carefully.

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note 2, at 1132 (condemning the use of legal memoranda to defend positions that were not previously considered legal under international human rights law); An Ideology of Lawlessness, <http://glenngreenwald.blogspot.com/2006/01/ideology-of-lawlessness.html> (Jan. 6, 2006, 9:07 EST) (civil rights litigator characterizing the torture memoranda as "authoritarian and lawless ideology"); Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (quoting a practitioner arguing that "[the Yoo] memoranda will directly undermine the enforcement of the law"); William H. Neukom, Op-Ed, *It's Time to End Torture*, Oct. 11, 2007, <http://www.abanet.org/abanet/media/oped/oped.cfm?releaseid=199> (American Bar Association president characterizing the Yoo memoranda authorizing torture as violating the nation's core values of decency).

<sup>33</sup> See Lawyers' Statement, *supra* note 32, at 2 (arguing that the government lawyer's "ultimate client is not the President or Central Intelligence Agency, or any other department of government but the American people"). It is a well-accepted proposition that government lawyers are charged with serving justice. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that a prosecutor's interest "is not that [he] shall win a case, but that justice shall be done"); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2003) [hereinafter MODEL RULES] (stating that government lawyers are "minister[s] of justice"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (2004) (stating that the prosecutor's "duty is to seek justice"); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 790 (2000) (discussing prosecutors' "public interest serving role"); Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 619 (1999) (discussing sources of prosecutors' obligation to "seek justice"); see *infra* notes 35-37 (citing articles on prosecutorial ethics).

<sup>34</sup> Although the *Lawyers' Statement* published shortly after the Yoo memoranda were made public did allude to a broad duty of the lawyer "as an officer of the court and as a citizen" to "uphold the law," the statement focuses exclusively on the activities of government lawyers involved in writing memoranda about torture. Lawyers' Statement, *supra* note 32, at 2.

A. *The Misperception That the Dilemma Arises from Government Lawyers' Uniqueness*

Consider first the proposition that Yoo's willingness to provide his superiors with the opinion they requested was inappropriate because, as a government lawyer, he owed his primary duty to "justice." A fair portion of my own scholarship has analyzed what it means for government lawyers, especially prosecutors<sup>35</sup> and lawyers in the federal Justice Department,<sup>36</sup> to "serve justice."<sup>37</sup> It is self-evident that "justice" is a nebulous term. Government lawyers can twist it to justify virtually any conclusion.<sup>38</sup>

The more interesting and pertinent question is "who gets to decide what justice is" within a hierarchical Department of Justice and Executive Branch? In a recent article, Bruce Green and I noted that a low- or intermediate-level Justice Department attorney might justifiably control decisions that involve determinations of fact that they are best suited to make.<sup>39</sup> Yet these attorneys are not elected or directly accountable to the public. Arguably, they are the last people who should be in charge of national policy decisions; at least in some situations, those decisions are better left to the more senior DOJ lawyers, such as the Attorney General.<sup>40</sup>

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<sup>35</sup> E.g., Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993).

<sup>36</sup> E.g., Bruce Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996).

<sup>37</sup> E.g., Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) [hereinafter Zacharias, *Structuring*]. Of course, others have addressed the subject as well. See *supra* note 33 (citing articles discussing government lawyer ethics).

<sup>38</sup> See Zacharias, *Structuring*, *supra* note 37, at 48 (arguing that the vagueness of the concept "leaves prosecutors with only their individual sense of morality to determine just conduct").

<sup>39</sup> Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 202 (2008); cf. GOLDSMITH, *supra* note 6, at 24 (stating that Yoo frequently bypassed Attorney General Ashcroft, working directly with White House staff).

<sup>40</sup> Green & Zacharias, *supra* note 39, at 203. That is not to say that Yoo acted properly or that his special obligations as a government lawyer were irrelevant. I simply suggest that the mere fact that Yoo was a government lawyer doesn't easily resolve the issues or neatly distinguish Yoo from other lawyers facing ethical dilemmas in counseling clients. For an interesting historical analysis of what "independence" of a federal government attorney might mean, see Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1937 (2008). Cf. Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 1, 41-42 (2006)

Margaret Love has exposed the other fallacy of the government lawyer critique.<sup>41</sup> Practicing lawyers are accustomed to dealing with line prosecutors, who typically function as the client for purposes of making legal and tactical decisions.<sup>42</sup> In that context, it becomes easy to assume that DOJ lawyers have no individual clients. Love, however, highlighted the fact that U.S. Attorneys and other DOJ lawyers in the civil context are like private practitioners in that they usually do have clients—administrative agencies, government employees, and ultimately, as in the Yoo situation, the higher-ups in the Executive Branch.<sup>43</sup> Although it is arguable that these lawyers, in serving justice, sometimes have a special role to play when analyzing the law, they do not have universal moral or legal authority to overrule their clients' decisions about how the government should act.<sup>44</sup>

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(stating that “[t]he so-called ‘torture memos’ beg for a re-examination of government lawyers’ ethical obligations, especially when acting as advisors, not advocates” and proposing a new Model Rule governing government attorney advisors).

<sup>41</sup> See Margaret Colgate Love, *Outside Authority*, A.B.A. J., Jan. 2004, at 53, available at [http://www.abajournal.com/magazine/article/who\\_is\\_the\\_client/](http://www.abajournal.com/magazine/article/who_is_the_client/) (“I remember [as a government lawyer] feeling a little irritated by assertions . . . that the government lawyer’s client is the general public.”); cf. Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541, 560 (2004) (arguing that the government lawyer’s client should be considered “the agency that employs him”). Although Ms. Love, a former DOJ attorney and current practitioner, is not a full-time academic, she has engaged in scholarship and served on the faculties of Georgetown and American University law schools.

<sup>42</sup> See Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 35 (2009) (noting that the prosecutor “personifies the client and makes the client decisions in criminal cases”).

<sup>43</sup> See Love, *supra* note 41 (“Government lawyers are not their own clients.”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000) (stating that the government lawyer’s client usually is the agency involved in the underlying dispute); cf. Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) (identifying five possible conceptions of the government lawyer’s client); Michael Stokes Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 489 (1998) (arguing that, for purposes of attorney–client privilege, the government lawyer’s client is usually the Executive Branch, typically personified by the President); Patricia E. Salkin & Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney–Client Privilege*, 39 IND. L. REV. 561, 564 (2006) (“The literature is full of robust debate on this point with arguments advanced that the client can be an individual public official, an agency or department within the government, the government as a whole, or the public at large.”).

<sup>44</sup> See Love, *supra* note 41, at 54 (“Government clients may have a higher ethical duty to the public than a private corporate citizen would, and government lawyers may be obliged to advise them of it. But government lawyers, as lawyers, do not have that duty.”); see also 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, 986 (1991) (concluding reluctantly that when a client-agency and the government lawyer disagree about which public policy will serve the public interest in litigation, “the government lawyer has the same

For our purposes, it is important to note that practitioners' instinctive assumptions about the independence of DOJ attorneys arise because the assumptions seem to hold true in routine cases. Outside the low-level litigation setting, however, government attorneys have more occasion to be subservient to others in government. Were it not for scholarly work illustrating these intricacies—work that highlights for government lawyers the nuances of their “justice” role—the government lawyers themselves may come to mistake the low-level practice norms for a substantive principle of personal decision-making authority.<sup>45</sup>

*B. The Misperception That the Dilemma Does Not Occur in Private Practice*

It has taken the intervention of academics to point out that the dilemma confronted by Yoo is not confined to the government lawyer. On the surface, OLC's analysis of the legality of torture involved a moral issue that could only be debated in the higher reaches of government (and, perhaps, within organized crime syndicates). This apparent uniqueness may account for the willingness of judges and bar leaders to publicly criticize Yoo's approach.<sup>46</sup>

If one conceptualizes the scenario more generally, however, the picture changes. The following reality might prove embarrassing to Yoo's critics in the bar: corporate counsel, criminal and civil litigators, and tax and regulatory lawyers all must decide regularly how to accommodate client inquiries about potentially illegal or immoral conduct.<sup>47</sup> Scholars have written about the

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ethical duty that the every lawyer has”); *cf.* Berenson, *supra* note 33, at 799–800 (2000) (arguing that, however the government lawyer's client is characterized, the lawyer has a duty to serve “the public interest”).

Occasionally, statutes give government lawyers the power to control decision making. *See, e.g.*, 28 U.S.C. § 516 (2006) (authorizing government lawyers to make litigation decisions in particular cases that are not consistent with a client-agency's desires); *see also* Paulsen, *supra* note 43, at 518 (arguing that independent counsel investigating misconduct by those in management positions in the U.S. government may have special authority to supplant the managers' control of the exercise of attorney–client privilege).

