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W. Bradley Wendel* Executive Branch Lawyers in a Time of Terror:
The 2008 F.W. Wickwire Memorial Lecture

This article discusses the ethical responsibilities of the lawyers who advise executive branch officials on the lawfulness of actions taken in the name of national security. To even talk about this subject assumes that there is some distinction between a government that does all within its power to protect its citizens, and one that does all within its lawful power. If there are good normative reasons to care about maintaining this distinction, then we have the key to understanding the ethical responsibilities of government lawyers. The Bush administration took the position that the role of lawyers is to get out of the way in circumstances of a threat to national security, and not do anything to interfere with the most aggressive possible government response. The author's argument is not based on the horrific nature of torture as an ordinary moral matter. In fact, one of the arguments here is that supporters of the administration's policies have made a conceptual mistake by attempting to establish the moral permissibility of torture in some cases, those resembling the hypothetical "ticking bomb" scenario. The problem with this argument is not only that the ticking bomb case is wildly unrealistic, but that the legality of torture is distinct from the morality of torture, and it is the job of lawyers to advise on the former, not the latter.

L'article traite des responsabilités morales des avocats qui dispensent aux cadres supérieurs des conseils sur la légalité des mesures prises au nom de la sécurité nationale. Le seul fait d'aborder le sujet laisse supposer qu'il existe une distinction entre un gouvernement qui fait tout en son pouvoir pour protéger ses citoyens et un gouvernement qui fait tout ce qu'il a légalement le pouvoir de faire. S'il existe de bons motifs normatifs de se soucier de maintenir cette distinction, nous tenons alors la clé qui nous aidera à comprendre les responsabilités morales des avocats salariés de l'État. L'administration Bush a adopté la position que le rôle des avocats est de s'effacer dans des circonstances où il y a menace à la sécurité nationale, et non de faire quoi que ce soit pour s'opposer à la réaction la plus agressive possible du gouvernement. L'auteur ne fonde pas son argument sur l'horrible nature de la torture comme question morale courante. De fait, un des arguments invoqués est que les partisans des politiques de l'administration ont commis une erreur conceptuelle en tentant d'affirmer que la torture est permise dans certaines situations, soit celles qui ressemblent à l'hypothèse qu'on est en présence d'une bombe à retardement. Le problème que pose cet argument est que non seulement l'hypothèse de la bombe à retardement est-il tout à fait irréaliste, mais également que la légalité de la torture est distincte de la moralité de la torture—et le rôle des avocats est de dispenser des conseils sur la première, non sur la seconde.

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Introduction

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Introduction

In 2008, Antonin Scalia, Associate Justice of the Supreme Court of the United States, gave an interview with BBC Radio in which he ridiculed the moral objections raised by critics of the Bush Administration's torture program:

Is it really so easy to determine that smacking someone in the face to determine where he has hidden the bomb that is about to blow up Los Angeles is prohibited in the constitution? It would be absurd to say you couldn't do that. And once you acknowledge that, we're into a different game.¹

It is tempting to use these remarks as the starting point for a lecture on judicial ethics. Not that I think it is problematic for judges to speak in public about contested political matters—in fact, I think the American law regulating judicial conduct is unnecessarily skittish about judges publicly stating views that might be deemed “political.” The ethical problem with Justice Scalia's comments are that they reveal a remarkably superficial thought process with respect to one of the most serious matters facing any government today: how to effectively protect national security and the lives of citizens while not surrendering our commitment to values such as human dignity and decency. Regrettably, attempts to minimize the terrible nature of the conduct we are engaging in are all too common.² Justice Scalia talks about “smacking someone in the face” in order to save Los Angeles. I wonder whether he would feel differently about conduct described as follows:

Waterboarding is controlled drowning It does not simulate drowning, as the lungs are actually filling with water. There is no way to simulate that. The victim is drowning A team doctor watches the quantity of water that is ingested and for the physiological signs which show when the

1. “US judge steps in to torture row” *BBC News* (12 February 2008), online: BBC News <<http://news.bbc.co.uk/2/hi/americas/7239748.stm>>.

2. See e.g. Jess Bravin, Gary Fields, “How do U.S. interrogators make a captured terrorist talk?” *The Wall Street Journal* (4 March 2003); Jackie Northam, “Army probes deaths of Iraq, Afghanistan detainees” *All Things Considered: NPR Broadcast* (16 March, 2005), online: National Public Radio <<http://www.npr.org/templates/story/story.php?storyId=4537927>>.

drowning effect goes from painful psychological experience, to horrific suffocating punishment to the final death spiral. Waterboarding is slow motion suffocation with enough time to contemplate the inevitability of black out and expiration—usually the person goes into hysterics on the board. . . . When it is done right it is controlled death.³

This is what we do to people, specifically to detainees in the so-called “war on terror.” In 2008 the White House admitted that waterboarding had been used in several cases, insisted that it was legal, and intimated that it could be used in the future.⁴ Vice President Dick Cheney had already stated that, in his view, it was a “no brainer” that suspected terrorists could be waterboarded although, like Justice Scalia, he preferred to refer to torture euphemistically, calling a terrifying simulated death a “dunk in the water.”⁵ It is important to focus on these statements by high-level government officials, because the problem of human rights violations in the war on terror is not simply a matter of a few rogue interrogators getting out of control. It would be comforting to believe that the abuses such as those documented at Abu Ghraib were committed by a couple of bad apples.⁶ The truth, however, is that the United States has adopted an elaborate torture policy. And when a government adopts policies, lawyers inevitably are involved. Dick Cheney could believe whatever he wanted about the morality of torture, but the policy would not be approved and implemented unless someone concluded that it was consistent with law.

