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TORTURED LEGAL ETHICS: THE ROLE OF THE GOVERNMENT ADVISOR IN THE WAR ON TERRORISM

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The so-called "torture memos" beg for a re-examination of government lawyers' ethical obligations, especially when acting as advisors, not advocates. This article explores the two major models of government lawyers' ethics: the "agency" approach, which stresses the duties of loyalty, zeal and confidentiality and disfavors attorney interference with client goals, and the "public interest" approach, which places greater weight on fairness and justice, and wants lawyers to weigh in on the wisdom and morality of what their clients are considering. This article argues that an Eighth Amendment analysis should be employed to determine what constitutes a "morally perilous question." Finally, government attorneys should ascribe primacy to the public interest approach when rendering advice on morally perilous questions and the ABA Model Rules should adopt a provision governing the special responsibilities of government lawyers acting in an advisory capacity.

INTRODUCTION

A client asks his lawyer a question: During an interrogation of a suspected terrorist, how much pain can I legally inflict?

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The lawyer should:

a) Explore every legal avenue available for his client, including all possible defenses should criminal charges be filed.

b) Give legal guidance but add advice on the wisdom and morality of what the client is considering.

c) Tell the client to take a walk.[1]

The lawyers at the Department of Justice who prepared the so-called "torture memos"[2]—a series of United States government legal opinions holding that the torture of terrorism suspects might be legally defensible—have come under fire in the legal community[3] for choosing option "a" above.[4] The Department of Justice's Office of Legal Counsel ("OLC"), which "writes legal opinions considered binding on federal agencies and departments"[5] and maintains a longstanding tradition of

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1. Adam Liptak, *How Far Can a Government Lawyer Go?*, N.Y. TIMES, June 27, 2004, § 4, at 3.

2. After the terrorist attacks of September 11, 2001, attorneys for the White House, the Justice Department and the Defense Department wrote memoranda arguing that traditional laws of war should not always apply in fighting terrorists. "In memorandums in 2002 and 2003 on the torture of prisoners, for example, the administration argued that the president could order the use of torture even if it was forbidden by treaty or by Congressional statute." Anthony Lewis, *License to Torture*, N.Y. TIMES, Oct. 15, 2005, at A19. Some of the memoranda went further, arguing that extreme physical and mental duress could be inflicted on detainees by narrowing the legal definition of torture.

The memoranda became colloquially referred to as the "torture memos." *E.g.*, Kerrita McClaughlyn, *The Rights of Enemy Combatants*, WASH. LAW., Nov. 2004, at 24. On June 22, 2004, White House counsel Alberto R. Gonzales distanced the Bush administration from those memoranda (an extremely rare event for such opinions), saying that they were theoretical legal explorations and that the president never authorized the torture of suspected al Qaeda and Taliban members. *See generally* Editorial, *Unanswered Questions*, WASH. POST, July 11, 2004, at B6 ("The White House . . . repudiat[ed] parts of a legal opinion that justified torture . . . .").

The memoranda are collected in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS].

3. *See, e.g.*, Stephen Gillers, *Tortured Reasoning*, AM. LAW., June 14, 2004, at 65, 66; Lincoln Caplan, *Lawyers' Standards in Free Fall*, L.A. TIMES, July 20, 2004, at B13.

4. Many government lawyers believe that government agencies are entitled to their day in court and to have the best possible arguments made on their behalf, especially "because the agencies are captive clients who cannot seek representation elsewhere." DONALD L. HOROWITZ, THE JUROCRACY 21 (1977). *But see* Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Lawyers and Ethics*, 1 TOURO L. REV. 1, 4 (1985) (citing with approval refusals of U.S. Attorneys for the Eastern and Southern Districts of New York to defend certain cases brought to challenge cutbacks in the Social Security disability program).

5. Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1. The OLC is sometimes called "the Attorney General's Lawyer." It is an elite bureau in the Justice Department staffed by highly-credentialed lawyers. Its primary function is to give opinions on matters of constitutionality regarding interdepartmental and inter-branch relations, and to opine on the constitutionality of pending legislation. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 141 (1978):

dispensing objective legal advice to its clients in executive-branch agencies, authored the most incendiary of the interrogation memoranda—the infamous "torture memorandum" [6] of August 1, 2002, which advised the CIA and White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that only "serious physical injury, such as organ failure, impairment of bodily function, or even death" constitutes torture.[7]

"[I]t is well known that the 2002 Opinion was used for guidance by the Defense Department to justify interrogation practices, including abusive ones . . . ."[8] In June 2004, the White House renounced the controversial document, calling it "over-broad and irrelevant,"[9] but only once the Abu Ghraib prison abuse scandal broke and the memorandum became public.[10] The Justice Department did not put out a replacement memorandum for more than six months. On December 30, 2004, the original memorandum was "formally repudiated by the administration the week before [then-White House Counsel Alberto] Gonzales's appearance before the Senate Judiciary Committee for confirmation as attorney general."[11]

[T]he counsel's office of a government agency [is a different creature]. These law offices are more or less an integral part of the client itself.

The relationship between the general counsel's office and the client can be, and often is, intimate, more so than that between the client and any other staff office.

6. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzalez, Counsel to the President, The White House, Re: "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A" (Aug. 1, 2002), *in* THE TORTURE PAPERS, *supra* note 2, at 172–217 [hereinafter Torture Memo].

7. *Id.* at 172. *But see* David Cole, *Less Safe, Less Free*, SALON.COM, Nov. 19, 2004, http://www.salon.com/opinion/feature/2004/11/19/justice/index_np.html (characterizing the memorandum as "a detailed guide to how to torture and get away with it").

8. Physicians for Human Rights, *New Opinion Will Not Prevent Torture or Cruel, Inhuman or Degrading Treatment, Particularly Severe Mental Pain and Suffering*, Jan. 4, 2005, http://www.phrusa.org/research/torture/tortureopinion.html.

9. *See* Press Briefing by White House Counsel Judge Alberto Gonzales, Dep't of Def. Gen. Counsel William Haynes, Dep't of Def. Deputy Gen. Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence Gen. Keith Alexander (June 22, 2004), http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html. ("Unnecessary, overbroad discussions in some of these memorandums that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by decision-makers are under review, and may be replaced, if appropriate . . . .").

10. In 2004, reports emerged of numerous instances of abuse and torture of prisoners in the Baghdad Correctional Facility, formerly Abu Ghraib Prison, by personnel of the U.S. Armed Forces, CIA officers and contractors involved in the occupation of Iraq. The abuse gained public attention after U.S. soldier Joseph Darby placed an anonymous note under his commander's door. Seymour Hersh wrote a detailed story in *The New Yorker* and *60 Minutes II* ran a feature. *See* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 43–44.

11. Andrew Sullivan, *Atrocities in Plain Sight*, N.Y. TIMES, Jan. 23, 2005, § 7, at 1 (book review). Gonzales had requested and approved the memorandum.

The Justice Department issued a new memorandum on acts that constitute torture, which states that the memorandum "supersedes the August 2002 memorandum in its entirety."[12] However, the very existence of the rescinded memorandum, which became one of the most criticized policy memoranda drafted during President Bush's first term,[13] still begs for a reexamination of the proper role for the government lawyer acting in an advisory capacity in the war on terrorism.[14]

There are nearly 40,000 lawyers employed by the federal government in every branch and at every level.[15] Case law,[16] statutes,[17] and legal scholarship[18] have long recognized that government attorneys face ethical obligations in addition to those borne by other lawyers.[19] The two major models of government lawyers' ethics are the "agency" approach and the "public interest" approach, both of which this article describes. With respect to torture, the two approaches invert the usual paradigm of moral arguments *against* torture being deontological and moral arguments *in favor* of torture being utilitarian. When it comes to government advisors opining on torture, the agency approach's deontic devotion to loyalty, zeal, and confidentiality fails precisely because it neglects to consider the consequences of the practice.