<sup>45</sup> *Cf.* David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1067 (2007) (questioning the activities of a Justice Department lawyer-whistleblower who spoke to the press about her superiors' actions, in part because she believed doing so served justice).

<sup>46</sup> Lawyers' Statement, *supra* note 32.

<sup>47</sup> *See* David Luban, *Tales of Terror: Lessons for Lawyers from the “War on Terrorism”*, in REID MORTENSEN, ET AL., REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS (forthcoming June 2010) (manuscript at 113, on file with author) (noting that dilemmas similar to those in the Yoo scenario may arise “when a tax advisor, or a corporate compliance counselor, delivers a contestable legal opinion safe in the knowledge that it will never be audited or tested by outside authorities”).

phenomenon,<sup>48</sup> and professional responsibility teachers universally incorporate hypotheticals involving this dilemma into their classes.<sup>49</sup>

Moreover, as in the torture scenario, clients often have options in couching their requests for representation. When Enron sought its lawyers' advice about questionable accounting practices, did the corporate officers inquire "are our practices wise?;" "are they legal?;" "can we make a good faith argument that they are legal?;" or "are we likely to be caught by the SEC or IRS if we use them?" How should the Enron lawyers have answered these various questions?<sup>50</sup> How should attorneys for other companies respond when corporate officers hope to avoid the letter or spirit of regulations that govern them, as the Bush Administration hoped to avoid the prohibitions of the Geneva Convention?<sup>51</sup>

The same quandary recently occurred in the banking industry, when lawyers became involved in studying mortgage-backed securities that were bundled, superficially insured, and sold to the public.<sup>52</sup> Even if these securities

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<sup>48</sup> See generally Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (directly addressing the counseling issues).

<sup>49</sup> See Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001, 1002-05 (1999) (discussing classroom hypotheticals involving potential witness perjury); see also Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961, 965-67 (2003) (discussing similar issues that can be raised in evidence courses).

<sup>50</sup> For an academic's response, see generally Susan P. Koniak, *Corporate Fraud: See, Lawyers, 26 HARV. J.L. & PUB. POL'Y* 195 (2003). See also Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1202-04 (2003) (criticizing the Enron lawyers for consciously avoiding awareness of the facts). Professor Koniak's criticisms spurred a noted practitioner to respond. See Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243.

<sup>51</sup> One of John Yoo's early memoranda concluded that the War Crimes Act and the Geneva Conventions did not apply to al Qaeda and Taliban detainees. Memorandum from John Yoo, Deputy Assistant Att'y Gen., OLC, to William J. Haynes II, Gen. Counsel, De'pt of Def. (Jan. 9, 2002), reprinted in GREENBERG & DRATEL, *supra* note 2, at 38 (memo on the Application of Treaties and Laws to al Qaeda and Taliban Detainee).

<sup>52</sup> See Anthony Lin, *\$70M Suit Against Calwalader Reflects Risks of Practice in Mortgage-Backed Securities*, LAW.COM, Sept. 26, 2007, <http://www.law.com/jsp/article.jsp?id=1190745424969&pos=ataglance> (reporting that attorneys included higher-than-justified warranties in mortgage securitizations, leading to damages and malpractice suits); Joseph R. Mason & Josh Rosner, *Where Did the Risk Go? How Misapplied Bond Ratings Cause Mortgage Backed Securities and Collateralized Debt Obligation Market Disruptions* 34 (working paper, 2007), available at <http://ssrn.com/abstract=1027475> (stating that attorneys were pressured to avoid commenting on a company's risky securitization scheme when giving legal opinions to rating agencies); cf. Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 19 (2005) (noting the difficulty of rendering opinions regarding the legality of structured financial transactions when attorneys are only consulted regarding limited aspects of the transaction).

Endless other examples exist. Lawyers for polluting companies, for instance, may need to counsel clients regarding the dumping of toxic waste that exceeds legal limits yet might not be discovered or

were technically legal, should the lawyers have considered whether they were as safe as they were marketed to be to investors? Similar dilemmas arise in routine business matters as well. Corporate counsel must often balance their duties to further the corporation's interests and the managers' interests against the public interest inherent in transparency or regulatory controls.<sup>53</sup>

Criminal defense lawyers face these issues in almost every case. They must decide whether to advise their clients of the possible defenses to the charged crimes before the clients tell the lawyers their stories.<sup>54</sup> If the lawyers simply ask clients to spill the truth first, they may foreclose a good defense—self-defense, temporary insanity, or the like. But a smart client may try to take this moral dilemma out of the lawyer's hands by inquiring about the law before the lawyer seeks information about the facts of the situation. The lawyer's response will help the client decide what to tell the lawyer about the facts, which facts to emphasize, and (potentially) whether to perjure himself so as to support a viable defense. How should the criminal defense attorney answer the client's query, "What are the possible defenses to murder?"

And the ordinary civil litigator? How should she respond to the sophisticated client who asks, after receiving a subpoena *duces tecum*, "what kinds of documents would be harmful to our case *if they existed*?"<sup>55</sup>

Suffice it to say that practitioners are not entirely disinterested when it comes to evaluating lawyers' professional conduct, and the professional rules developed by the ABA to define appropriate conduct<sup>56</sup> do not provide guidance

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prosecuted by the regulating agency. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1551 (1995) (analyzing the ethics of lawyer counseling of polluters). Companies may request advice regarding the potential legal costs of selling dangerous products. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206–35 (1988) (analyzing the ethics of lawyer counseling in the context of the Ford Pinto case). Finally, tax advisors routinely must deal with clients who wish to take questionable deductions.

<sup>53</sup> See Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 466–74 (2006) (discussing the conflicting demands upon, and incentives of, corporate counsel); cf. Janet Austin, *Is My Client's Conduct Dishonest or Merely Excusable Sharp Practice?* 3–4 (working paper, 2008), available at <http://ssrn.com/abstract=1288970> (discussing the complex obligations of Australian lawyers who are forbidden to engage in "dishonest" conduct when advising corporate clients).

<sup>54</sup> See, e.g., Stephen Ellmann, *Truth and Consequences*, 69 FORDHAM L. REV. 895, 924–25 (2000) (discussing the famous "lecture" scene from the movie *Anatomy of a Murder*); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 25 (1995) (discussing witness preparation involving potential perjury).

<sup>55</sup> This scenario is discussed in KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 17, 103–05 (1985).

<sup>56</sup> See *infra* text accompanying note 59 (quoting pertinent Model Rules).

on all issues. Academics, who are generally less susceptible to the pressures of law practice and have greater leisure to look at the big picture, can provide a different perspective.

## II. THE LIKELY PRACTITIONER RESPONSE TO THE ETHICAL DILEMMA

Suppose that the bar comes to understand that the problem confronting John Yoo was of the same type that lawyers face on a daily basis. In the various scenarios catalogued above, how would practitioners approach their clients' troubling, but seemingly legitimate, questions? The answer is that they would probably respond in one of four ways.

Lawyers who perceive a professional responsibility issue—such as whether they should respond directly to a question when doing so might help a client break the law—probably would consult the prevailing legal ethics code. Other lawyers might rely on their sense of role, informed by their internalization of one of the three prevailing schools of thought about the lawyer's function in the adversary system.<sup>57</sup> Third, some lawyers might simply act on their own economic incentives—for example, by pleasing the client.<sup>58</sup> Finally, many lawyers would not even think about the problem. They would respond unhesitatingly to the client's inquiry.

There is not much that anyone—academics, regulators, or peer groups—can do to inform the conduct of attorneys in the latter two groups. By definition, self-interested or unreflective lawyers will be oblivious to outside influence about appropriate conduct. So let us focus on the first two sets of attorneys, who do sense a potential problem or at least can be taught to recognize a problem.

### A. *The Lessons of the Professional Rules*

In our scenarios, how much will the legal ethics codes help the rule-bound lawyers? Frankly, not much at all. The rules either are too vague or fail to address the core issues.

Consider, for example, two directly pertinent provisions of the ABA Model Rules of Professional Conduct. Rule 2.1 instructs lawyers to “exercise

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<sup>57</sup> These are described *infra* text accompanying note 70.