3. This account is from an article by Malcolm Nance, a former instructor at the U.S. Navy’s Survival, Evasion, Resistance and Escape (SERE) School. The full article can be found in an on-line magazine called *Small Wars Journal*, Malcolm Nance, “Waterboarding is torture . . . period” *Small Wars Journal* (31 October 2007), online: *Small Wars Journal* <<http://smallwarsjournal.com/blog/2007/10/waterboarding-is-torture-perio/>>. See also Richard E. Mezo, “Why it was called ‘Water Torture’” *The Washington Post* (10 February 2008), B7. See generally Evan Wallach, “Drop by Drop: Forgetting the History of Water Torture in U.S. Courts” (2007) 45 Colum. J. Transnat’l L. 468.

4. See Jennifer Loven, “White House defends interrogation method” *Associated Press* (6 February 2008), online: Bay Ledger News Zone <http://www.blnz.com/news/2008/02/06/White_House_defends_interrogation_method_6332.html>. See also Scott Shane, “C.I.A. Chief doubts tactic to interrogate is still legal” *The New York Times* (8 February 2008), online: The New York Times <<http://www.nytimes.com/2008/02/08/washington/08intel.html>>; Philip Shenon, “Mukasey offers view on waterboarding” *The New York Times* (30 January 2008), online: The New York Times <<http://www.nytimes.com/2008/01/30/washington/30justice.html>>.

5. See Dan Eggen, “Cheney’s remarks fuel torture debate” *The Washington Post* (27 October 2006), online: Washington Post <<http://www.washingtonpost.com/wpdyn/content/article/2006/10/26/AR2006102601521.html>>; Mark Tran, “Cheney endorses simulated drowning” *The Guardian* (27 October 2006), online: Guardian Unlimited <<http://www.guardian.co.uk/world/2006/oct/27/usa.guantanamo>>.

6. George Bush blamed the abuse at Abu Ghraib on “a few bad apples” and has doggedly persisted in this explanation, just as he has continued to insist that “we don’t torture.” See e.g. Mark Danner, “Abu Ghraib: The Hidden Story” *The New York Review of Books* 51:15 (7 October 2004).

That's where the lawyers come in. The lawyers have helped design an elaborate *legal* torture policy.

The title of this lecture is "Government Lawyers in a Time of Terror," and the subject is the ethical responsibilities of the lawyers who advise executive branch officials on the lawfulness of actions needed to protect the lives of their citizens. To even talk about this subject assumes that there is some distinction between a government that does all within its power to protect its citizens, and one that does all within its *lawful* power. Some defenders of the Bush administration have assumed it is self-evident that the role of lawyers is to get out of the way in these circumstances, and not do anything to interfere with the most aggressive possible response. The most extreme version of this position is the assertion of John Yoo, the former Office of Legal Counsel lawyer who drafted many of the memos authorizing the torture of detainees. Yoo believes the terrorists are using the rule of law against the United States, as a weapon, in a novel strategy of "lawfare."⁷ Knowing that our hands will be tied up with legal red tape, and that government officials will be worried about incurring civil, or even criminal, liability for acting too energetically, terrorists know they will not run the same risks of detection and capture as they would if they were dealing with an enemy unconstrained by such legal niceties. I am not quite sure what to make of this argument, even though I know its rhetorical purpose is to put the burden of proof on those who would defend imposing restrictions on the freedom of the government to act. The reason I find it baffling is that it is inherent in the nature of law to limit what would otherwise be the freedom of anyone, whether an individual or the state, to act.⁸ Lawful action is a subset of all action, and presumably we care about the ascription of lawfulness for a reason. Assuming there is a reason for all of us, as a society, to care about the distinction between lawful action and simply action, then it is the special role of lawyers to ensure that this distinction is respected.

My aim in this lecture is to briefly suggest what might be the reason to care about the distinction between legality and the exercise of raw power. If there are good moral reasons to care about maintaining this distinction,

7. See John Yoo, "Terror suspects are waging 'Lawfare' on U.S." *Philadelphia Inquirer* (16 January 2008), online: *Philadelphia Inquirer* < <http://www.philly.com/inquirer/>>. Conservative commentator Heather MacDonald has similarly argued that interrogations have been so hemmed in by bureaucratic and legalistic safeguards that American interrogators erred too far in the direction of respecting the rights of detainees. See Heather MacDonald, "How to Interrogate Terrorists" *City Journal* 15:1 (Winter 2005), online: *City Journal* < http://www.city-journal.org/html/15_1_terrorists.html>.

8. Scott Horton, "Through a Mirror, Darkly: Applying the Geneva Conventions to 'A New Kind of Warfare'" in Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge: Cambridge University Press, 2005) 136 at 147.

then we have the key to understanding the ethical responsibilities of lawyers. Before getting into that part of the argument, however, I first want to consider a position that seems initially promising, which is that ethics for government lawyers is really no different from ethics for people generally. If doing something, like torturing people, is horrible in ordinary moral terms, then it is horrible for lawyers to participate in a process that leads to torture being practised. Many prominent legal ethics scholars argue that we should understand the responsibilities of lawyers in this way. Deborah Rhode, for example, argues:

Lawyers can, and should, act on the basis of their own principled convictions.... [L]awyers [must be prepared to] accept personal responsibility for the moral consequences of their professional actions. Attorneys should make decisions as advocates in the same way that morally reflective individuals make any ethical decision.⁹

Applying Rhode's approach, any morally reflective individual would recognize that the prohibition on torture is as close to a moral absolute as there is. Thus, morally reflective lawyers—who, after all, continue to be persons and moral agents, even when acting in a professional capacity—should refuse to lend their assistance to designing an official torture regime.