Next, the article suggests an Eighth Amendment analysis to determine what constitutes a "morally perilous question"; in other words, *when* a lawyer is advising on something that has a moral dimension where lives hang in the balance. (Examples of morally perilous questions that government lawyers might face include the constitutionality of euthanasia laws, the evaluation of human rights violations in an asylum-

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12. R. Jeffrey Smith & Dan Eggen, *Justice Expands 'Torture' Definition*, WASH. POST, Dec. 31, 2004, at A1 (quoting Memorandum from Justice Department (Dec. 30, 2004)).

13. *See generally* R. Jeffrey Smith, *Slim Legal Grounds for Torture Memorandums*, WASH. POST, July 4, 2004, at A12 (documenting that most scholars reject the broad view of Executive power found in the torture memoranda).

14. The President disavowing the torture memoranda does not end the debate; in fact, it complicates the debate because it creates mixed messages being sent by the highest levels of the administration. Moreover, the repudiation came nearly two years after it was written, after the Abu Ghraib scandal broke, and after the memorandum was leaked.

15. Cornell W. Clayton, *Introduction: Politics and the Legal Bureaucracy*, *in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS 1 (Cornell W. Clayton ed., 1995).

16. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds by* Stirone v. United States, 361 U.S. 212 (1960).

17. *See, e.g.*, McDade Amendment, 28 U.S.C. § 530B (2000) (also known as the *Ethical Standards for Federal Prosecutors Act* and the *Citizen's Protection Act*); Ethical Standards for Attorneys for the Government, 28 C.F.R. § 77.1 (2005).

18. *See infra* note 64.

19. This article focuses on the role of the lawyer in a federal administrative agency, though its analysis and conclusions are applicable to other government settings.

seeker's country of origin, and whether immigration status should matter in prosecuting human trafficking.) This Eighth Amendment analysis looks to "the evolving standards of decency that mark the progress of a maturing society"[20]—including domestic legislation, international law, world opinion, and other social and professional expertise—to decide whether a "national consensus" has developed that an issue poses a morally perilous question.[21] The article then applies this analysis to the example of torture, proving that it is a morally perilous question that triggers special duties for government legal advisors.

Finally, the article argues that government attorneys should ascribe primacy to the public interest approach when rendering advice on morally perilous questions. Accordingly, it suggests that the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules")[22] adopt a provision governing the special responsibilities of government lawyers acting in an advisory capacity, and offers a suggested model rule for government attorney advisors.

I. THE TWO MAJOR APPROACHES TO GOVERNMENT LAWYERS' ETHICS

"A government lawyer serves the interests of many different entities: his supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which that agency is part, and the public interest."[23] Although support can be found for each possibility, the debate generally can be boiled down to a broader public interest approach versus a narrower agency approach.

The proper identification of the lawyer-client relationship is a threshold question to determining the lawyer's duties. One must decide

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20. Trop v. Dulles, 356 U.S. 86, 101 (1958).

21. The Eighth Amendment looks to the evolving standards of decency that mark the progress of a maturing society to decide whether a national consensus has developed regarding a certain practice, whereas this article looks to such a formula to decide whether a national consensus has developed that a practice itself constitutes a "morally perilous question."

22. MODEL RULES OF PROF'L CONDUCT (2003); *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 8 (1998).

23. Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1414 (1981) [hereinafter *Developments in the Law*]. *See also* Roger C. Cramton, *Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) ("The possibilities include: (1) the public, (2) the government as a whole, (3) the branch of government in which the lawyer is employed, (4) the particular agency or department in which the lawyer works, and (5) the responsible officers who make decisions for the agency."); 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, 1004 (1991) ("Unlike private practitioners, the government lawyer has at least four possible clients: (1) the agency official, (2) the agency itself, (3) the government, and (4) 'the people,' sometimes termed 'the public interest.'").

whether loyalty ultimately rests with the public interest, or with the agency.[24]

A. The "Agency" Approach

1. Background

One model of government lawyers' ethics, the agency approach,[25] mirrors the client-centered model of mainstream legal ethics applicable to all lawyers.[26] It proceeds from the proposition that the government lawyer's employing agency is the client and emphasizes the three related duties of loyalty, zeal and confidentiality[27] that are applied to lawyers in private practice. Even though the ABA formally removed the "zealous advocacy" standard from the Model Rules, it can still be found in the commentary.[28] The manifestation of this is that "it is hardly unusual . . . for lawyers in private practice to give narrow and comprehensive advice on how to comply with, say, the tax laws to maximum advantage."[29] In the private sector, lawyers "may, and if it will serve their clients' interests must, exploit any gap, ambiguity, technicality or loophole, any not-obviously-and-totally-implausible interpretation of the law or facts."[30]

Under the agency approach, the government lawyer is obligated to press every non-frivolous legal argument to support the agency's position, regardless of the possible injustice arising from any given situation.[31] This essentially deontological approach exalts the values of loyalty, zeal and confidentiality in and of themselves, rather than any particular outcomes resulting from their application.[32]

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24. *See generally* Griffen B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1069 (1978).

25. *See, e.g.*, Lanctot, *supra* note 23, at 975–1017; Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1116 (1995).

26. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 71–82 (1990).

27. *See generally* Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 504–05 (1999).

28. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

29. Liptak, *supra* note 1.

30. Caplan, *supra* note 3 (quoting Robert Gordon).

31. *See, e.g.*, Lanctot, *supra* note 23, at 975–1012.

32. This may seem ironic because, in terms of the "big three" moral theories of deontology, utilitarianism and virtue theory, the arguments *against* torture are most often deontological. The first two schools of moral theory predominate in the torture debate: 1) the absolutists, coming from a deontological perspective, who want an unqualified prohibition on torture re-

The agency approach and its single-minded client emphasis finds strong support among the patriarchs of legal ethics like Monroe Freedman and Geoffrey Hazard, Jr.[33] Even though its rooting in the Model Rules has been weakened,[34] "it remains central to the folklore of the profession."[35]

The libertarian premise that all client interests that are not illegal are ethical[36] fuels the agency approach, and it maintains that clients are entitled to unfettered legal representation to pursue those interests.[37] The agency approach is wary of paternalism—that lawyers not dominate, much less exert influence over, their clients.[38] "[T]he client is autonomous and the attorney [is] a bystander . . . ."[39] If lawyers are allowed to evaluate and judge their clients' objectives, then lawyers would effectively act as unelected, unaccountable governors of private conduct,[40] which is undemocratic. Accordingly, "the mid-Victorian image of detached counsellor"[41] evoked by the agency approach sharply limits the extent to which the lawyer may permissibly steer the client. As Hazard notes, "If you have a client, you have to represent him and not 'justice' in some abstract sense."[42] Predictably, he believes that "[i]t was very appropriate for lawyers in the government 'to think in concrete terms about what is meant by torture.'"[43] Charles Fried of Harvard Law School defended the memoranda, asserting that "[t]here's nothing wrong with exploring any topic to find out what the legal requirements are."[44] Some

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gardless of the outcome, so as not to legitimize it, and 2) the consequentialists, coming from a utilitarian perspective, who measure the worth of torture by its ultimate consequences. *See generally* TORTURE: A COLLECTION (Sanford Levinson ed., Oxford University Press 2004).

33. *See* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); FREEDMAN, *supra* note 26; HAZARD, *supra* note 5.

34. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (1986); SIMON, *supra* note 22.

35. David Luban, *Selling Indulgences*, SLATE, Feb. 14, 2005, http://slate.msn.com/id/2113447.

36. Indeed, the Justice Department's Professional Responsibility Advisory Office was fond of saying, "If it's legal, it's ethical." (notes on file with author).

37. *See* FREEDMAN, *supra* note 26, at 57.

38. *See* William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 474–75 (1984).