<sup>58</sup> On the other hand, a self-interested lawyer who is concerned that helping the client do wrong will lead to consequences for the lawyer in the long run may try to dissuade the client or withdraw from the representation.

independent professional judgment and render candid advice.”<sup>59</sup> Rule 1.2(d) forbids lawyers to “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”<sup>60</sup>

Depending on what question he purported to be answering, John Yoo arguably satisfied the requirement of Rule 2.1 to render candid advice.<sup>61</sup> Let us suppose that his superiors asked him to identify the best arguments supporting the interrogation tactics in question. Yoo evaluated, in his view honestly,<sup>62</sup> whether the Bush Administration had a legal leg to stand on if government agents proceeded with the proposed conduct. In reaching his conclusions confirming broad executive power, Yoo apparently believed the novel legal position he offered his clients.<sup>63</sup> He answered the question posed to him forthrightly. (Of course, if he was asked for and purported to give an opinion about the current state of the law, but instead offered the best arguments for supporting the lawfulness of the interrogation tactics, then his opinions would have been unclear if not misleading or deceptive.)

One might argue that, in the spirit of full candor, Yoo should have urged the immorality of torture or emphasized that his legal argument departed from the import of at least some prior precedents.<sup>64</sup> But to what end, if his clients already were fully aware of those considerations? Rightly or wrongly, Yoo also may have personally considered torture to be justified under the prevailing circumstances.<sup>65</sup> His failure to condemn his own honestly held legal and moral conclusions can hardly be deemed a failure to exercise independent judgment.

Of course, as a factual matter, if Yoo did not credit his own analysis and manufactured it simply to please his clients, he would have been engaging in

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<sup>59</sup> MODEL RULES, *supra* note 33, R. 2.1.

<sup>60</sup> *Id.* R. 1.2(d).

<sup>61</sup> *Cf.* Spaulding, *supra* note 40, at 1969–70 (condemning the Bush Administration lawyers in some respects, but challenging “condemnatory” literature’s reliance on proclamations regarding the lawyers’ lack of “professional independence”). *But see* Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 GEO. J. LEGAL ETHICS 845, 845 (2009) (interpreting Model Rule 2.1 to forbid OLC lawyers from providing legal opinions that advocate for unorthodox interpretations of the law and to require them to “provide what they believe to be the best, rather than a merely plausible, view of the law”).

<sup>62</sup> *See* YOO, *supra* note 11, at 172 (arguing that the August 2002 torture memorandum gave “clear guidance on the state of the law”).

<sup>63</sup> *Id.* at x (“I thought we had made the right calls at the time.”).

<sup>64</sup> *See* Luban, *supra* note 47 (manuscript at 111) (criticizing Yoo for failing to “indicate[e] that its interpretations were outside the mainstream”).

<sup>65</sup> *See* YOO, *supra* note 11, at 167–68, 172–73 (challenging the “torture narrative” of Bush Administration critics and stating that “[u]npleasant as it is, our government has a responsibility to eliminate the al Qaeda threat and do what is reasonably necessary in *self-defense*” (emphasis added)).

both incompetent and unethical lawyering. He owed it to his clients to present them with an accurate picture of the law. In that vein, some of Yoo's critics have attacked his analysis as implausible—particularly his conclusion that courts might evaluate whether interrogation techniques were torture by resorting to definitions of “severe pain” in unrelated health statutes.<sup>66</sup> Yoo, however, vehemently denies that his efforts represented anything other than his truthful evaluation of the legal landscape, as contemplated by Model Rule 2.1.

The professional rules forbidding lawyer participation in illegal conduct are equally unhelpful. The blackletter of Model Rule 1.2(d) states: “a lawyer may . . . assist the client to make a good faith effort to determine the . . . scope . . . of the law.”<sup>67</sup> Although the rule does forbid a lawyer from “assist[ing]” a client in criminal conduct, the comments to the rule specifically limit what it means to provide assistance. The comments advise that the prohibition “does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses the advice in a course of action that is criminal or fraudulent necessarily make the lawyer a party to the course of action.”<sup>68</sup>

Hence, the professional rules would not forbid Yoo—or the Enron lawyers, or the criminal defense lawyer, or the civil litigator—from answering a client’s carefully-crafted question about the legal consequences of potential conduct or the status of the law.<sup>69</sup> Indeed, answering an inquiry about the law seems to be a quintessential lawyerly function. In theory, autonomous clients have the freedom to chart their own course of conduct.

### *B. The Lessons of Role-Differentiation Theory*

Note that the professional rules are limited only in the sense that they do not expressly forbid legal advice such as Yoo provided. They do not require a lawyer to provide the requested information nor do they advise that a lawyer

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<sup>66</sup> See, e.g., Luban, *supra* note 47 (manuscript at 109–10) (questioning the plausibility of Yoo’s argument regarding torture).

<sup>67</sup> MODEL RULES, *supra* note 33, R. 1.2(d).

<sup>68</sup> *Id.* cmt. 9; see Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557, 561 (2005) (“The case law interpreting Rule 1.2(d) focuses almost exclusively on its first directive against knowingly counseling a client to engage in criminal conduct. Practically, this rule [only] prohibits a lawyer from directing her client to break the law.” (footnote omitted)).

<sup>69</sup> Angell, *supra* note 57, at 562 (concluding that the Yoo memorandum regarding torture “despite its gill, is not a per se wrong or illegal interpretation” and therefore did not violate Model Rule 1.2(d)).

should forebear from attempting to change the client's inclinations. So, if the professional code is ambiguous, how should a lawyer figure out whether he has unspecified obligations to produce a socially good result?

Most practitioners probably would employ the second approach mentioned above. They would consult—explicitly or simply out of habit—their personal sense of a lawyer's role in the adversary system. This Essay will not detail the possible “roles” lawyers might implement because that has been done elsewhere,<sup>70</sup> but it is worth sketching out the three main schools of thought.

The first school emphasizes a highly aggressive client-oriented role.<sup>71</sup> Described broadly, the theory suggests that lawyers should honor client dignity and autonomy by doing virtually anything they can to further a client's interests and choices, short of committing a personal crime, participating in death-producing behavior, or lying—and even the latter sometimes gives way.<sup>72</sup>

At the other extreme are those who believe in the lawyer's obligation to exercise contextual moral discretion.<sup>73</sup> This point of view suggests that lawyers should not use the adversarial system as an excuse,<sup>74</sup> but that lawyers should ordinarily act morally, as each situation demands.<sup>75</sup>

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<sup>70</sup> E.g., Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541 (2009); Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491, 492–94 (2008) [hereinafter Zacharias, *Lying*].

<sup>71</sup> See generally MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 15–19, 45–69 (3d ed. 2004) (discussing the importance of adversarial representation for enhancing clients' individual dignity and preserving individual rights).

<sup>72</sup> See generally Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006) (setting forth a few situations in which the author believes it might be appropriate for lawyers to lie); see also Zacharias, *Lying*, *supra* note 70, at 494–97 (analyzing Freedman's position on lying to the court); FREEDMAN & SMITH, *supra* note 71, at 119–22 (arguing that zealous advocacy sometimes requires lawyers to violate professional rules).

<sup>73</sup> The leading proponents of this path are David Luban and William Simon. See generally LUBAN, *supra* note 52, at xxii (advocating “moral activism” through which a lawyer “shares and aims to share with her client responsibility for the ends she is promoting in her representation” and “cares more about the means used than the bare fact that they are legal”); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9 (1998) (advocating a “contextual view” which accords lawyers significant latitude to exercise moral discretion).

<sup>74</sup> The phrase “the adversary system excuse” was coined in DAVID LUBAN, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (1983).

<sup>75</sup> See, e.g., Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. 1, 11 (2009) (asserting that “[i]f we choose to implement a client's objective, it ought to be because doing so reflects what we personally value . . .”). But see Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. 33, 45 (2009) (stating that a lawyer should not impose her moral worldview, but should bring moral legal matters into the open, allowing the client to make her own decision);

The third school of thought represents an intermediate position.<sup>76</sup> It emphasizes the existence of multiple roles for lawyers within the legal system, not simply the client-oriented role.<sup>77</sup> This middle ground looks to judicial regulation, professional norms and understandings, and conscience as factors that may limit lawyers' unquestioning adherence to client interests while still incorporating the basic elements of role-differentiation.<sup>78</sup>

The point here is simply that different approaches to the lawyer's role exist, which means that practitioners have choices in developing professional behavior. In practice, some lawyers adhere to each of the different schools of thought. The ramifications of this indeterminacy can be serious, because when practitioners face difficult moral dilemmas, they often resolve them with a knee-jerk application of the role they have chosen for themselves. For instance, criminal defense lawyers who often take the most adversarial approach enhance client autonomy with no hesitation by telling their clients about possible defenses before their clients convey the facts. In contrast, lawyers who exercise contextual moral discretion would consider enabling clients to perjure themselves to be an abdication of personal responsibility for the results they produce. For lawyers in either camp, there is often no need for deeper inspection of the issues.