I disagree that this is the right way to think about legal ethics, because there are important differences between the morality of ordinary life and what the late philosopher Bernard Williams said are the values and principles “inherent in there being such a thing as politics.”¹⁰ This is not because morality is relative or subjective or just a matter of opinion but because political, and especially legal, considerations have properties such as generality, creating precedent for future cases, and being applied by institutions and procedures and thus being susceptible to a kind of bureaucratic rationality. This is both a virtue of legality, the foundation of the classical ideal of the rule of law, and a danger when lawyers try to make moral decisions in the same way as an ordinarily morally sensible person, without being sensitive to the particular institutional context of these decisions. To elaborate on this claim, I want to proceed with an example that often comes up in discussions about ethics and torture.

9. Deborah L. Rhode, *In the Interests of Justice: reforming the legal profession* (New York: Oxford University Press, 2000) at 58, 66-67.

10. Bernard Williams, “Realism and Moralism in Political Theory” in Geoffrey Hawthorn, ed., *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2005) 1 at 5.

I. *The morality of torture, for individuals and for states*

Observers of debate on the internet have discovered a fixed and invariant law of nature, known as Godwin's Law. It states: "As an online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches one." I would like to propose a similar principle pertaining to debates about the morality of torture: that principle is that in any discussion involving two or more people, it is impossible to mention torture without someone raising the ticking bomb hypothetical. I am not sure what accounts for the persistence of this little story. Certainly nothing like it has ever occurred. It is tempting to blame it on the television series "24," which is known to be popular among right-wing politicians and judges in the U.S.¹¹ But the ticking bomb story predates "24"—the philosopher Henry Shue, in his classic 1978 article on torture, wrote about the ticking bomb hypothetical, and his wearied tone suggests that he had been talking about it for years.¹²

The ticking bomb story goes like this.¹³ Law enforcement officers have captured a known member of a terrorist cell, which has hidden a nuclear bomb somewhere in New York City. The bomb is set to go off in an hour. Before then it can be found and defused; if the police are too late ... boom. As Shue points out, the hypothetical trades on a completely unrealistic assumption of certainty with respect to the critical facts:

11. See Jane Mayer, "Whatever It Takes; Letter from Hollywood" *The New Yorker* 83:1 (19 February 2007) 66.

12. See Henry Shue, "Torture" (1978) 7 *Phil. & Pub. Aff.* 124 at 141.

13. See e.g. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) at 140-142; Richard A. Posner, "Torture, Terrorism, and Interrogation" in Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004) 291; Charles Krauthammer, "The Truth about Torture" *The Weekly Standard* 11:12 (5 December 2005), online: <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp?pg=2>; James R. Schlesinger, *Final Report of the Independent Panel to Review DoD Detention Operations* (Buffalo, NY: William S. Hein, 2005).

The proposed victim of our torture is not someone we suspect of planting the device: he *is* the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated....¹⁴

Once you make these assumptions, however, the rhetorical strategy of the hypothetical is clear.¹⁵ You are forced to admit that, yes, in those circumstances torture would be justified. Why? Because while it may represent a *prima facie* violation of someone's human rights, that violation is necessary to avoid a catastrophic consequence. The justification takes the form of consequentialist balancing, or at least an exercise in threshold deontology—given a sufficiently large number of potential victims, it would be permissible to torture someone in order to prevent the harm. Even Shue admits, “I can see no way to deny the permissibility of torture in a case *just like this*.”¹⁶ The idea is, therefore, to force the admission that there is a moral debate to be had about torture.¹⁷

I don't see the point in conducting “debates” around fanciful scenarios that bear no relationship with the actual problem we are supposed to be debating. In addition to Shue's point about the implicit epistemology of the example, there are several other, fairly well known, reasons why it should not be taken seriously.

1. The description of the problem omits to mention the possibility of what the military euphemistically calls “collateral damage”—innocent bystanders who are in the wrong place at the wrong time, and suffer the harm intended for someone else. Some 5,000 people have been detained, and some number of those mistreated, since the September 11th attacks.¹⁸ How many have possessed information that could be used to prevent future attacks? But even this response misses the real objection, which is

14. Shue, *supra* note 12 at 142. Those who employ the ticking-bomb argument are understandably keen to find real-world analogues. One frequently cited case involves the torture by secret police in the Philippines of a suspected member of an *al-Qaeda* cell that led to the unwinding of a plot to blow up several Western airliners over the Pacific. See Richard A. Posner, “The Best Offense” *The New Republic* 227:10 (2 September 2002) 28 at 28; Doug Struck et al., “Borderless network of terror” *The Washington Post* (23 September 2001) A1. The problem with relying on this case, however, is that at the time the interrogation of the captured suspect began, Philippine intelligence officials did not know of the plot, or that the captive had information that could prevent it. They simply tortured him because he was believed to be part of *al-Qaeda*, and fortuitously they discovered information that enabled them to unwind the bombing plot. See David Luban, “Liberalism, Torture, and the Ticking Bomb” in Greenberg, *supra* note 8, 35 at 45.