39. HAZARD, *supra* note 5, at 140; *see also* Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS (forthcoming 2006), http://ssrn.com/abstract=602203: "[The author of the torture memorandum] values *client autonomy* to such an extreme that he is willing to push the boundaries of reasonable legal analysis . . . ." *Id.* at 12 (emphasis added).

40. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617–18 (1986).

41. HAZARD, *supra* note 5, at 141.

42. *Id.* at 125.

43. Liptak, *supra* note 1 (quoting Geoffrey C. Hazard, Jr.).

44. Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (quoting Charles Fried).

attorneys went so far as to say that the torture memoranda were "standard lawyerly fare, routine stuff."[45]

Legal scholars and journalists often invoked the example of tax loopholes to describe the agency model as applied to the torture memoranda:

> Guided by a determination to prevent another terrorist attack on U.S. soil, strong loyalty to the president, and in some cases an ideological disdain for international law, government attorneys sought ways to justify White House policies in the war on terror, much as a corporate lawyer might exploit loopholes in the tax code.[46]

Indeed, followers of the agency approach say such steps are required and see many advantages.

2. Benefits

There are several benefits to the agency approach. They include, among others: 1) easy applicability of the ethics codes; 2) clearer lines of authority; and 3) increased democratic accountability.

First, the agency approach makes it easy to apply the categorical ethical framework of the Model Rules to government lawyers. By treating the agency as the client, the agency approach treats government lawyers no differently from their counterparts in private practice. The agency approach makes application of the standard ethical codes to government lawyers more straightforward because government lawyers are bound by the ethics rules of the state in which they are licensed, as well as every jurisdiction in which they practice.[47] A clear, uniform way to apply professional codes to government lawyers can eliminate vagueness and uncertainty in the law.[48]

Second, the agency approach provides clear lines of accountability by removing discretionary judgments from government line attorneys and reposing them solely in senior agency officials.[49] One way the

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45. Eric Posner & Adrien Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL. ST. J., July 6, 2004, at A22.

46. Vanessa Blum, *Culture of Yes: Signing Off on a Strategy*, LEGAL TIMES, June 14, 2004, at 1.

47. *See* McDade Amendment, 28 U.S.C. § 530B (2000).

48. *But see* Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the* McDade Amendment *and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707, 708–09 (2001) (arguing that government lawyers still face horizontal and vertical conflicts of law due to the McDade Amendment).

49. *See, e.g.*, Lanctot, *supra* note 23, at 1012–17; Macey & Miller, *supra* note 25, at 1116.

agency approach can constrain a low-level government attorney's discretion is by making her absolutely accountable. For example, the agency can always subject her actions to review by agency superiors.[50]

In that vein, the agency approach provides increased democratic accountability by moving final authority for the lawyer's actions closer to the top of the chain of command, namely to politically-appointed officials and the President.[51] Some commentators have even suggested that the agency approach is more likely to facilitate the implementation of executive policy.[52]

B. The "Public Interest" Approach

1. Background

Running parallel to the agency approach to government lawyers' ethics is the public interest approach.[53] This approach follows, and goes further than, the public interest considerations found in mainstream legal ethics. In mainstream legal ethics, the public interest approach still accepts the core duties of loyalty, zeal and confidentiality. The approach, though, places relatively greater weight on the duties of the lawyer to the courts and to innocent third parties. In the government sphere, the public interest approach is even stronger—it makes serving the public good the attorney's primary duty. Consequently, it also values the interests of the lawyer's agency only to the extent that those interests coincide with the public interest. It holds that the government lawyer owes a duty to the public interest or the common good apart from, and at times above, any duty the lawyer may owe to the agency. "[For a government lawyer,] the client is not simply the Justice Department or the administration more generally or the government most generally but the nation itself and the law under which the nation lives."[54] Moreover, certain conduct that would be sanctioned by the agency approach is contrary to the interest of the people.[55] The public interest approach is epitomized by the social and moral emphasis of David Luban[56] and Deborah Rhode,[57] and "virtue

50. But this is not a safeguard if the questionable actions are being taken by the agency head herself.

51. Lanctot, *supra* note 23, at 1015; Macey & Miller, *supra* note 25, at 1116.

52. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296–97 (1987).

53. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

54. Blum, *supra* note 46 (quoting Roger Pilon).

55. LUBAN, *supra* note 53, at 31–49.

56. *See* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1984); LUBAN, *supra* note 53.

ethicists" like Thomas Shaffer.[58] Luban endorses the "morally activist lawyer [who] shares and aims to share with her client responsibility for the ends she is promoting in her representation [and who] cares more about the means used than the bare fact that they are legal."[59] Rhode wants attorneys "to accept personal responsibility for the moral consequences of their professional actions."[60]

The public interest approach has the support of the ABA,[61] the largest bar association in the U.S. and the *de facto* ethical voice of the bar.[62] The public interest approach also has been endorsed by former government attorneys,[63] scholars,[64] commentators,[65] and judges.[66]

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57. *See* DEBORAH RHODE, IN THE INTERESTS OF JUSTICE (2000).

58. *See* THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS (1987); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 133 (1981).

59. LUBAN, *supra* note 53, at xxii.

60. RHODE, *supra* note 57, at 66–67.

61. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342, at 120 (1975) (Canon 7 recognizes that "the duty of all government lawyers [is] to seek just results rather than the result desired by a client.").

62. *See* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 688–91 (1989).

63. *See* HARRY C. SHRIVER, THE GOVERNMENT LAWYER 137 (1975) (former Department of Justice lawyer stating that Department of Justice attorneys "provide an independence and an objective viewpoint unfettered by the occasional bias of the administrator"); Archibald Cox, *The Lawyer's Public Responsibilities*, 4 HUM. RTS. 1, 8 (1974) (former Solicitor General comparing private and public practice, noting, "As the lawyer in private practice has a public responsibility not merely for the legal system centered upon the courts but for all the processes of a free, self-governing society, so does the responsibility rest upon the lawyer in public office—all the more clearly because of his greater opportunities and relative freedom from competing obligations."); Rex E. Lee, *Lawyering for the Government: Politics, Polemics and Principle*, 47 OHIO ST. L.J. 595, 595 (1986) (former Solicitor General discussing the government lawyer's "enhanced responsibility as an officer of the court precisely because he or she is a government lawyer"); Harold Leventhal, *What the Court Expects of the Federal Lawyer*, 27 FED. B.J. 1, 2 (1967).

64. *See* Kenneth W. Dam, *The Special Responsibility of Lawyers in the Executive Branch*, CHI. B. REC. (SPECIAL CENTENNIAL ISSUE), 1974, at 4 ("[The] responsibility of the Government lawyer must be to adhere to high ethical standards."); Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625, 645 (1979) ("[A]s a pubic official, he seems to have a special obligation to every citizen that is very different from that which an ordinary lawyer has in serving a private client."); Steven H. Leleiko, *Professional Responsibility and Public Policy Formulation*, 49 ALB. L. REV. 403, 417 (1985) ("[G]overnment lawyers have a particular public responsibility to ensure fairness and honesty in government affairs."); Alan B. Morrison, *Defending the Government: How Vigorous Is Too Vigorous?*, *in* VERDICTS ON LAWYERS 242, 242 (Ralph Nader & Mark J. Green eds., 1976) ("There are, in my opinion, limits on the behavior of a government attorney defending federal officials in a civil lawsuit."); Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1187 (1988) (The Solicitor General's office applies more stringent ethical standards and attorneys throughout the federal government ought to be, and at times are, equally conscientious.); Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1738 (1988) ("The government attorney must seek a fair result beyond, or rather as the ultimate manifestation of, the interests of the government client.");

Thirty years ago, Judge Charles Fahy argued that "because the Government is a composite of the people[,] Government counsel therefore has as a client the people as a whole."[67] He recognized the importance of the government lawyer as "the maker of the conscience of the government,"[68] a notion that is reflected repeatedly in case law. The classic and most frequently cited description of the "special" role of government lawyers as public servants comes from *Berger v. United States*.[69] A government lawyer:

> is the representative not of an ordinary party to a controversy, but of a sovereignty [the United States] whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that *justice shall be done.* As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[70]

The notion that government lawyers owe a higher duty to the public is not limited to the criminal arena. Federal courts have suggested that

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Marian Wolff Easton, Note, United States v. National Medical Enterprises: *What to Do When Government Attorneys Engage in Misconduct*, 21 LOY. L.A. L. REV. 159, 197 (1987) ("[G]overnment attorneys also represent the sovereign and have a duty to look beyond . . . the case at hand to ensure that justice is done.").