The variations in practitioners' approaches is worrisome because the status quo superficially vests lawyers with the freedom to act however they wish—including acting in furtherance of their own economic interests—simply by blaming the outcome on faithful adherence to their so-called role. Worse, practitioners facing the troubling client inquiries identified here can avoid thinking seriously about the moral issues. This seems to have been the response of the Enron and banking industry lawyers, many in the criminal defense bar, and perhaps John Yoo. The client inquiries arise on an ad hoc basis—in situations when practitioners may not have time even to recognize the ethical problem because the questions posed simply appear to demand a

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W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U. L. REV. 58, 63–64 (2009) (asserting that we want lawyers “to respect the law when advising clients, and not to rely on ordinary moral considerations, the demands of conscience, or the public interest”).

<sup>76</sup> See generally Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 4–6, 44–45 (2005).

<sup>77</sup> See Zacharias, *Lying*, *supra* note 70, at 498–99 (discussing lawyers' alternative roles).

<sup>78</sup> See Zacharias & Green, *supra* note 76, at 45 (arguing that lawyers “must exercise professional conscience—that is, they must attempt to strike a fair balance between competing professional values and interests”).

routine legal analysis and a prompt response. Because the attorneys typically are psychologically aligned with their clients, their inclinations are to provide the requested legal work. As one moves from government lawyers into the private sector, financial incentives reinforce practitioners' inclinations to please their clients, so long as providing the advice is lawful.

### III. THE CONTRIBUTIONS OF SCHOLARSHIP

Here is where insights from the ivory tower can be instructive. Once lawyers have identified themselves with a particular school of thought about the lawyer's role, practitioners tend to implement their choices mechanically. Scholars, in contrast, have killed a lot of trees writing about the nuances of role-differentiation theory.

#### A. *Identifying the Core Issue*

What might surprise some readers is that, for all the debate among the academic proponents of the three schools of thought, there *is* a point of agreement—one that is important for the scenarios discussed above. In implementing their roles, lawyers should not equate client counseling with advocacy in litigation.

Monroe Freedman, for example, is known as a staunch advocate for helping the client accomplish his chosen ends. Freedman notes, however, that client dignity and client autonomy do not eliminate the lawyer's ability, and sometimes even obligation, to discuss with clients the possibility of acting in a legal or moral fashion.<sup>79</sup> Indeed, Freedman suggests that it is practitioners' client-oriented outlook that gives them a reason to inquire into their clients' motivations.<sup>80</sup> Arguably, the fact that clients perceive lawyers as being on their side also gives lawyers the standing to sometimes influence their

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<sup>79</sup> See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478 (1966) (“[B]efore the client testifies perjuringly, the lawyer has a duty to attempt to dissuade him on the grounds of both law and morality.”); see also Tigar, *supra* note 6, at 529 (criticizing the Yoo memoranda and noting—despite the author’s commitment to adversarial ideals—that “the lawyer as advisor is different from the advocate”).

<sup>80</sup> See FREEDMAN & SMITH, *supra* note 71, at 70 (“[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the clients’ legal rights and moral responsibilities as the lawyer perceives them.”); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1977) (“The lawyer fails in her responsibility to maximize the client’s autonomy when she fails to provide the client with the fullest advice and counsel, legal and moral, so that the client can make the most informed choice possible.”).

clients' goals. A lawyer who implements a client-oriented role as an excuse not to think in moral terms misunderstands the thrust of the theory.

David Luban, a leading sponsor of the exercise of contextual moral discretion, has suggested that his justifications for the exercise of moral discretion are strongest in the counseling setting.<sup>81</sup> Luban argues that, when lawyers counsel clients outside the spotlight of the courtroom, they act as mini-legislators.<sup>82</sup> In advising clients about the law, they effectively determine the substance of the law, because most client conduct never becomes the subject of litigation and will never be reviewed by the courts.<sup>83</sup> Luban concludes that John Yoo failed in his responsibilities as a mini-legislator because he allegedly misrepresented the legal precedents concerning torture and pressed a legal position that, in Luban's view, was out of the mainstream.<sup>84</sup>

Representing the third perspective, I, too, have differentiated counseling and negotiations from the advocacy setting.<sup>85</sup> An emphatic client orientation is justified in litigation because an adversarial contest can produce accurate fact finding, and the presence of neutral judges and juries will temper the excesses or inappropriate results that pure advocacy might otherwise bring about. The absence of these safeguards in the counseling setting makes implementation of a purely client-oriented role problematic. Thus, I have argued, the obligation lawyers have to be objective in a counseling setting may not be the same or as important in other contexts.<sup>86</sup>

Among academic proponents of all three schools, the consensus that lawyer-counselors should be prepared to engage in a moral dialogue with clients is truly surprising, especially given the tenacity of some of the

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<sup>81</sup> Luban, *supra* note 47 (manuscript at 111) (distinguishing the counseling from the advocacy setting).

<sup>82</sup> *Id.* (manuscript at 112).

<sup>83</sup> *Id.* (manuscript at 112–13); *All Things Considered: Did Justice Department Lawyers Violate Ethics?* (National Public Radio broadcast July 1, 2009) (“The rules are completely different when it’s just the lawyer and the client and a confidential relationship . . . . The legal ethics rules call on lawyers to be absolutely candid and straight up . . . [and] to give more or less the same advice they would give if they knew their client wanted the opposite.”) (quoting Georgetown University law professor David Luban).

<sup>84</sup> Luban, *supra* note 47 (manuscript at 112).

<sup>85</sup> See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1334 (1995) [hereinafter Zacharias, *Reconciling Professionalism*] (“In the negotiation context, one can imagine that a society interested in just results would expect lawyers to seek not the best deal for their clients, but rather a result that, viewed objectively, is both good for the clients *and* fair.”).

<sup>86</sup> See Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 93 (2007) (arguing that application of an aggressive adversarial role “may not be necessary—or may even be counter-intuitive—in contexts divorced from litigation (e.g., the advice setting, matters involving transactions with the client) or in contexts in which systemic safeguards of the adversary system are not present (e.g., negotiations)”).

proponents' other exchanges. It is even more remarkable that some practitioners implement this principle while others do not even consider the possibility of tempering their advocacy in counseling. Because dissecting adversarial theory is not something practitioners customarily do, it is left to scholars to develop the nuances and—when cases like Enron and the torture situation garner enough public attention—to heighten the bar's awareness.<sup>87</sup>

### *B. Academic Debate: Models for Approaching the Ethical Dilemma*

Although scholarly attention to an issue does not always resolve it, academic discourse often advances the ball. It eventually may cause regulators and practitioners to acknowledge and start working through the problem.

With that kind of discourse in mind, let me both question and try to build upon David Luban's analysis of the Bush Administration's "torture lawyers."<sup>88</sup> Luban's mini-legislator concept is informative, interesting, and in some respects unassailable. He is correct that lawyers in the counseling setting, in effect, set the boundaries for client behavior in a way that often will not be reviewed. But Luban's conclusions about Yoo's conduct may need elaboration.

Luban argues that Yoo erred in three respects. First, he distorted the law to reach the outcome his clients wanted.<sup>89</sup> Second, Yoo's memoranda did not state that his interpretations were "outside the mainstream."<sup>90</sup> And third, Yoo enabled torture, for which he must bear personal moral responsibility.<sup>91</sup>

Luban's analysis of the first point rests on the debatable proposition that there is one law that can be accurately "found" by practitioners.<sup>92</sup> Although Yoo relied on a theory of constitutional interpretation that Luban admits the Supreme Court might consider, Luban claims that Yoo had an obligation to adhere to

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<sup>87</sup> See, e.g., Koniak, *supra* note 50, at 196–97 (arguing that the Enron lawyers were complicit in Enron's wrongdoing).

<sup>88</sup> Luban, *supra* note 47.

<sup>89</sup> *Id.* (manuscript at 112).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (manuscript at 109, 119).

<sup>92</sup> Luban acknowledges that law can be somewhat uncertain, but he suggests that lawyers will be constrained in the advice they give if they "look at the sources of law—the law in books" because that places an "external constraint on [the lawyer's] powers of invention." *Id.* (manuscript at 115). Although one can share Luban's sentiment, his caution seems to understate, or underestimate, the true indeterminacy and fluidity of law.

prior understandings.<sup>93</sup> Although Luban and many others are confident about the illegality of torture,<sup>94</sup> Yoo persists in making a plausible (though highly controversial) argument that his legal analysis was correct, including his treatment of prior precedents.<sup>95</sup>

On the second issue, I would be the last to dispute Luban's conclusion that Yoo had the obligation like any counselor providing a legal analysis to make his clients aware of the uncertainty of his analysis and the risk that it might be rejected by the courts.<sup>96</sup> But giving Yoo the benefit of the doubt, Bush and Cheney probably understood that Yoo's theory was novel; they may in fact have been asking whether any plausible legal argument existed. A realistic chance that the Supreme Court might uphold the theory certainly qualifies in this regard.