15. See Luban, *ibid.* at 44.

16. Shue, *supra* note 12 at 141.

17. See Elaine Scarry, “Five Errors in the Reasoning of Alan Dershowitz” in Levinson, *supra* note 13, 281 at 285.

18. *Ibid.* at 284.

that talking in the sterile, abstract terms of numbers of potential victims tends to discount the human costs of employing torture. Consider the case of Dilawar, the Afghani taxi driver who was tortured to death by American personnel at Bagram Air Force base, because they believed he had information about rocket attacks on American soldiers.¹⁹ As it turns out, not only was Dilawar completely innocent—he had been set up by the real perpetrator of the attacks, who had turned in innocent people in order to lull the Americans into trusting him—but many of his captors had come to believe in his innocence before he died. Nevertheless, the imperatives of the intelligence-gathering process had acquired their own momentum, and it was impossible to shut down the brutality in time.

2. The second problem is that the ticking bomb scenario contains no logical stopping point. If torturing the prisoner is justified by the necessity of saving thousands of lives, is it permissible to threaten to kill or torture the seven year-old son of the terrorist?²⁰ Or, can we torture a bystander who happens to have information about the location of the bomb, but is reluctant to talk for fear of retaliation? The appeal to necessity creates an open-ended invitation to balance away the costs on one side of the ledger.²¹ With catastrophe on the other side, it is natural not to think very hard about the harm we are prepared to inflict. Threatening to, and actually torturing the seven year-old son of the suspect is no more difficult to justify on this kind of analysis than torturing the suspect himself. Yet, once we accept that equivalence, we have clearly lost sight of something with great moral significance.

Going in the other direction, the analysis does not provide much guidance as to what constitutes a sufficiently catastrophic outcome that justifies putting aside moral restraints. A bomb blowing up New York City is one thing, but what about a bomb blowing up a thousand people, or a hundred, or ten, or two? Sandy Levinson has argued that, while we are always being told by politicians that 9/11 changed everything, it did

19. See Tim Golden, "In US report, brutal details of 2 Afghan inmates' Deaths" *The New York Times* (20 May 2005), online: The New York Times <<http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>>. See Richard Leiby, "Down a dark road" *The Washington Post* (27 April 2007), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042601569.html>>.

20. See Sanford Levinson, "Contemplating Torture: An Introduction" in Levinson, *supra* note 13, 23 at 32.

21. It may be possible to reformulate the necessity defense to avoid a simple balancing of evils. Michael Moore has argued that the right form of analysis is threshold deontology, in which we are not balancing harms, but recognizing a very limited exception to an otherwise absolute prohibition. See Michael Moore, "Torture and the Balance of Evils" (1989) 23 *Isr. L.R.* 280 at 287-88. Once the threshold is passed, however, the objection remains that there appear to be no limits on what harms can be inflicted to prevent the catastrophe.

not truly represent an existential threat to our nation. As terrible as it was, it only serves to remind us that we remain "vulnerable to certain kinds of terrorism, as had been amply illustrated . . . less than a decade earlier when the World Trade Center was bombed, or with the demolition of American embassies in Africa."²² His point is not in any way to minimize the horror of the 9/11 attacks, but only to remind us that all this talk of ticking bombs is predicated on something less than the destruction of an entire society, or an entire city, so we have to take seriously the question of how bad the consequences have to be on one side of the ledger to justify overriding the deontological reasons on the other.

3. Finally, even if we are forced to admit, as Henry Shue puts it, that there is "no way to deny the permissibility of torture in a case *just like this*," we might nevertheless insist on maintaining moral and legal prohibitions on torture, to ensure that the torturers are willing to stake everything on this being a true ticking-bomb situation. While we might be able to envision a court concluding, after the fact, that law enforcement personnel acted reasonably in light of the emergency, it is essential that this possibility of after-the-fact justification not be allowed to influence the underlying substantive rules of conduct, which establish an absolute prohibition on torture, nor to influence the deliberation of persons subject to these conduct rules.²³ We create a kind of artificial separation between conduct rules and decision rules, applied by courts after the fact, in order to force actors to consider whether they believe torture is really necessary, even if it means being prosecuted for war crimes. "[T]he test of necessity should be the actor's willingness to face, as an alternative to the ill consequences of abiding by the law, the threat of criminal punishment unmitigated by the prospect of legal reprieve."²⁴ Watering down the prohibition on torture, to accommodate the possibility of ticking-bomb cases, can lead to disastrous consequences in the long run, while not making it any more likely that the interrogator will do the right thing in the ticking bomb case.

The reference to long-term consequences leads to the point that I want to emphasize in connection with analysis of the ticking-bomb hypothetical from the point of view of legal ethics.

22. Levinson, *supra* note 20.

23. See Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97 Harv. L. Rev. 625.

24. *Ibid.* at 683; see also Scarry, *supra* note 17 at 282.

Although this may sound trivial, there is a world of difference between asking whether such-and-such is immoral and asking whether it is unethical to advise a client that such-and-such is legally permitted. Legal considerations, by their nature, can be generalized to apply to similar cases. It is also in the nature of legal reasoning that it takes into account the capacities of various institutional actors—for example, courts give varying levels of deference to the legal and factual decisions made by juries, trial judges, administrative agencies, and so on. Legal processes are adapted to dealing with imperfect information, and never proceed from the assumed truth of some fact (like whether this person in custody planted the bomb). Thus, we should be wary of attempts to simply transplant the moral evaluation of some problem, like torture, into the legal domain. Even assuming you have some sympathies for the police officers in the ticking-bomb scenario, there are reasons to resist moving too quickly to the conclusion that torture should be legal in these circumstances.