65. *See* VICTOR S. NAVASKY, KENNEDY JUSTICE 360 (1971) (quoting Joseph Kraft's description of the Attorney General's role "less as a player on the government team than as an umpire exerting a legal check on arbitrary action of the executive"); Easton, *supra* note 64, at 189 ("[I]n 1904, [President Theodore] Roosevelt wrote to his attorney general that, 'of all the officers of the government those in the Department of Justice should be kept most free from suspicion of improper action.'") (quoting H. SCRIVER, THE GOVERNMENT LAWYER 136 (1975)); Perry Pendley, *Overzealous Advocates? No Clients, No Responsibility*, LEGAL TIMES, Feb. 15, 1988, at 17 ("[O]ver-emphasis by government lawyers on their role as zealous advocates" is inappropriate because they have no clients and they have virtually unlimited power and resources.).

66. *See* Charles Fahy, Lecture at Columbia University School of Law: Special Ethical Problems of Counsel for the Government (Apr. 11, 1950), *in* 33 FED. B.J. 331 (1974). For more on how judges view government attorneys, see JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES 145 (1978); Leventhal, *supra* note 63, at 2 ("In principle, the same objectives, the same standards apply to all lawyers in court. But government lawyers may be held in fact to higher standards."); Jack B. Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807, 810 (1966) (A government lawyer's obligation to the client is "tempered by the fact that he has a deeper obligation to the public, which his client represents, and to the enforcement of justice generally."); Weinstein & Crosthwait, *supra* note 4, at 4–5 (Government lawyers "represent not only the government entity, but also the public" and are bound by the "highest ethical standards.").

67. Fahy, *supra* note 66, at 332. *See also* Morrison, *supra* note 64, at 252 (The government attorney has "responsibilities to all of the people, who are, after all, the real 'clients.'").

68. Fahy, *supra* note 66, at 335.

69. 295 U.S. 78 (1935).

70. *Id.* at 88 (emphasis added).

the same principle applies with equal force to the government's civil lawyers. For example, in *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Commission*,[71] the United States Court of Appeals for the District of Columbia Circuit found it "astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission."[72] While the "higher duty" view is not surprising in the District of Columbia, which has the highest percentage of government attorneys nationwide, it is a view also shared by other district[73] and circuit[74] courts in both the criminal and civil context. As Douglas Kmiec, a professor of constitutional law at Pepperdine University Law School and a Justice Department official in the Reagan and George H.W. Bush administrations, noted, the government sometimes "may have a good legal argument . . . [b]ut as a citizen, I always want my government to act on a plane higher than the minimum of what the law requires."[75]

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71. 962 F.2d 45 (D.C. Cir. 1992).

72. *Id.* at 48. "[T]he American Bar Association's Model Code of Professional Responsibility expressly holds a 'government lawyer in a civil action or administrative proceeding' to higher standards than private lawyers." *Id.* at 47 (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1981)); *see also* Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983) (demanding a higher duty because the client was not only an agency but also the public at large); Douglas v. Donovan, 704 F.2d 1276, 1279–80 (D.C. Cir. 1983) ("[G]overnment attorneys . . . have special responsibilities to both this court and the public at large.").

73. Equal Employment Opportunity Comm'n v. Waterfront Comm'n of N.Y. Harbor, 665 F. Supp. 197, 201 (S.D.N.Y. 1987) ("[T]his case should serve to put government attorneys on notice that they are not exempt from the federal rules [of civil procedure] and that they will be held to the highest standards of the Bar."); Jones v. Heckler, 583 F. Supp. 1250, 1256 n.7 (N.D. Ill. 1984) ("[C]ounsel for the United States has a special responsibility to the justice system."); Braun v. Harris, Unemployment Ins. Rep. (CHH) ¶ 17,070, at 2499–500 (E.D. Wis. Apr. 30, 1980) ("Government attorneys, however, by virtue of their unique position, owe a greater responsibility to the justice system. The courts have come to expect and have rightly demanded a higher degree of candor from government attorneys.") (citing Equal Employment Opportunity Comm'n v. Datapoint Corp., 457 F. Supp. 62, 65 n.10 (W.D. Tex. 1978) ("Because of the peculiar power of the government litigator, he is subject to ethical considerations beyond the ordinary litigator.")).

74. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1370 (9th Cir. 1980) ("The effectiveness of and need for harsh measures is particularly evident when the disobedient party is the government."); *see also* Bulloch v. United States, 763 F.2d 1115, 1125 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986) (McKay, J., dissenting) (stating that concealment of information by the government during discovery was "made even more egregious by the fact that government lawyers in civil actions have the 'responsibility to seek justice and to develop a full and fair record.'") (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980)).

75. Carol D. Leonnig, *U.S. Stymies Detainee Access Despite Ruling, Lawyers Say*, WASH. POST, Oct. 14, 2004, at A11. In the quote, Kmiec was referring to the government's

2. Benefits

The benefits of the public interest approach are: 1) it is consistent with most government lawyers' recognition that they owe a higher duty to "the people" by virtue of their position as public servants, as discussed *supra*; and 2) it provides constraints on the government lawyer that may prevent abuses of the lawyer's position—even when those abuses are committed in furtherance of the agency's agenda. Because a lawyer's untrammeled loyalty to the client agency risks supporting manifest social injustice, instead of the government attorney being solely accountable to the agency, the public interest approach makes the attorney's primary loyalty lie with the public at large. This gives the government attorney greater leeway to make—and challenge—substantial decisions related to the agency's legal positions.[76]

This consequentialist approach focuses on outcomes. Public interest advocates draw on moral philosophy to argue that certain types of action that would likely be sanctioned by the dominant agency model are inherently wrong in a just society.[77] This article submits that the torture memoranda are one such example.

II. USING AN EIGHTH AMENDMENT STANDARD TO DETERMINE WHAT IS A "MORALLY PERILOUS QUESTION"

One of the main arguments against a public interest approach is that it is too subjective, too indeterminate, and too much at the mercy of lawyers' idiosyncratic judgments about the public good.[78] When it comes to the most controversial torture memorandum, "[i]ts critics . . . have attacked the fact that it did not consider policy or moral issues."[79] Government attorneys, *because* they are held to a higher standard,[80] need to

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claim that the Guantánamo detainees do not need lawyers at their military review hearings, but the sentiment applies with even greater force to the issue of torture.

76. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 831–32 (2000); Weinstein & Corsthwait, *supra* note 4, at 25–27.

77. *See* LUBAN, *supra* note 53, at 31–49.

78. *See, e.g.*, William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539, 564 (1986) ("[P]ublic interest . . . is a vague and meaningless abstraction.") (quoting Douglas Sale, *The City Attorney's Relationship with Council and Staff: Determining Who is the Client in Day-to-Day Affairs*, 11 CURRENT MUN. PROBS. 10, 11 (1984)); Daniel Schwartz, *The "New" Legal Ethics and the Administrative Law Bar*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS, *supra* note 56, at 244 (identifying a variety of competing interests).

79. John Yoo, *A Crucial Look at Torture Law*, L.A. TIMES, July 6, 2004, at B11.

80. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

be aware of when they are advising on morally perilous questions. But how does a lawyer know if something poses a morally perilous question? Is it like pornography—we cannot define it, but we know it when we see it?[81]

This article answers such a question in the negative. Just because something is hard to define does not mean that we should not try. The torture memoranda triggered a universal gag reflex.[82] They gave lawyers within and outside the U.S. *agita*—an existential dyspepsia of the soul.[83] The question of torture crossed over from "ethics" into the murkier terrain of "morality." Most hard questions do. Nevertheless, a consensus was still possible.