It is unlikely that Luban means to suggest the general proposition that a lawyer may never offer his client an "out-of-the-mainstream" theory.<sup>97</sup> To understand the problem with such an approach, one might simply consider whether the lawyers who offered the plaintiffs in *Brown v. Board of Education* a theory for reversing well-established precedent act inappropriately as well.<sup>98</sup>

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<sup>93</sup> *Id.* (manuscript at 110–11).

<sup>94</sup> *See, e.g.,* Luban, *supra* note 6, at 1455 (noting a "near consensus that the legal analysis in the Bybee Memo was bizarre"); Wendel, *supra* note 6, at 82 ("Under existing law, it is impossible for torture to be made lawful."); *see also* authorities cited *supra* note 3 (discussing the ethical issues surrounding interrogation). Luban and those who share his view probably contest even the plausibility of Yoo's legal analysis, particularly Yoo's use of health care statutes addressing medical emergencies to define the type of "severe pain" that would shift interrogation techniques into the realm of torture. Luban, *supra* note 47 (manuscript at 109). To the extent that Yoo's opinion was unequivocally and willfully inaccurate, Luban is correct that offering the opinion to justify the client's actions was unacceptable. *See supra* text accompanying note 66. However, once the scenario moves from an "unequivocally incorrect" opinion to an opinion that a court might realistically accept, drawing lines for when the lawyer may offer his analysis becomes more difficult.

<sup>95</sup> YOO, *supra* note 11, at 168–87. The OLC continued to avow that waterboarding and the other controversial techniques approved by Yoo were lawful. *See* Memorandum from Steven G. Bradbury, OLC, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA (May 10, 2005), available at [http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc\\_05102005\\_bradbury46pg.pdf](http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05102005_bradbury46pg.pdf) (memo on Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee).

<sup>96</sup> *See generally* Zacharias, *Reconciling Professionalism*, *supra* note 85 (arguing that lawyers representing clients have an obligation to act objectively).

<sup>97</sup> *See* Luban, *supra* note 47 (manuscript at 112) (acknowledging the situation in which the "legal opinion writer . . . believe[s] that [he has] the law right and the mainstream has it wrong").

<sup>98</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954), overruled long-standing precedent holding constitutional the "separate but equal treatment" of racial minorities established in *Plessy v. Ferguson*, 163 U.S. 537, 548–49 (1896). For a discussion of the development of the novel legal arguments in *Brown*, *see generally* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 556–59 (2004) (describing how social science material summarizing the effects of segregation came to be included in the Supreme Court briefs arguing for reversal

Unfortunately, Luban does not fully explain *when* lawyers must rely exclusively on “existing law;” he only suggests that the lawyer must tell his client that his “view of the law is out of the mainstream.”<sup>99</sup> Luban’s omission is unsurprising because distinguishing in neutral, non-political fashion those situations where it is legitimate for lawyers to press the boundaries of the law is a tall order.<sup>100</sup>

Luban’s third and core concern, however, is clearly legitimate. It is troubling for counselors to rely mechanically on an adversarial notion that a lawyer should always give clients what they want.<sup>101</sup> An attorney’s allegiance can shore up client’s sense that he is being fully represented and fairly treated.<sup>102</sup> In a world that honors client autonomy, the fact that a lawyer represents a client who makes undesirable choices cannot automatically mean that the lawyer should be personally accountable for all of her client’s actions. But Luban is correct to note that a lawyer’s advice has external consequences—particularly when it may never become public or be reviewed—and that the lawyer’s contribution to those consequences is inevitably his responsibility to bear.<sup>103</sup> Luban emphasizes this reality by suggesting that the lawyer-counselor should live by a paraphrase of Immanuel Kant’s “publicity principle”<sup>104</sup>: he should ask

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of the long-standing precedent supporting the separate-but-equal doctrine); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 161 (2001) (“[A]ccepting the NAACP’s sociological argument was an innovation.”). Cf. Jack M. Balkin, *Introduction to WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 30–34* (Jack M. Balkin ed., 2001) (arguing that, in litigating *Brown*, Thurgood Marshall stressed that earlier decisions targeting inequality in higher education had weakened constitutional support for racial separation).

<sup>99</sup> Luban, *supra* note 47 (manuscript at 112)

<sup>100</sup> Luban suggests that, to be true to the law, a counselor’s rule of thumb should be to describe the law in the same way he would describe it if the client wanted the opposite result, because this approach would lead to a truly objective evaluation of the precedents. *Id.* (manuscript at 111). Luban argues that the torture memo fails that test. Suppose, however, that making a fully objective assessment is possible and that Yoo had correctly stated that his theory had a 20% (or 30%) chance of winning in the Supreme Court. The result would have been the same.

<sup>101</sup> Cf. Anthony Lewis, *The Imperial Presidency*, N.Y. TIMES BOOK REV., Nov. 4, 2007, at 26 (“[Yoo] was so reliable in pronouncing lawful what Bush wanted to do that Attorney General John Ashcroft, displaying an unheralded wit, called him Dr. Yes.”).

<sup>102</sup> See FREEDMAN & SMITH, *supra* note 71, at 42–43 (“[The adversary system] serves as a safeguard of personal autonomy and respect for each person’s particular circumstances . . . [and] thereby gives both form and substance to the humanitarian ideal of the dignity of the individual.”).

<sup>103</sup> Luban, *supra* note 47 (manuscript at 119) (“Lawyers may believe that they bear no moral responsibility for what use their advice is put to, but even if you are not interested in moral responsibility, moral responsibility is interested in you.”).

<sup>104</sup> IMMANUEL KANT, *PROJECT FOR A PERPETUAL PEACE* 66 (London, Vernor & Hood 1796) (“All the actions, relative to the right of another, whose maxim is not susceptible of publicity, are unjust”).

himself “Could I get away with [giving this advice] if my action and my reason for performing it were made public?”<sup>105</sup>

I will offer my view of how Luban’s analysis could be enhanced presently, but the value of his contribution should first be emphasized. It makes clear that acceding to a client’s request for information cannot always be justified based on ambiguity in the professional rules or simple application of the advocacy role. In addition to posing the core issue starkly, Luban’s analysis invites further inquiry by other scholars, which has already begun.

Bradley Wendel, for example, has suggested a different model, arguing that lawyers act unethically when they “regard[] the law as merely an inconvenient obstacle standing in the way of their clients’ freedom of action.”<sup>106</sup> Wendel suggests that because clients must obey legal constraints and lawyers are clients’ agents, lawyers owe “fidelity to enacted, positive law when representing clients.”<sup>107</sup> Accordingly, they should avoid “interpretive moves” that undermine such law even when it is somewhat indeterminate.<sup>108</sup> Following this same model, Wendel asserted in a recent lecture that certain argumentative “moves” by a lawyer are ruled out by the existing body of law,<sup>109</sup> so lawyers should not make legal arguments that are “so far outside the range of reasonable that it is impossible to take them seriously.”<sup>110</sup> Steven Pepper’s more individualistic approach, developed in the 1980s, emphasizes different values—namely client autonomy and a right to full information about

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<sup>105</sup> Luban, *supra* note 47 (manuscript at 116).

<sup>106</sup> W. Bradley Wendel, *Legal Advising and the Rule of Law*, in MORTENSEN ET AL., *supra* note 47 (manuscript at 13). In analyzing the torture memoranda, Wendel concluded that “the poor quality of reasoning displayed by the memos” can be explained by the facts 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.” Wendel, *supra* note 6, at 3.

<sup>107</sup> Wendel, *supra* note 106 (manuscript at 10); *see also* Wendel, *supra* note 6, at 6 (“[L]awyers have an obligation to do right with regard to the law.”).

<sup>108</sup> Wendel, *supra* note 106, at 17; *see also* Wendel, *supra* note 6, at 79 (“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.”).

<sup>109</sup> W. Bradley Wendel, 2008 *F.W. Wickwire Memorial Lecture: Executive Branch Lawyers in a Time of Terror*, 31 DALHOUSIE L.J. 247 (2008).