Picking up on Hannah Arendt's account of the trial of Adolf Eichmann, this might be called the "banality of evil" argument.²⁵ The problem is that specifying conditions for the *legal* permissibility of torture tends to normalize it.²⁶ Legal permissibility implies a justification that can be given on the basis of reasons that can be generalized to relevantly similar cases; anything else would be ad hoc and lawless. Legalizing something means there will be policies and guidelines put into place, chains of command and review procedures to regulate compliance with these guidelines, and a new structure of rationality employed that may be described as bureaucratic.²⁷ The result will be an erosion of the moral sensibilities of everyone—those who administer the system, the line-level law enforcement and military personnel who actually do the torturing, and members of society who observe the abuses committed in their name.²⁸

Fortunately, one would hope, the possibility of an actual legalized torture regime exists only in the fantasies of John Yoo, Dick Cheney and,

25. See Hannah Arendt, *Eichmann in Jerusalem: a report on the banality of evil* (New York: Viking Press, 1964). See Susan Neiman, *Evil in modern thought: an alternative history of philosophy* (Princeton: Princeton University Press, 2004) at 301. ("Contemporary dangers begin with trivial and insidious steps. Once these are taken, they lead to consequences so vast they could hardly have been foreseen.")

26. Shue, *supra* note 12 at 141. ("[A] considerable danger exists that whatever necessary conditions were specified, any practice of torture once set in motion would gain enough momentum to burst any bonds and become a standard operating procedure.")

27. Luban, *supra* note 14 at 47. ("The real world is a world of policies, guidelines, and directives. It is a world of *practices*, not of ad hoc emergency measures.")

28. See Pierre Vidal-Naquet, *Torture: Cancer of Democracy- France and Algeria 1954-1962*, trans. by Barry Richard (Harmondsworth, England: Penguin, 1963). See generally Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (London: Jonathan Cape, 1999).

somewhat surprisingly, Alan Dershowitz, who has proposed establishing procedures for obtaining “torture warrants” in ticking-bomb scenarios.²⁹ The law as it stands contemplates no latitude whatsoever for employing interrogation techniques that are tantamount to torture. But this hope is contradicted by the evident fact that a number of very smart lawyers in the elite Office of Legal Counsel have concluded that some of these “enhanced” interrogation techniques are permissible. How did that occur, and what do we think of the ethics of these lawyers? The answer to this question will take up the remainder of the lecture and, as I have been suggesting, will not be given primarily in terms of the ordinary immorality of torture. Instead, I want to argue that the role of lawyer contains certain internal ethical standards, including standards of good lawyering craft. The problem with the advice given to the Bush administration about the legality of torture is not that it is unethical because torture is immoral; rather, it is unethical because it is crummy legal advice.

II. *Government lawyers and the ethical responsibility of fidelity to law*

It is often asserted that the basic obligation of government lawyers is to provide impartial legal advice and to remain independent of partisan political concerns. George Washington is reported to have said he was seeking a “neutral expounder of the law rather than a political advisor” when he selected the nation’s first Attorney General.³⁰ Although the distinction between independence and partisanship is a superficially appealing one, it does not stand up very well to analysis. The reason for this is that the President is elected on the basis of an ideological agenda he puts forward. The winner of the presidential election justifiably believes that the election conferred a mandate from voters to pursue a particular political agenda. The President accordingly may select executive branch officials on basis of their fealty to this agenda—not just because it is the President’s agenda, but because the content of the agenda has been set by a democratically legitimate process. The responsibility of these officials is, in part, to serve as agents of the President, faithfully executing the President’s agenda. Lawyers are agents, too, and they accordingly have a responsibility to help the President implement his agenda, as long as it is lawful to do so. When I say lawyers are agents, that does not mean that their responsibility is simply to help their client do whatever it wants, as long as there is some argument that can be made, however far-fetched, that the conduct is legally permissible. Rather, the role of the lawyer is

29. See Dershowitz, *supra* note 13.

30. See Griffin B. Bell, “Office of the Attorney General’s Client Relationship” (1981) 36 Bus. Law. 791.

to ascertain what the client's legal rights and duties really are. That task is different in an important way from trying to figure out what the client can get away with. It's possible to get away with a lot of things, by concealment, secrecy, subterfuge, or the exercise of raw coercive power, but that does not mean it is legal.

Concluding that something is legal necessarily means accepting the law from what the legal philosopher H.L.A. Hart called "the internal point of view," as creating genuine obligations, not simply enabling citizens to predict when government officials will do unpleasant things like lock them in jail or seize their property.³¹ This little bit of jurisprudential terminology is useful, because it helps distinguish a very different way from looking at the law, which might be called the Holmesian bad man stance. Oliver Wendell Holmes famously told a class of entering law students that if they wanted to know what the law required, they should look at it from the point of view of a bad man, who was uninterested in doing the right thing, but only keen to avoid punishment.³² Holmes's point was really to stress the autonomy of the law and the separability of the legal and moral domains. It may be that there are legal duties that do not track moral duties exactly, and students who fail to appreciate this might misunderstand the content of the law. One might have a *moral* obligation to save the life of a stranger in peril, but tort law does not impose a *legal* duty to rescue. Holmes's point, however, has come to be understood as an invitation to conceive of the binding force of law as deriving entirely from the possibility that sanctions might be imposed on conduct. If sanctions are not imposed, one is thus entitled to infer that the conduct was lawful. Hart understood that the problem with reading Holmes in this way is that it eliminates legality as a conceptual category altogether. If one is interested in distinguishing between something that is permitted as a matter of right, and something that one got away with, it is necessary to build into one's theory the possibility of recognizing the law as creating genuine obligations.

One might respond that all that matters is freedom of action, and whether it is possible to get away with something. Hart himself was really only concerned with ensuring that judges acknowledged legal obligations

31. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 89. See W. Bradley Wendel, "Lawyers, Citizens, and the Internal Point of View" (2006) 75 *Fordham L. Rev.* 1473.