If a government lawyer's superiors in the employing agency are asking the attorney to do something beyond the pale, an attorney generally senses it in her gut. "Ultimately, the attorney must be guided by what his conscience tells him is in the public interest."[84] Whether originated from the brain or the enteric nervous system, these signals must be heeded. Both the Enron scandal and the torture memoranda provoked common responses of moral outrage from both lawyers and laypeople. According to the Supreme Court, "public reaction" counts.[85] Attorneys need to pay attention to their own moral convictions.

But what if one's "sixth sense" is impaired or lacking, or what if an attorney does not trust his or her intuition? As evidenced by the torture memoranda, what is morally perilous is not always self-evident. This article submits that, in those cases of moral ambiguity, one should look to modern Eighth Amendment jurisprudence for guidance.[86] Though the Eighth Amendment's "evolving standards of decency" test is used to make determinations about whether a punishment is cruel and unusual,[87] it is also useful when applied to morally perilous questions. The Model Rules can "impose ethical restrictions that go *beyond* those imposed by constitutional provisions."[88] The ABA Committee on Ethics and Profes-

81. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

82. *See, e.g.*, *supra* note 13; Liptak, *supra* note 44.

83. For an insightful essay on the difficulty of definitions, see Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION, *supra* note 32, at 291: "Almost all official interrogation is coercive, yet not all coercive interrogation would be called 'torture' by any competent user of the English language, so that what is involved in using the word is picking out the point along a continuum at which the observer's queasiness turns to revulsion."

84. *Developments in the Law*, *supra* note 23, at 1421.

85. Atkins v. Virginia, 536 U.S. 304, 313 (2002) (discussing public reactions as expressed through legislation).

86. U.S. CONST. amend. VIII.

87. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion).

88. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 2 (2001) (emphasis added).

sional Responsibility recognizes that "the Constitution establishes only the 'minimal historic safeguards' that defendants must receive rather than the outer limits of those they may be afforded."[89] Therefore, the Eighth Amendment provides a good beginning, especially since its jurisprudence does not shy away from analyzing how "[a] moral and civilized society" behaves.[90]

Additionally, determining what comprises a "national consensus" is consonant with deciding what is in the public interest. It keeps the government lawyer's thinking within the mainstream, rather than outside it. Finally, lawyers have looked to the Eighth Amendment to inform some of the most vexing legal questions of our time, including the death penalty[91] and late-term abortion.[92] The Eighth Amendment should be the starting point of the ethics analysis, not the end of it.

The Eighth Amendment's "evolving standards of decency"[93] approach provides a useful test.[94] Under this approach, the Court weighs capital punishment laws according to what a 1958 ruling elegantly referred to as the "evolving standards of decency that mark the progress of a maturing society."[95]

In the 2002 landmark case of *Atkins v. Virginia*,[96] the Supreme Court voted six to three to strike down the death penalty for the mentally

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89. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995), at 11 (quoting United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990)).

90. *Atkins*, 536 U.S. at 310 (internal citations omitted). The Eighth Amendment analysis suggested in this article is not meant to establish an absolute trans-substantive ethical principle that a given action (e.g., torture) has the same ethical valence regardless of the factual context in which the action is taken. There are some instances where torture is arguably acceptable. *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 140 (2002) (describing a ticking time bomb scenario: If an arrested terrorist knew the location of a ticking time bomb that was about to explode in a busy area but refused to disclose its location, would it be proper to torture the terrorist in order to prevent the bombing and save lives?); Panel Discussion, *Professional Responsibility and the Model Rules of Professional Conduct*, 35 U. MIAMI L. REV. 639, 650–55 (1981) (presenting various views on whether it would be appropriate to find different ethical results in different factual situations).

91. *See Atkins*, 536 U.S. at 313 (2002).

92. *See, e.g.*, Andrew Hyman, *Abortion and Free Speech: Applying the "Prior Restraint" Doctrine to Abortion Law*, FINDLAW, June 13, 2002, http://writ.findlaw.com/commentary/20020613_hyman.html ("Important issues would remain, such as what constitutes cruel and unusual punishment, in violation of the Eighth Amendment, for parents who abort.").

93. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion).

94. The "shocks the conscience" test, which considers whether the conduct at issue was "unjustifiable by any government interest," *see* Herrera v. Collins, 506 U.S. 390 (1993), is also helpful, but is beyond the scope of this article.

95. *Trop*, 356 U.S. at 101.

96. 536 U.S. 304 (2002).

retarded.[97] *Atkins* established a framework for evaluating such claims that broadened the list of relevant factors to be considered. "The court looks to state legislation and jury verdicts to decide whether a 'national consensus' has developed against a practice that was previously accepted—but it has recently opened the door to world opinion as a measure of moral consensus."[98] In other words, incorporating international opinion into our interpretation of the Eighth Amendment is part of the evolution of humane standards in our country.

On October 13, 2004, the Supreme Court heard argument in *Roper v. Simmons*[99] on juvenile executions, which are a controversial issue nationally and internationally. "With the United States under fire in international human rights forums because it is the only democracy that still permits the death penalty for offenders younger than 18, the court's ruling will have both national and worldwide significance."[100] Importantly, "[t]he European Union, human rights lawyers from the United Kingdom and a group of Nobel Peace laureates"[101] urged the Court in amicus briefs to strike down the juvenile death penalty.

On March 1, 2005, the Supreme Court abolished juvenile executions, ruling that it is unconstitutional to sentence anyone to death for a crime he committed while younger than 18. In reaching its conclusion, "the [C]ourt cited a 'national consensus' against the practice, along with medical and social-science evidence."[102] Writing for the Court's majority, Justice Kennedy, who voted to uphold the juvenile death penalty in 1989,[103] said the Court's judgment was also influenced by a desire to end the United States' international isolation on the issue:

> The overwhelming weight of international opinion against the juvenile death penalty . . . provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only coun-

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97. The Supreme Court had upheld the death penalty for the mentally retarded in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

98. Charles Lane, *Court to Hear Pleas on Executing Juveniles*, WASH. POST, Oct. 13, 2004, at A3.

99. 125 S. Ct. 1183 (2005).

100. Lane, *supra* note 98. The case is *Roper v. Simmons*, 125 S. Ct. 1183.

101. Charles Lane, *5–4 Supreme Court Abolishes Juvenile Executions*, WASH. POST, Mar. 2, 2005, at A1.

102. *Id.*

103. Stanford v. Kentucky, 492 U.S. 361 (1989). In *Stanford*, a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders who are older than 15 but younger than 18. The same day the Court decided *Stanford*, it held in *Penry* that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the *Roper* Court reconsidered the issue decided in *Stanford*.

> try in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.[104]

In doing so, Kennedy lengthened the recent string of decisions in which the Court has incorporated foreign views[105] and decisively rejected the arguments of others on the Court who say it should consider U.S. law exclusively. Even in her dissent, Justice O'Connor agreed with Justice Kennedy that international trends affect the meaning of "cruel and unusual punishment" in modern times.[106] Commentators noted immediately that the most significant effect of this decision "is to reaffirm the role of international law in constitutional interpretation."[107]

The benefit of the Eighth Amendment analysis is that it considers a variety of factors. In *Roper*, the Court was "heavily lobbied by international organizations and dignitaries . . . with the European Union, Nobel Peace laureates . . . and a group of former U.S. ambassadors urging an end."[108]

Clearly, there is a national and international consensus on issues such as slavery, apartheid, and genocide.[109] It is clear now that there is a

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104. *Roper*, 125 S. Ct. at 1200–01 (citations omitted).

105. Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); Thompson v. Oklahoma, 487 U.S. 815, 830-31 & n.31 (1988) (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); Enmund v. Florida, 458 U.S. 782, 796–97 & n.22 (1982) (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion) ("It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."); Trop v. Dulles, 356 U.S. 86, 102–103 (1958) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.").

106. *Roper*, 125 S. Ct. at 1215. O'Connor's problem was that too few states had recently enacted such laws to convince her that the country generally had "set its face" against the juvenile death penalty. *Id.* at 1206.

107. Lane, *supra* note 101.

108. Lane, *supra* note 98. *See also* Editorial, *Correcting a Mistake*, WASH. POST, Oct. 14, 2004, at A30 ("[I]t is worth noting the company this country has to keep in subjecting juveniles to capital punishment: China, Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen. The practice simply no longer exists among democratic nations.").

109. *See* Berenson, *supra* note 76, at 817–21. Berenson applies the work of William Simon to create a framework within which government lawyers can make discretionary judgments. Berenson's theory is that certain public values are fairly inferable from traditional legal

national and world consensus condemning the execution of juveniles. This article submits that there is also a consensus within the meaning of the Eighth Amendment on the issue of torture.[110]

A national consensus does not mean unanimity, but rather reflects a "widespread judgment"[111] about a particular practice. Moreover, the Court considered the importance of an issue's momentum: "It is not so much the number of these states that is significant, but the consistency of the direction of change."[112] The *Atkins* Court noted that the number of death penalty states that ban the practice of executing the mentally retarded had grown from two in 1989 to thirteen in 2002, while none had trended the other way.[113] The recent shift of states against the juvenile death penalty was less dramatic in *Roper*, but enough to carry the day. Both decisions took account of the fact that within the "world community," capital punishment for the young and the retarded was "overwhelmingly disapproved."[114] This progressive aspect to domestic legislation, human rights law, and international covenants cannot be ignored.

Regarding torture, the direction of change is clear. As Jeremy Waldron, director of the Center for Law and Philosophy at Columbia Law School, points out:

> [W]e . . . have something that we might think about as the general spirit of our law, the background currents of principle that run through our legal heritage, and those are profoundly opposed to the idea of torture . . . . [Y]ou find this in the ethos that underpins the Eighth Amendment ban on cruel punishment. You find it in the ethos that strictly regulates what can be done in police interrogations . . . . [T]he law as a whole has profoundly set aside . . . this business of getting its way through breaking the will or brutalizing and savagely destroying the spirit of human beings by torturing them. This is a deep-seated principle.[115]

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materials such as statutes, regulations and court opinions. *Id.* In contrast, this article submits that these traditional legal materials can be used to determine when one is faced with a "morally perilous question," which must be informed by the "public interest" approach to government lawyers' ethics.

110. After this article was completed, the *Washington Post* ran an editorial suggesting the Eighth Amendment approach to interrogation tactics. Editorial, *Congress Awakens*, WASH. POST, June 18, 2005, at A18 ("As a general principle, interrogation tactics that would violate the Eighth Amendment if engaged in domestically should not be permitted.").

111. Atkins v. Virginia, 536 U.S. 304, 317 (2002).

112. *Id.* at 315.

113. *Id.* at 314–15.

114. *Id.* at 316 n.21.

115. *Talk of the Nation: Debate over Modern Uses of Torture* (NPR radio broadcast Nov. 18, 2004), http://www.npr.org/templates/story/story.php?storyId=4176862 (quoting Jeremy

The "evolving standards of decency" test warrants consideration "when the advice is from government lawyers, concerns the treatment of prisoners, is selective, and advocates a view likely to lead to violation of fundamental human rights guarantees."[116] John Yoo, former deputy of the Justice Department's Office of Legal Counsel and principal author of the most controversial torture memorandum,[117] argues that "[a] lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights law."[118] This article begs to differ. These factors *must* be part of the calculus when the guidance is coming from a government advisor.

Because the OLC's notorious memoranda "raise profound questions about the ethical and moral limits of what lawyers can and should do in advising their clients,"[119] the following offers an analysis of how Eighth Amendment jurisprudence can inform whether torture is a morally perilous question.

A. Domestic Legislation

In the Eighth Amendment context, the Supreme Court has "pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[120] The best way to ascertain whether norms are widely held and publicly accessible is to identify those norms that have been enacted as positive law.[121]

A federal anti-torture statute[122] enacted in 1994 provides for the prosecution of a U.S. national or anyone present in the U.S. who commits torture abroad under color of law. Torture is defined as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person

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Waldron, Dir., Ctr. for Law and Philosophy, Columbia Law Sch.) [hereinafter *Modern Uses of Torture*].

116. Gillers, *supra* note 3.

117. Although the memorandum is nominally from Jay S. Bybee, John Yoo drafted it and provided its substantive analysis. Michael Hirsh, et al., *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50.

118. Yoo, *supra* note 79.

119. Liptak, *supra* note 1.

120. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

121. *See generally* Thomas D. Morgan & Robert W. Tuttle, *Legal Respresentation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 986 (1995).

122. 18 U.S.C. § 2340A (2000).

within his custody or physical control."[123] A person found guilty under the act can be incarcerated for up to 20 years or receive the death penalty if the torture results in the victim's death.

The War Crimes Act of 1996[124] makes it a criminal offense for U.S. military personnel and U.S. nationals to commit war crimes as specified in the 1949 Geneva Conventions. War crimes under the Act include grave breaches of the Geneva Conventions.[125] They also include violations of "Common Article 3" to the Geneva Conventions, which protects detainees even if the Conventions do not.[126] It prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular humiliating and degrading treatment."[127] Beginning late last year, Defense Department lawyers revised Directive 23.10, the "DoD Program for Enemy Prisoners of War and Other Datainees," to bring the policy into line with the Geneva Conventions.[128] "Following one of the recommendations of the [9/11] Commission, the [rewrite] . . . lifted directly from Article 3 of the Geneva accords in setting out new rules for the treatment of terrorism suspects . . . ."[129]

Finally, the Military Extraterritorial Jurisdiction Act of 2000[130] ("MEJA") can subject military contractors working for the Department of Defense to prosecution. The MEJA permits the prosecution in federal court of U.S. civilians who, while employed by or accompanying U.S. forces abroad, commit certain crimes. Generally, the crimes covered are any federal criminal offense punishable by imprisonment for more than one year.[131] Military personnel who mistreat prisoners can be prosecuted by a court-martial under various provisions of the Uniform Code of Military Justice.[132]

In August 2005, Republican senators John McCain, John Warner and Lindsay Graham, all members of the Armed Services Committee, introduced a legislative amendment to the defense authorization bill for 2006, which would expressly prohibit cruel, inhuman or degrading

123. *Id.* § 2340.
124. *Id.* § 2441
125. *Id.* § 2441(c)(1).
126. *Id.* § 2441(c)(3).
127. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 136 [hereinafter Geneva III].
128. Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES, Nov. 2, 2005, at A1.
129. *Id.*
130. 18 U.S.C. § 3261 (2000).
131. *Id.* It should be noted that the MEJA remains untested because the Defense Department has yet to issue necessary implementing regulations required by the law.
132. Uniform Code of Military Justice arts. 77–134, 10 U.S.C. §§ 877–934 (2000).

treatment of detainees in U.S. custody,[133] language that tracks American laws and international standards like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"),[134] a longstanding treaty discussed *infra*. On October 5th, by an overwhelming vote of 90-9, the Senate, including 46 Republicans, passed the new law.[135] It was a rare wartime rebuke to President Bush. More than two dozen retired senior military officers, including two former chairmen of the Joint Chiefs of Staff, also endorsed the language in the military spending bill.[136]

Using an Eighth Amendment standard, these existing and proposed laws provide ample objective evidence of contemporary values regarding torture and other mistreatment of persons in custody.[137] Case law confirms what is found in domestic legislation. For example, torture is a form of cruel and unusual punishment under the Eighth Amendment in the prison context.[138] Indeed, Senators John McCain and Joseph Lieberman proposed a definition of torture rooted in the Constitution: "No prisoner shall be subject to torture or cruel, inhumane or degrading treatment or punishment that is prohibited by the Constitution, laws or treaties of the United States."[139] This bolsters the argument for using an Eighth Amendment analysis to determine what constitutes a morally perilous question, and the conclusion that torture qualifies.