<sup>110</sup> *Id.* at 265. Wendel differentiates between openly defying an unjust law by following a public and established process to change the law and Mr. Yoo’s determination of legality based on what he thought the law should be. *Id.* at 259–60. An example of the former is the civil rights movement in the South during the 1950s and 1960s. *Id.* An example of the latter is Mr. Yoo’s attempt to create a *gap* for unlawful combatants in international law when the existing international framework for the treatment of war combatants is intended to be *gapless*, with no “non-legal” persons envisioned. *Id.* at 260–61.

the law.<sup>111</sup> In light of the recent contributions by Luban and Wendel, Pepper's model is certain to receive renewed attention. Neither Wendel's nor Pepper's approach is definitive,<sup>112</sup> but academic debate like this moves the discussion forward.

In that spirit, let me offer some observations about how one might refine Luban's analysis. Luban addresses lawyers who provide clients with confidential legal opinions on which the clients rely.<sup>113</sup> But Luban does not distinguish among the kinds of questions that a client seeking a legal opinion might ask. He treats all possible client questions as presenting equivalent counseling issues and, accordingly, offers universal prescriptions for how counselors should act—which he calls “rules of thumb.”<sup>114</sup>

Not all of Luban's rules of thumb seem germane to the Yoo example, however. For example, Yoo would argue that he fulfilled Luban's requirements that an attorney must evaluate the law candidly<sup>115</sup> and provide the same evaluation regardless of the client's preference for a particular legal outcome.<sup>116</sup> That is because Yoo's clients presumably were not asking him to identify the existing blackletter law; they knew he was stretching prior precedents and may have been inquiring specifically about a plausible new argument that might win in the Supreme Court. Arguably, the only Luban prescriptions that apply directly to Yoo's situation are his emphasis on

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<sup>111</sup> See Pepper, *supra* note 48, at 614 (“[I]f such conduct by the lawyer is lawful, then it is morally justifiable, even if the same conduct by a layperson is morally unacceptable and even if the client's goals or means are morally unacceptable.”); see also Pepper, *supra* note 52, at 1609 (“[T]he client has a presumptive right to know the law governing his or her situation, understanding ‘law’ in the widely defined contemporary sense.”).

<sup>112</sup> As Wendel recognizes, it is difficult to develop a clear framework for identifying “positive law” in a world replete with competing legal arguments. Wendel, *supra* note 106, at 16. Wendel attempts to fill this void through a vague notion of the lawyers's “craft”—a commonly-shared but undefined sense among attorneys about when law is established and when a legal argument is far-fetched. *Id.* at 17.

Pepper starts with the presumption that clients are entitled to learn the law. Yet he suggests (as this Essay suggests later) that “the lawyer has a presumptive moral obligation to engage in a counseling conversation if there is reason to foresee that the client may violate the law or a significant legal or moral norm.” Pepper, *supra* note 52, at 1609. Pepper himself notes that his simultaneous belief in the “rebuttable presumption” that the lawyer should provide a client with advice and the notion that “that there are occasions when . . . the client does not have the ‘right’ to be informed” ultimately “restate[s]” the basic issue of when lawyers should desist. *Id.* at 1599–1600. Pepper's reliance on lawyers' “exercise and development of their own practical wisdom” to alleviate the dilemma is not satisfying. *Id.* at 1610.

<sup>113</sup> Luban, *supra* note 47 (manuscript at 112).

<sup>114</sup> *Id.* (manuscript at 115–16).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

lawyers' personal responsibility for client acts and his reference to Kant's "publicity principle."

A clearer categorization of the different types of counseling that practicing lawyers engage in might enhance Luban's analysis, or make it more complete. Sometimes, attorneys merely advise clients who want to conform to existing regulation. In that context, Luban's insistence that lawyers should be accurate and objective in their description of the law—without reference to how the client wants the issue to be determined—makes sense. In other counseling situations, clients hope that their lawyer will find and implement the best possible arguments to help them win ongoing litigation. Here, Luban's prescription that lawyers must be candid and advise their clients when the arguments are far-fetched is patently correct. But, arguably, the ultimate decision on how to proceed should ordinarily be left in the client's hands.

The most difficult issues arise in the third counseling context; namely, when lawyers offer formal legal opinions for purposes other than helping clients conform to the law or advance litigation. Lawyers provide such opinions in many settings: to help a corporate client establish, prospectively, the absence of an intention to violate the law<sup>117</sup> or breach its fiduciary duties;<sup>118</sup> to convince third persons to trust a client;<sup>119</sup> or to justify a client's argument as being in good faith in connection with tax or other regulatory proceedings.<sup>120</sup> The problem in these kinds of formal opinion-writing contexts is not just that lawyers serve as mini-legislators, but also that lawyers themselves are actively engaged in promoting conduct that may violate at least the spirit of existing law. Here, it becomes problematic to attribute the results exclusively to client autonomy because—although the client is the ultimate actor—the client might not have been able or willing to engage in the conduct without the lawyer's help.<sup>121</sup>

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<sup>117</sup> For example, Enron principals were advised that their accounting practices were lawful, thus limiting the claim that the principals *willfully* committed fraud or other crimes.

<sup>118</sup> Corporate officers, for example, may seek legal opinions that will support a future defense against a claim that they violated the business judgment rule.

<sup>119</sup> For example, prospective co-venturers or lenders may be swayed in their opinions about whether to proceed with a transaction based on a lawyer's opinion for example, her client's credit-worthiness, the validity of the client's patent, or her client's entitlement to particular assets.

<sup>120</sup> A taxpayer pressing an attenuated claim before the Internal Revenue Service may, for example, avoid criminal penalties if he can show that he had a good faith belief that his claim was not frivolous.

<sup>121</sup> *Cf.* Markovic, *supra* note 6, at 354–55 (“Yoo and Bybee knew that their advice would be relied upon to shape interrogation policies. Thus, they had a duty, not only as lawyers but also as moral agents, to discharge their duties responsibly given the important use to which their efforts were being directed.” (footnote omitted)).

### C. *Furthering the Debate: A Proposal*

This Essay does not purport to offer a grand theory about how best to regulate lawyers who counsel and give opinions to clients. Luban's allusion to Kant's publicity principle, though discretionary, seems like a helpful place to start. John Yoo or the Enron lawyers, for example, might have been more hesitant to validate their clients' proposed conduct had they considered the possibility that their participation would be publicized and their reputations called into question.

With or without Kant's hortatory instruction, further attention needs to be paid to the question when lawyers should exercise their discretion not to take a case—or, in the case of organizational lawyers, to decline to perform a legal task designed for improper ends. This inquiry cannot progress when the issue is framed so as to treat all opinion writing as equivalent to “advising clients about the law” because, in the abstract, clients have a right to know the law. The key is *why* clients want to know the law and *why* lawyers plan to provide it.

The admittedly limited insight that counseling contexts should be distinguished merely refines Luban's issue. Still, it provides a framework that perhaps can lead to more workable and enforceable solutions than those proposed by Luban and Wendel in response to the Yoo situation. Practitioners or legal ethics regulators are unlikely to agree on any approach unless the various counseling contexts are differentiated.

Conversely, if practitioners and regulators were to focus on formal legal opinions regarding prospective behavior, they could perhaps develop guidelines or rules. The following model, for example, might help curtail the ability of lawyers to avoid personal responsibility by requiring them to inform themselves about how their advice will be used.

It is worth noting that proponents of the three schools of thought described above might disagree on the benefits of having lawyers identify this information. Knowing the client's goals may at times reduce a lawyer's ability to promote a client's autonomy—as when a lawyer learns his client will use his advice to commit perjury<sup>122</sup>—but at other times may help the lawyer advance autonomy by clarifying his client's true desires. For proponents of the exercise of contextual moral discretion, the information can sometimes but not always

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<sup>122</sup> See *supra* text accompanying note 54.

prove useful because results rather than motivations are the key; the lawyer should act to produce a morally just resolution of the legal matter. Knowledge may be more important for those who envision multiple roles for lawyers, because it is only by identifying how their advice will be used that lawyers can assess whether giving that advice is consistent with their client-oriented function or their role as officer of the court, for example.