32. Oliver Wendell Holmes Jr., "The Path of the Law" (1897) 10 *Harv. L. Rev.* 457 at 459-462. See also Robert W. Gordon & William H. Simon, "The Redemption of Professionalism?" in Robert L. Nelson, David M. Trubek, & Rayman L. Solomon, eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1992) 230 at 249.

from the internal point of view. I believe, however, that most clients are interested in knowing when something is legally permissible, and that lawyers, when they say, "You are legally permitted to do such-and-such," are asserting that the client has a *right* to do such-and-such, not just that it is unlikely that the client will be detected and punished. Despite some aggressive talk by Bush administration officials about taking a "forward-leaning" approach to legal compliance,³³ the government was interested in asserting that its interrogation policy was really lawful, in the sense that government lawyers had concluded that the law permitted the conduct in question.³⁴ The government in fact was not seeking only freedom of action, but action with the blessing of the law. Expressing this sort of justification for one's action necessarily means acknowledging the law from the internal point of view.

I would go so far as to say that it is an ethical failing to refuse to orient oneself to the law in this way. Yes, there are unjust laws, and one might take an attitude of resistance, or at least grudging acquiescence, toward them. But the mere fact that some legal rule or doctrine seems wrong by one's moral lights does not mean there is a correlative right to disobey the law. We have avenues for challenging unjust laws, through lawsuits against the government, lobbying for reform, protests, and even civil disobedience, which is the morally motivated, open defiance of the law coupled with the willingness to accept lawful penalties. What unifies all of these responses is the overt nature of resistance to the specific law in question, combined with an attitude of respect for the legal system as a whole. In the American legal tradition, we tend to valorize opposition to unjust laws. Our heroes are the African-American students who sat in at lunch counters to protest legal segregation, and Rosa Parks, who refused to move to the back of the bus, as commanded by law. We are right to see civil rights protesters as heroes, but it is important to recognize that their resistance to specific laws

33. See Tim Golden, "After terror, a secret rewriting of military law" *The New York Times* (24 October 2004), online: The New York Times <<http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html>>; R. Jeffrey Smith & Dan Eggen, "Gonzalez helped set the course for detainees" *The Washington Post* (5 January 2005), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/articles/A48446-2005Jan4.html>>; Jane Mayer, "Outsourcing Torture" *The New Yorker* 81:1 (14 February 2005) 106, online: The New Yorker <http://www.newyorker.com/archive/2005/02/14/050214fa_fact6> (reporting testimony by head of counter-terrorism operations for the CIA, who told Congressional committees that "there was a 'before 9/11' and there was an 'after 9/11.' After 9/11, the gloves came off.").

34. Mike Allen & Dana Priest, "Memo on torture draws focus to Bush" *The Washington Post* (9 June 2004), online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html>> (quoting former administration official saying that the CIA "was prepared to get more aggressive and re-learn old skills, but only with explicit assurances from the top that they were doing so with the full legal authority the president could confer on them").

was founded on the conviction that our legal system was basically just, but could be better. Their disobedience was an appeal to higher values that were latent within the society and its legal system. Martin Luther King's famous defense of civil disobedience advocates breaking unjust laws openly, lovingly, and with a willingness to accept the penalty.³⁵ The openness of non-compliance, and the willingness to accept the penalty are a way of manifesting respect for one's fellow citizens.

King's directive to disobey lovingly may sound odd, particularly abstracted from the religious context from which it grows, but it is important to focus on the attitude conveyed toward one's fellow citizens by obedience or disobedience to the law. The claim that, "I believe this law is unjust, in moral terms," is a claim that other citizens and the procedures they have set up for making and administering the law, are somehow morally corrupt. As Jeremy Waldron has said, this represents a combination of self-assurance, in the rightness of my own convictions, and mistrust in the convictions of my fellow citizens.³⁶ That mistrust may be warranted, as in the Jim Crow era in the American South, when whites can hardly be said to have been acknowledging African-Americans as full and equal citizens. But it seems out of place in today's debate about the balance between national security and civil liberties, in which the disagreement is vigorous, but the dispute is in good faith, and no position has been systematically excluded. In these circumstances, morally motivated disobedience of the law does exhibit the attitude of disrespect Waldron describes, of believing oneself to have privileged access to moral truth.

At root this is what is wrong with the defense of the Bush administration's policies which rests on the so-called "new paradigm" of 9/11. For example, John Yoo has said that we need to re-think the law of war to deal with the new threat of stateless terrorism. In a talk at William and Mary Law School, Yoo said that the Geneva Conventions make sense in a war between nation-states, but we ought to establish a new set of rules when dealing with al-Qaeda.³⁷ One problem with Yoo's argument is that the threat of non-state terrorism is not exactly new. The international community has had plenty of time to develop legal norms respecting the treatment of detainees in non-state conflicts, including not only insurgents and parties to civil wars, but also international terrorists.

35. Martin Luther King, "Letter from Birmingham City Jail" in Hugo Adam Bedau, ed., *Civil Disobedience in Focus* (New York: Routledge, 1991) 68.

36. Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 281-282.

37. See Brian Whitson, "John Yoo defends views on treatment of terrorists" *W&M News* (8 April 2005) online: College of William & Mary <<http://web.wm.edu/news/archive/index.php?id=4427>>. This is also a theme of Yoo's "lawfare" op-ed. See Yoo, *supra* note 7.