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133. Bob Herbert, *Who We Are*, N.Y. TIMES, Aug. 1, 2005, at A17.

134. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113, 114 (entered into force June 26, 1987) [hereinafter Convention against Torture].

135. Editorial, *Binding the Hands of Torturers*, N.Y. TIMES, Oct. 8, 2005, at A14.

136. *Id.* These were the same military officers who opposed Bush's decision to disregard the Geneva accords. Editorial, *Rebellion Against Abuse*, WASH. POST, Nov. 3, 2005, at A20. The CIA and the White House are insisting that the CIA be exempted from the proposed ban. Eric Schmitt, *House Delays Vote on U.S. Treatment of Terrorism Suspects*, N.Y. TIMES, Nov. 4, 2005, at A25. Vice President Cheney is trying to persuade members of a House-Senate conference committee to adopt language that would nullify the McCain amendment. Editorial, *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18. President Bush has threatened to veto the entire military budget over this issue. Editorial, *The Prison Puzzle*, N.Y. TIMES, Nov. 3, 2005, at A26.

137. *But see* War Powers Resolution Act of 1973, Pub. L. No. 93–148, 87 Stat. 555. To this day, presidents from both political parties have refused to acknowledge the legality of this law, which requires congressional approval for hostilities of more than 60 days.

138. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 6–9 (1992).

139. Sonni Efron, *Torture Becomes a Matter of Definition*, L.A. TIMES, Jan. 23, 2005, at A1.

B. International Law and the Geneva Conventions

International legal standards can also inform the Eighth Amendment analysis on morally perilous questions like torture. The Supreme Court's Eighth Amendment jurisprudence has decided "to place weight on foreign laws . . . ."[140] The High Court "has made use of foreign legal opinion to bolster its rulings in two major recent opinions, [one of which was] its 2002 decision to abolish the death penalty for the moderately mentally retarded . . . ."[141] Justice Sandra Day O'Connor extolled the growing role of international law in U.S. courts in a post-September 11th world.[142]

The primary source of international humanitarian law ("the laws of war") is the four Geneva Conventions of 1949,[143] which the U.S. ratified in 1955. The Third Geneva Convention protects prisoners of war[144] from "physical or mental torture [or] any other form of coercion . . . to secure . . . information of any kind whatever."[145] The Fourth Geneva Convention safeguards "protected persons,"[146] a term for detained civilians, "against all acts of violence or threats thereof."[147] Detainees must

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140. Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting).

141. Charles Lane, *The Court Is Open for Discussion*, WASH. POST, Jan. 14, 2005, at A1. The other case was the Supreme Court's 2003 decision to abolish state laws against private consensual sex between same-sex adults. *Id.*

142. Hope Yen, *O'Connor Extols Role of International Law*, SEATTLE POST-INTELLIGENCER, Oct. 27, 2004, *available at* http://www.nctimes.com/articles/2004/10/28/news/nation/17_49_1310_27_04.prt ("International law is a help in our search for a more peaceful world.") (quoting J. O'Connor).

143. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva III, *supra* note 127; Geneva Convention Relative to the Protection of Civilian Persons in a Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]. *See generally* U.S. Army Field Manual 34-52, *Intelligence Interrogation*. The Army Field Manual is the standard doctrine setting interrogation guidelines in conformance with the Geneva Conventions and unequivocally states that U.S. policy and binding international treaties "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army." *Id.* at 1-8. The Army Manual also forbids "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time" and "any form of beating." *Id.*

144. *See* Geneva III, *supra* note 127, arts. 17 & 87, 6 U.S.T. at 3332, 3384, 75 U.N.T.S. at 150, 202.

145. *Id.* art. 17, 6 U.S.T. at 3332, 75 U.N.T.S. at 150.

146. *See* Geneva IV, *supra* note 143, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

147. *Id.*

at all times be treated humanely.[148] Detainees may be questioned, but any form of "physical or mental coercion" is prohibited.[149]

Torture or inhuman treatment of prisoners of war or protected persons are grave breaches of the Geneva Conventions and are considered war crimes.[150] War crimes create an obligation on any state to prosecute the alleged perpetrators or turn them over to another state for prosecution. This obligation applies regardless of the nationality of the perpetrator, the nationality of the victim, or the place where the act of torture or inhuman treatment was committed.[151]

As mentioned in the previous subsection's discussion of the War Crimes Act, "common Article 3" to the Geneva Conventions also protects detainees in an armed conflict. It prohibits "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular humiliating and degrading treatment."[152]

Even persons who are not entitled to the protections of the Geneva Conventions are protected by the "fundamental guarantees" of Article 75 of Protocol I of 1977 to the Geneva Conventions.[153] The U.S. has long considered Article 75 to be part of customary international law.[154] Article 75 prohibits murder, "[t]orture of all kinds, whether physical or mental," "[c]orporal punishment," and "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, . . . and any form of indecent assault."[155] Supreme Court Justice Stephen Breyer is a leading proponent of the idea that the Supreme Court should take greater notice of international legal opinions. [156] He argues "that the goal is not to

148. Geneva III, *supra* note 127, art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146; Geneva IV, *supra* note 143, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

149. Geneva III, *supra* note 127, art. 17, 6 U.S.T at 3332, 75 U.N.T.S. at 150; Geneva IV, *supra* note 143, art. 31, 6 U.S.T. at 3538 , 75 U.N.T.S. at 308.

150. Geneva III, *supra* note 127, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Geneva IV, *supra* note 143, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

151. *See* Geneva III, *supra* note 127, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva IV, *supra* note 143, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

152. Geneva III, *supra* note 127, art. 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

153. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 37 (entered into force Dec. 7, 1979 in accordance with Article 95), *available at* http://www.unhchr.ch/html/menu3/b/93.htm [hereinafter Protocol 1].

154. The torture memoranda argued that the customary international law of war did not bind the president because it was not federal law. *See* Memorandum from John Yoo & Robert J. Delabunty to William J. Haynes II, Gen. Counsel, Dep't of Def., *in* THE TORTURE PAPERS, *supra* note 2, at 71–76.

155. Protocol I, *supra* note 153.

156. Lane, *supra* note 141.

make foreign rulings binding on U.S. courts but rather to consider them as a source of information and analysis."[157]

Worldwide, torture is unacceptable. The acts endorsed by the torture memoranda violate a *jus cogens* norm of international law by advocating and excusing acts of torture.[158]

C. Human Rights Law and Treaties

Torture and other mistreatment of persons in custody are also prohibited in all circumstances under international human rights law, which applies in both times of war and peace. In regard to codified international law, torture is clearly prohibited by the International Covenant on Civil and Political Rights (ICCPR)[159] to which the U.S. is a signatory, and the binding Convention against Torture,[160] both of which the United States has ratified. The standard definition of torture can be found in Article 1 of the Convention against Torture.

In its reservations to the Convention against Torture, the United States claims to be bound by the obligation to "prevent 'cruel, inhuman or degrading treatment or punishment' only insofar as the term . . . means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[161] In other words, the Senate has legally defined

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157. *Id.*

158. *Jus cogens* is Latin meaning "compelling law." BLACK'S LAW DICTIONARY 876 (8th ed. 2004). This "higher law" may not be violated by any country. *See id.* For example, genocide or slavery may be considered to go against *jus cogens*.