The following proposal assumes that, at least in the formal opinion context, encouraging lawyers to investigate clients' intentions would, on balance, be a good thing. Although the proposal cannot ensure that an inquisitive lawyer will always be able to identify a client's true motivation, the suggested standard would limit, at least somewhat, the lawyer's ability to consciously *avoid* knowledge. The following is proposed set of principles to regulate the provision of legal opinions:

1. When a client asks a lawyer to provide a legal opinion evaluating prospective conduct or a transaction that may be illegal, tortious, or a breach of fiduciary duty, the lawyer shall, before providing any opinion, discuss with the client his or her motivation for requesting the opinion.<sup>123</sup>
2. A lawyer who believes that a client intends to use a legal opinion rendered by the lawyer to justify behavior that may be unlawful, tortious, or a breach of fiduciary duty and who has not yet rendered the opinion shall:
  - a. candidly discuss with the client the merits of the behavior, including moral and political considerations, before agreeing to render the opinion; and
  - b. if the lawyer believes that rendering the opinion will help or encourage the client to engage in behavior that is unlawful, tortious, or a breach of fiduciary duty, ordinarily decline to render the opinion.
3. A lawyer who believes that a client intends to use a legal opinion that the lawyer has already rendered to justify behavior that may be unlawful, tortious, or a breach of fiduciary duty shall discuss with the client the merits of the behavior, including its morality and legality. In the ordinary case, the lawyer should encourage the

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<sup>123</sup> To a significant extent, laws exempt sovereignties from civil lawsuits for tortious conduct. But that is not to say that the laws, such as the Federal Tort Claims Act, affirmatively authorize the government to engage in what would otherwise be tortious conduct.

client not to engage in behavior that would be unlawful, tortious, or a breach of fiduciary duty.<sup>124</sup>

The mandate that a lawyers must investigate her client's motivations, discuss the merits of alternative behavior, and sometimes decline to participate in a matter signal to lawyers that they are part of a potential problem. The emphasis on dialogue with clients also reduces the possibility that lawyers in John Yoo's shoes will misunderstand the question they are being asked or will incorrectly assume that their clients share their own worst instincts.<sup>125</sup>

The proposal, at root, seeks to counteract the primary defect that results when Model Rule 1.2(d) is applied to the formal opinion setting.<sup>126</sup> Rule 1.2(d) encourages lawyers not to learn clients' actual intentions. This absence of "knowledge" enables lawyers to rely reflexively on autonomy reasoning to provide the requested service. It usually also causes lawyers to frame their advice on the assumption that their clients wish to engage in the worst possible behavior.

By requiring lawyers to engage in moral dialogue and attempt to identify clients' actual intentions, section 1 of the above proposal forces lawyers to face the consequences of participating in wrongful conduct. For clients who simply plan to conform to the law (though taking full advantage of legal loopholes) or seek to maximize their legal options in litigation, the proposal does not change the status quo. However, when clients seek legal advice to justify or further improper behavior, the proposed dialogue reduces a lawyer's ability to attribute the results exclusively to the client's choice. Section 2 of the proposed standard does not always forbid the lawyer from providing the advice. But it makes clear that under certain circumstances the lawyer *is* assisting a crime or wrongdoing such that moral and legal consequences may legitimately be imposed upon the lawyer.

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<sup>124</sup> There may be cases in which an exception to the general proposition is warranted; for example, in situations involving well-intentioned civil disobedience.

<sup>125</sup> Freedman, *supra* note 80, at 200 (arguing that lawyers should not "assume the worst regarding the client's desires"). It has been suggested that Yoo's memoranda pressed his own legal and political agenda, not simply his clients'. See, e.g., George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SECURITY L. & POL'Y 409, 446 (2005) ("Yoo may have been motivated by a desire to see his own theory of broad executive power expressed as government policy in the war on terror."); Margulies, *supra* note 6, at 22–24 (discussing Yoo's antagonism to the norms of international law); Pillard, *supra* note 10, at 1307 (noting Yoo's pre-existing views); Wittes, *supra* note 10, at 51 (discussing Yoo's "ambitions").

<sup>126</sup> See *supra* text accompanying note 60 (quoting Model Rule 1.2(d)).

The model provision does not resolve all of the hard issues. For example, it leaves for future debate the question of whether clients should be allowed in exceptional cases to balance the benefits of future conduct against its arguably wrongful consequences (as in the Ford Pinto case).<sup>127</sup> It also defers for separate analysis the question of how lawyers should respond to completely legal but immoral client conduct.<sup>128</sup> But when such issues are isolated and framed concretely, there is a better prospect for reasoned resolution. In the cost-benefit scenario, for instance, Wendel's agency concept becomes more helpful<sup>129</sup>: If, under society's rules, clients are allowed or encouraged to engage in the behavior, then their lawyer-agents arguably should be allowed to assist them in doing so. If clients are forbidden to commit the acts, lawyer-agents should not help them. When the rules and law are indeterminate, lawyers may be in the same position as clients—required to make their best judgments about the law and to accept potential responsibility for pressing the envelope when their prediction turns out to be wrong.

Of course, the message inherent in the proposed standard assumes idealistically assumes that lawyers, once informed, will do the right thing. There is little doubt that, even if the proposal is adopted as a rule of professional conduct, sophisticated clients and lawyers could circumvent its spirit through carefully crafted inquiries<sup>130</sup> and a few winks and nods.<sup>131</sup> A more general regulatory approach to counseling<sup>132</sup> would, likewise, inevitably depend upon lawyers' willingness to exercise appropriate discretion—a freedom that some lawyers and clients would abuse. Regulators who wish to create workable or enforceable guidelines thus need to focus realistically on what can be done to

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<sup>127</sup> See LUBAN, *supra* note 52, at 206–13 (discussing the Ford Pinto issues). Although the proposal takes a dim view of lawyer participation in any tortious or unlawful conduct and requires the lawyer to discuss moral consequences with clients, the proposal's prescription leaves some wiggle room for exceptional cases by only mandating that the lawyer should “ordinarily” decline to render the requested opinion.

<sup>128</sup> Because people will disagree about what conduct is immoral, it is difficult to articulate a standard to govern potentially immoral behavior that will not intrude too far on attorney-client relationships. Perhaps, the best one can do in this situation is to suggest to attorneys who perceive a problem that it is appropriate to raise the matter with the client. Cf. MODEL RULES, *supra* note 33, R. 2.1 (“[A] lawyer shall exercise independent professional judgment and render candid advice . . . . [A] lawyer may refer not only to law but to . . . moral . . . factors, that may be relevant to the client's situation.”).

<sup>129</sup> Wendel, *supra* note 106 (manuscript at 14).

<sup>130</sup> See Zacharias, *supra* note 53, at 468 (discussing the ways corporate clients may phrase questions to lawyers or prospective lawyers).

<sup>131</sup> See Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 192–94 (2008) (describing signaling between lawyers and clients) [hereinafter Zacharias, *Effects of Reputation*].

<sup>132</sup> Such an approach would cover a broad range of clients, topics, and potential scenarios.

counteract the personal incentives likely to infect decision making by lawyers. Regulators might consider concrete measures, such as requiring particular opinions to be put in writing (so they can later be judged)<sup>133</sup> and developing more nuanced approaches to laws governing criminal conspiracy and aiding and abetting.<sup>134</sup>

These are merely suggestions for a place to start,<sup>135</sup> but they highlight that regulators, practitioners, and academics who are serious about addressing the issues raised by the torture memoranda would be wise to distinguish among the types of functions counselors perform. This helps put into context clients' legitimate needs and the likely effects of lawyers' advice.

To carry the insight a bit further, practitioners and regulators ultimately may even need to differentiate among clients. Sophisticated, well-empowered clients are more able to abuse legal opinions than helpless individuals who need aggressive assistance from their lawyers to protect legitimate interests.<sup>136</sup> Corporate and government clients seem altogether distinct, because in their situations the issue of who the client is often will be determinative.

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<sup>133</sup> See Zacharias, *supra* note 85, at 1367–68 (urging a requirement that some communications with clients be memorialized).

<sup>134</sup> For the most part, the ambiguities in Model Rule 1.2(d) and its comments are designed to exonerate lawyers from liability for assisting clients' illegal behavior by giving pure legal advice. However, in the category of counseling that this Essay has focused on—the presentation of formal opinions the lawyer knows the client intends to use for improper purposes—the lawyer's participation seems to move from advising to active participation in the untoward conduct. Thus, it might be properly targeted by substantive criminal law. Grey areas will remain, of course; in particular, in those situations when the lawyer does not *know* how the client will act or the client hides her true intent. The proposed model attempts to address these areas, at least in part, by requiring lawyers to raise and discuss their clients' motivations.

<sup>135</sup> The proposed prohibition against lawyer participation in tortious conduct might need to be refined because it covers a lot of territory. Corporate clients, for example, have a legitimate claim to legal evaluations of the degree to which their products may cause injuries that might subject them to lawsuits because the products still may deserve to be sold. In such circumstances, lawyers arguably should not be forbidden from providing the clients with advice. *But see* LUBAN, *supra* note 52, at 206–13 (discussing the Ford Pinto case).

<sup>136</sup> See Zacharias, *supra* note 53, at 477 (“[A]t each stage of their transactions, sophisticated lawyers and clients are likely to be aware of the different triggers [of lawyers' ethical obligations] and accordingly will cooperatively limit the knowledge transmitted to lawyers.”); Zacharias, *Effects of Reputation*, *supra* note 131, at 192 (“Sophisticated clients will know what is important for their representation. They will know what questions to ask (both of the lawyer and her references). And they will often be in a position to interpret the information they receive.”).