Prior to September 11, 2001, international and domestic law had developed with full cognizance of the Israel-Palestinian conflict, campaigns of terrorism by non-state actors like the IRA and ETA, and even previous al-Qaeda-linked attacks against the United States. That existing law, as I will discuss momentarily, cannot possibly be understood by a good faith interpreter as permitting waterboarding and other “enhanced interrogation techniques” on detainees in American custody.

Just when one makes a legal argument against John Yoo, however, he pivots and offers a moral argument, which is why I have been spending so much time talking about morally motivated disobedience. At his William and Mary talk, Yoo said that we *ought* to establish a new set of rules for dealing with al-Qaeda. That may or may not be true, but basing a determination of legality on what a lawyer thinks the law ought to be pretty clearly substitutes the lawyer’s judgment—no doubt reinforced by the client’s wishes—for the result of a process designed to resolve these sorts of moral and political disagreements through tolerably fair procedures. It is the assertion that John Yoo, and other national security hard-liners in the Bush administration, know more about the morality of torture than the rest of us.

As I have been emphasizing, however, the objection to the advice given by lawyers for the Bush administration is not that it is bad moral advice; rather, it is that it is bad legal advice. The law simply does not permit what interrogators at Gitmo, Bagram Air Base, and nameless “black sites” in eastern Europe have done to detainees. The natural response to this line of objection is often an assertion of the indeterminacy of law. I could quote academic lawyers, but this statement from President Bush is a pretty good summary of the indeterminacy claim. After the U.S. Supreme Court ruled that American personnel overseas had to comply with Common Article 3 of the Geneva Conventions, which prohibit outrages upon human dignity, Bush noted, “[t]hat’s like—it’s very vague. What does that mean ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation.”³⁸ Similarly, Attorney General Michael Mukasey has equivocated on the question of whether waterboarding is illegal. In a letter he released in advance of a hearing on interrogation policy, he stated:

If this were an easy question, I would not be reluctant to offer my views on this subject. But, with respect, I believe it is not an easy question. There are some circumstances where current law would appear clearly

38. U.S., Office of the President of the U.S. George W. Bush, “The President’s News Conference” (15 September 2006), online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=861>>.

to prohibit the use of waterboarding. Other circumstances would present a far closer question.³⁹

This sort of reasoning is intuitively appealing to lawyers, who recognize that there are legal questions about which reasonable minds can differ. But lawyers also recognize that there are some legal questions about which there are no differences of opinion or, at least, about which the range of differences is narrower.

The law governing torture is one of those areas in which there really is not any disagreement, in good faith, about the meaning and application of core terms. With respect to international law, the Third Geneva Convention, applicable to prisoners of war, prohibits the inflicting of physical or mental torture, or any form of coercion, on prisoners of war.⁴⁰ The Fourth Geneva Convention, applicable to civilian detainees, requires the protection of civilians from all acts of violence or threats thereof.⁴¹ Common Article 3, which is part of all of the separate Geneva Conventions, outlaws cruel treatment and torture, as well as outrages upon personal dignity, and humiliating and degrading treatment.⁴² The Convention Against Torture prohibits not only torture, but also cruel, inhuman, and degrading treatment which does not amount to torture.⁴³ Moreover, the prohibition on torture is a *jus cogens* norm in international law—a peremptory standard that may not be derogated from under any circumstances.⁴⁴ There are similar prohibitions in U.S. domestic law. These include a general federal assault statute, prohibiting assaults by striking or beating within the special maritime and territorial jurisdiction of the United States,⁴⁵ and a federal criminal statute specifically addressing torture, which prohibits anyone outside the United States to commit torture, which is defined as an act specifically intended to inflict severe mental or physical pain or suffering.⁴⁶

39. Quoted in Scott Horton, "Reasonable Minds Can Differ" *Harper's Magazine* (31 January 2008), online: Harper's Magazine <<http://www.harpers.org/archive/2008/01/hbc-90002285>>; original letter available online: <<http://i.a.cnn.net/cnn/2008/images/01/29/letter.to.senator.leahy.pdf>>.

40. *Geneva Convention [III] relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3517.

41. *Geneva Convention [IV] relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516.

42. Common Article III is the same in all the relevant *Conventions*. *Supra* note 40, note 41.

43. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

44. See generally Sean D. Murphy, ed., "Executive Branch Memoranda on Status and Permissible Treatment of Detainees" (2004) 98 Am. J. Int'l L. 820; Derek Jinks & David Sloss, "Is the President Bound by the Geneva Conventions?" (2004) 90 Cornell L. Rev. 97, at 108-20.

45. *Crimes and Criminal Procedure*, 18 U.S.C. 113.

46. *Crimes and Criminal Procedure*, 18 U.S.C. 2340-2340A.

As you might expect, the administration's lawyers have an explanation for why these prohibitions do not apply to prohibit the treatment inflicted upon detainees. They argue that the POW convention does not apply because al-Qaeda was not a contracting party to the Geneva Conventions, ignoring past American practice of treating all armed combatants, not just soldiers of signatory states, as POW's under the Third Geneva Convention.⁴⁷ With respect to the Fourth Geneva Convention on civilian detainees, the lawyers argue that the President has deemed al-Qaeda and Taliban fighters "unlawful combatants."⁴⁸ The trouble with that argument is that it may be possible for a detainee to lose POW status by being a non-privileged or unlawful combatant, but that simply throws that detainee into civilian status, protected by the Fourth Geneva Convention. One is either a POW or a civilian detainee; it is not possible to be a kind of legal non-person, totally outside the coverage of the Geneva scheme. As the International Committee of the Red Cross has stated, "nobody in enemy hands can fall outside the law."⁴⁹ Regarding Common Article 3, which applies to all detainees, however they may otherwise be categorized, the administration lawyers reasoned that the conflict with al-Qaeda is "international in scope."⁵⁰ Common Article 3 applies to conflicts "not of an international character" and the Global War on Terrorism is, obviously enough, global. But this reasoning is simply wrong as well, because the point of Common Article 3 is to fill in the gaps in coverage created by the application of the rest of the Geneva Conventions to conflicts between nation-states. A conflict is one or the other—a war between nation-states, or a conflict not of an international character—there is no such thing as an inherently non-law-governed conflict.

We could obviously explore each of these arguments in much more detail; the analysis of any of these legal provisions could occupy a lecture of its own. The point of raising them is to show that, at some point, a legal argument becomes untenable. A lawyer who knew enough about

47. See Presidential Memorandum of February 7, 2002, reprinted in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) 134.

48. U.S., Office of the President of the U.S. George W. Bush, "Executive Order 13440 - Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency" (20 July 2007), online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=75569>>.

49. ICRC, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (February 2004), online: Global Security <http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm>.

50. *Supra* note 47. See also Derek Jinks, "September 11 and the Laws of War" (2003) 28 Yale J. Int'l L. 1.

international humanitarian law and the law of warfare would respond to the administration lawyers' arguments with incredulity. The incredulity is a product of participating in an activity, a *craft*, which carries with it certain internal standards of good practice—excellences, or virtues, if you like.⁵¹ Recognizing what it means to be a practice aimed at some end means also recognizing what it is to do well or poorly at realizing that end. This is a long tradition in ethics, going all the way back to Aristotle, but it has a contemporary application to complex, institutional activities such as serving as an advisor to clients within the legal system. It means that we can understand the ethics of participating in that practice as a matter of craft. In the case of legal ethics, being a good lawyer means exhibiting fidelity to law, not distorting its meaning to enable the client to do something unlawful.

I know this may sound mysterious, like I am appealing to some faculty of intuitive judgment. U.S. Supreme Court Justice Potter Stewart once said it is impossible to define hard-core pornography, but you know it when you see it.⁵² However, I am not relying on knowing it when we see it. An experienced lawyer may have a gut-level negative reaction to an argument, but that intuition is only a symptom of something that has gone awry in the argument. How do we know what has gone awry? Making that determination is part of the craft that we teach in law school. As I have been arguing, the whole point of the law is to differentiate between something that you can get away with, and something that is authorized, as a matter of right, and regulated by rules of general application. We enforce that distinction by rhetorical practices that take certain considerations into account, as part of the justification of legal judgments, and exclude other considerations as irrelevant. Certain argumentative “moves” are ruled out by the existing body of law. For example, in international law, it is well understood that the structure of the law of war is intended to create gapless coverage—there is no such thing as a person who is not either a POW or a civilian detainee, or a war that is not either “of an international character” or “not of an international character.” Many of the categories of non-persons and non-wars were invented by Bush administration lawyers out of whole cloth. Another aspect of lawyering craft is analogical reasoning, and the use of paradigm cases. Marty Lederman gives a nice illustration, using the standard example from the jurisprudence literature, of a statute prohibiting

51. See David Luban, “Natural Law as Professional Ethics: A Reading of Fuller” in *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) 99 at 107-08.

52. *Jacobellis v. Ohio*, 378 U.S. 184 at 197 (1964).

“vehicles” in the park.⁵³ While there may be some indeterminacy in the application of that statute to, say, a baby stroller, an army jeep on a war memorial, or an ambulance rushing to the aid of a heart attack victim in the park, we do know that if the statute means anything, it means that you cannot drive a souped-up sports car through the park. Waterboarding, says Lederman, is the souped-up sports car of the prohibitions on torture. If your legal conclusion is that causing someone to experience the physical sensation of imminent death is not torture, then something in your argument has gone off the rails. It is time to abandon whatever interpretive principles led you to that conclusion, which cannot possibly be the right one, in light of the obvious purpose and overall rationality underlying the prohibition on torture.

Conclusion

I do not claim to have a touchstone that can be used to determine whether a legal argument is plausible or bogus. There can be no such touchstone, because the criteria for a good or bad legal argument are internal to the craft of making and evaluating those arguments. If we want to know whether the lawyers who authorized our current torture regime have got the law right, there is no substitute for digging into the law. Fortunately, that is something we, as lawyers, are well equipped to do. Our competence, as professionals, is bound up with making and evaluating legal arguments. We know that there are some arguments that are rock-solid, some that are plausible, some that are dodgy, and some that are impossible to make with a straight face. All I am saying here is that the ethics of our profession are constituted, in part, by the requirement that lawyers treat the law with respect. What that means may vary by context, and we may permit lawyers representing clients in adversarial litigation to be a bit more creative with their arguments, relying on the adversary system to counteract any excessively partisan interpretations. However, when lawyers are counselling clients on what the law permits, as opposed to urging a tribunal to adopt a novel interpretation of the law, there is less room for creativity. In this case, the arguments relied upon by the Bush administration lawyers are so far outside the range of reasonable that it is impossible to take them seriously. That is the basis for concluding that these lawyers acted unethically.

53. See Marty Lederman, “Sorry, Ben, But Judge Mukasey Can (and Should) Answer the Question” *Balkinization* (29 October 2007), online: *Balkinization* <<http://balkin.blogspot.com/2007/10/sorry-ben-but-judge-mukasey-should.html>>. See H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 *Harv. L. Rev.* 593 at 607; Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart” (1958) 71 *Harv. L. R.* 630 at 663.