## CONCLUSION

This Essay has not attempted to articulate a comprehensive scheme governing counseling. It has, however, demonstrated the complexity of the issues. John Yoo and others find themselves in awkward situations because, as a general matter, there is nothing inherently immoral about giving legal advice. There is no formula, even for the well-intentioned practitioner, for reconciling one's responsibility to inform clients about the law with that queasy feeling one gets when one believes candid advice may be misused.

The standard proposed in this Essay is a possible first step towards resolving the lawyer's dilemma. It offers practical guidelines for how lawyers should conceptualize and respond to client inquiries about the law. It leaves intact lawyers' traditional responsibilities to help clients interpret the law and press litigation aggressively. However, it suggests concrete limitations when lawyers' participation in matters risk involving them personally in wrongful behavior. There comes a point at which lawyers must be ready to say "no" to a client's request for assistance.

Perhaps more importantly, this Essay has shown how scholarship and the pointed academic analysis it prompts puts practitioners on notice. Some clear lessons follow from the scholarship concerning counseling. If lawyers apply the adversarial model to the counseling setting without question, as might be their intuitive response, the worst kind of lawyer behavior may follow. Conversely, if lawyers carry the discretionary models too far, lawyers may be vested with an unwarranted prerogative to predict and control clients' actions. The bottom line is that academic debate over issues such as these is important, even when it proves to be incomplete. Practitioners and professional code drafters need help identifying lines that are finer than the ones in the current professional rules or current conceptions of the lawyer's role.

Justice Scalia, in his own eyes a reformed law professor, delights in joining practitioners in the claim that law review articles have little impact—as illustrated by the fact that they are rarely cited by the Supreme Court.<sup>137</sup> That proposition has never proven true in the professional responsibility

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<sup>137</sup> Justice Scalia has expressed this view on more than one occasion in speeches at the University of San Diego Law School. Cf. David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469, 483 n.14 (2001) (quoting Justice Scalia as saying "the shelf life of any law review article is brief—a few years at best—but the impact of a good teacher upon a student is endless").

area. Without the influence of academics like Monroe Freedman, the drafters of modern professional codes would never have departed from the older, vague Canons of Ethics and implemented the adversarial model that is now mainstream.<sup>138</sup> Without scholarly responses to the bar's overemphasis of the adversarial model, the 1983 Model Rules probably would not have reintroduced officer-of-the-court notions,<sup>139</sup> incorporated exceptions to ultra-aggressive behavior,<sup>140</sup> or permitted a significant measure of moral discretion.<sup>141</sup> In the wake of Enron, it was a law professor who, against strong initial resistance from the practicing bar, persuaded the ABA to modify its rules governing confidentiality and corporate lawyers' responsibilities.<sup>142</sup> And

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<sup>138</sup> For a discussion of Freedman's influence, see Zacharias, *supra* note 85, at 1319.

<sup>139</sup> See MODEL RULES, *supra* note 33, Pmbl. (referring to the lawyer as an "officer of the legal system"); *id.* R. 3.3 (imposing obligations to the court); see also FREEDMAN & SMITH, *supra* note 71, at 10 (arguing that "officer of the legal system" language in the Model Rules reflected "the intention of some supporters of the Model Rules to reject the client-centered values of the Model Code").

<sup>140</sup> See, e.g., MODEL RULES, *supra* note 33, R. 1.6(b) (incorporating exceptions to attorney-client confidentiality); *id.* R. 3.3(b) (requiring lawyers to disclose information necessary to ensure candor to the court).

<sup>141</sup> See Zacharias & Green, *supra* note 76, at 15–16 (discussing the professional discretion that the modern rules accord lawyers).

<sup>142</sup> In 1998, Professor Richard Painter urged the ABA Ethics 2000 Commission to amend Model Rule 1.13 to require corporate lawyers to inform senior corporate officers about contemplated illegal acts for which the corporation could be held responsible. Richard W. Painter, Professor of Law, University of Illinois, Testimony to the ABA Ethics 2000 Commission on Amending Model Rule 1.13 (May 13, 1998), *available at* <http://www.abanet.org/cpr/e2k/painter.html>. In 2001, Painter revised his proposal as an SEC regulation and obtained the support of many academics. See Letter from Richard W. Painter, College of Law, University of Illinois at Urbana-Champaign, to Harvey Pitt, SEC, Chairman (Mar. 7, 2002); Letter from David Becker, SEC, Gen. Counsel, to Richard W. Painter, College of Law, University of Illinois at Urbana-Champaign (Mar. 28, 2002), *available at* [www.abanet.org/buslaw/corporateresponsibility/becker.pdf](http://www.abanet.org/buslaw/corporateresponsibility/becker.pdf) (responding to Richard Painter and declining to consider the matter because of the legal profession's heated opposition and the SEC's lack of express legislative authority); see also Richard W. Painter, *Afterword: Jurisdictional Competition as Federalism's Answer to the Multidisciplinary Practice Debate*, 36 WAKE FOREST L. REV. 185, 186 (2001) (arguing that the failure of the ABA to allow disclosure regarding ongoing and prospective fraud would call into question the profession's "core values"). This ultimately led to Congress's adoption of the Sarbanes-Oxley Act and the SEC's adoption of regulations pursuant to the act. Sarbanes-Oxley Act § 307, 116 Stat. 745 (2002); SEC, Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205 (2003). In response to Painter's importuning, the ABA also formed a Task Force on Corporate Responsibility to consider the need for changes to the Model Rules. See AMERICAN BAR ASSOCIATION, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY (2003), *available at* [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) (discussing the Task Force's recommendations); ABA, *ABA Task Force Revised Recommendations to Model Rule Changes Generally Welcomed*, 19 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 263, 264–65 (2003) ("Painter and other professors have been arguing that the ABA should amend Model Rule 1.13 to include a mandatory 'reporting up' requirement."); Richard W. Painter, Opinion, *Lawyer-Client Confidentiality: Changing Model Rule 1.6 Is Long Overdue*, CAL. B.J., Aug. 2003, *available at* [http://www.calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2003&MONTH=August&YEAR=2003&sCatHtmlTitle=Opinion&sJournalCategory=YES&sCatHtmlPath=cbj/08\\_Opinion\\_Painter.html&sSubCatHtmlTitle=Richard%20Painter](http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2003&MONTH=August&YEAR=2003&sCatHtmlTitle=Opinion&sJournalCategory=YES&sCatHtmlPath=cbj/08_Opinion_Painter.html&sSubCatHtmlTitle=Richard%20Painter).

more and more, academics have been trusted with positions as reporters for the ABA task forces charged with proposing professional responsibility reforms.<sup>143</sup> The influence of high theory may take time to percolate down to the bar, but the influence is present. So long as practitioners are willing to engage with academia, lawyers and scholars can work together to make practical progress.\*

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In 2003, the ABA adopted the current Model Rules 1.6 and 1.13, which allow some disclosures about financial crimes and fraud and require corporate lawyers to go up the ladder with information about corporate misconduct. See MODEL RULES, *supra* note 33, R. 1.13(b), 1.6(b)(2)–(3) (expanding confidentiality exceptions and requiring responses by corporate lawyers to information of potential illegal conduct); American Bar Association Adopted by the House of Delegates Aug. 11–12, 2003, available at <http://www.abanet.org/leadership/2003/journal/119a.pdf> (explaining the reasons for the 2003 modifications to Model Rule 1.6).

<sup>143</sup> The 1908 Canons of Ethics were drafted by an ABA committee that was led by practitioners and included a few academics. See James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2416–21 (2003) (describing the process of drafting the Canons). The modern ABA model codes have been drafted by reporters who have hailed from academia—John Sutton (1969 Code of Professional Responsibility), Geoffrey Hazard (1983 Model Rules of Professional Conduct), and Nancy Moore (2002 Model Rules). In instituting task forces in recent years, such as those studying multi-jurisdictional practice and attorney–client privilege, the ABA also has routinely charged scholars with directing the task forces' inquiries. See Fred C. Zacharias, *The Legal Profession in the Year 2050*, 15 *WIDENER L.J.* 253, 255 (2006) (discussing the task forces).

\* The *Emory Law Journal* joins the legal community in mourning the loss of Professor Fred C. Zacharias, a distinguished and prolific scholar of constitutional law and professional responsibility. The *Journal* editors would like to thank Professor Bruce Green for his indefatigable efforts to bring this Essay to final publication.