159. International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976).

160. Convention against Torture, *supra* note 134.

161. 136 CONG. REC. 25, 36,192 (1990). In the course of consenting to the Convention, the U.S. Senate restricted the definition of torture by requiring specific intent "to inflict severe physical or mental pain or suffering" and narrowing the concept of mental harm. *Id.* at 36,193 (quoting U.S. understandings to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, part II(1)(a)). The Senate also tried to give clearer content to the category of cruel, inhuman, or degrading treatment by its analysis within the meaning of the U.S. Constitution. *See id.* at 36,192. (quoting U.S. reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Additionally, Attorney General Gonzales said that, despite the treaty, "'there is no legal prohibition' on the use of cruel, inhuman and degrading treatment by U.S. personnel as long as it is inflicted on 'aliens overseas.'" Jackson Diehl, *Inhuman: Yes or No?*, WASH. POST, Sept. 12, 2005, at A19 (quoting Gonzales' January 2005 testimony during nomination hearing to be Attorney General). The White House is still trying to advance the argument—most recently in the form of a proposed exemption to McCain's amendment—that such a prohibition "shall not apply with respect to clandestine counterterrorism operations conducted abroad, with respect to terrorists who are not citizens of the United States . . . ." Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, Oct. 25, 2005, at A16 (quoting Sen. John McCain).

"cruel, inhuman, and degrading" as any treatment that would violate the Eighth Amendment. Here, the Eighth Amendment analysis comes full circle in that "the Convention bans conduct that is already unconstitutional."[162]

Prohibitions on torture are also found in other international documents, such as the Universal Declaration of Human Rights, adopted in 1948, which states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[163] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment is another poignant international document.[164] It provides that, "[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."[165] Finally, there is the U.N. Standard Minimum Rules for the Treatment of Prisoners.[166]

Additionally, the prohibition on torture is considered a fundamental principle of customary international law that is binding on all states.[167] All states must respect the prohibition on torture and mistreatment, whether or not they are parties to treaties that expressly contain the prohibition.[168] They are also obliged to prevent and to punish acts of tor-

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162. John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, *in* TORTURE: A COLLECTION, *supra* note 32, at 150. It should also be noted that by elementary deductive reasoning, if the U.S.'s reservations are being honored, then the Bush administration considers sexual humiliation, mock execution and "water-boarding" (simulated drowning) permissible under the Constitution, and thus available for use on Americans.

163. Universal Declaration of Human Rights, G.A. Res. 217A (III) art. 8, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

164. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988).

165. *Id.* at Principle 6.

166. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/6/1, annex I, *adopted* Aug. 30, 1955, U.N. ESCOR Supp. No. 1, at 11, U.N. Doc. E/3048 (July 31, 1957), *amended by* E.S.C. Res. 2076 (LXII), 62 U.N. ESCOR Supp. No. 1, at 35, U.N. Doc. E/5988 (May 13, 1977) (covering general management of institutions and applying to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to "security measures").

167. This is also known as a "peremptory norm" of international law because it preempts all other customary laws; in other words, the prohibition on torture cannot be overruled by any other law or by local custom. *See* Vienna Colucci, *Denounce Torture*, AMNESTY INT'L USA, Nov. 2001, http://www.amnestyusa.org/stoptorture/law.html.

168. *But see* Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, *in* TORTURE: A COLLECTION, *supra* note 32, at 199–212 (describing how countries that ratify treaties outlawing torture do not always have better torture practices than those that do not).

ture. The widespread or systemic practice of torture constitutes a crime against humanity.[169]

D. Other Social and Professional Expertise

The Supreme Court noted that oftentimes "legislative judgment reflects a much broader social and professional consensus"[170] about what constitutes an evolving standard of decency. The various pieces of legislation discussed in the preceding subsections bear this out. Numerous organizations and groups, across a wide political spectrum, have condemned the torture memorandum. "[L]iberals have condemned its near recklessness and conservatives its lack of refinement, and the Bush administration has disavowed it."[171] Even John Yoo admitted that it does not represent "majority views among international law academics."[172]

Organizations with specific expertise have historically served a critical function in the enlightenment of American law and society.[173] Just looking within the bar provides plenty of direction with regard to the torture memoranda. At its annual meeting in August 2004, the ABA adopted a resolution criticizing "any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government . . . and any endorsement or authorization of such measures by *government lawyers* . . . ."[174]

Over one hundred prominent lawyers, retired judges and law school professors—including former U.S. Attorney General Nicholas Katzenbach, former FBI Director William Sessions, seven past presidents of the ABA, former New York Governor Mario Cuomo, and former U.S. Senator Birch Bayh—signed a statement condemning the torture memoranda.[175] The statement declares that the primary memorandum sought to "circumvent long established and universally acknowledged principles of law and common decency."[176]

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169. *See, e.g.*, Rome Statute of the International Criminal Court art. 7, July 7, 1998, 2187 U.N.T.S. 90, 93 (entered into force July 1, 2002).

170. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

171. Caplan, *supra* note 3.

172. Smith, *supra* note 13 (quoting John Yoo).

173. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA VOLUME II 106–10 (Phillips Bradley ed., Alfred A. Knopf 1972) (1945) (discussing the virtues of "civil associations" to democratic society).

174. ABA Torture Resolution 10-B, at 1 (adopted Aug. 9, 2004) (emphasis added).

175. Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, WASH. POST, Aug. 5, 2004, at A4.

176. *Id.*

"The position taken by the government lawyers in these legal memoranda amount[s] to counseling a client as to how to get away with violating the law," according to John J. Gibbons, former chief judge of the U.S. Court of Appeals for the Third Circuit who was also the attorney in the U.S. Supreme Court case requesting hearings for the detainees at Guantánamo Bay, Cuba.[177] Arguably, the conduct described in the legal memoranda would be improper even under the agency approach.[178]

Numerous human rights groups like Amnesty International, the International League for Human Rights, and Human Rights First have excoriated the torture memoranda,[179] and expert organizations outside the legal community concur. Explicit opposition to torture by organizations of expertise has been longstanding, diverse, and continues to increase. Conversely and unsurprisingly, no such organization has taken a position endorsing torture.

Medical and health groups that oppose torture include *The New England Journal of Medicine*, one of this country's most influential medical journals. Various medical protocols—notably, the World Medical Association's ("WMA") 1975 Declaration of Tokyo, endorsed by the American Medical Association,[180] and the Hippocratic Oath—prohibit medical complicity in torture.[181] *The Journal of the American Medical Association* has also described the challenge to medical ethics posed by coercive U.S. interrogation policies.[182] *The Lancet*, a British medical

177. *Id.; see also* Rasul v. Bush, 540 U.S. 1175 (2004).

178. *See generally* Kathleen Clark, Professor of Law, Washington University in St. Louis, Remarks as Panelist on C-SPAN Broadcast at American University's Washington College of Law: Ethical Issues for Government Lawyers (Oct. 28, 2005), http://inside.cspanarchives.org:8080/cspan/cspan.csp?command=dprogram&record=188923411 (explaining that the torture memorandum did not violate the ethical obligation of competence, but violated Yoo and Bybee's obligations to be candid with their client and to adequately advise their client).

179. Jill Lawless, *Human Rights Groups Condemn Alleged Abuse*, NEWSDAY.COM, May 3, 2004, http://www.newsday.com/news/nationworld/wire/sns-ap-prisoner-abuse-world-view,0,4511050.story?coll=sns-ap-nationworld-headlines.

180. *See* Physicians for Human Rights, *Forced Feeding of Gitmo Detainees Violates International Medical Codes of Ethics*, Sept. 16, 2005, http://www.phrusa.org/research/torture/news_2005-09-16.html: "The WMA is the internationally recognized organization that represents national medical associations around the world. It promotes the highest standards of medical ethics and provides ethical guidance to physicians through its Declarations, Resolutions and Statements. The American Medical Association is one of the founding members of the WMA."

181. Robert Jay Lifton, *Doctors and Torture*, 351 NEW ENG. J. MED. 415, 415–16 (2004). *See also* M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantanamo Bay*, 353 NEW ENG. J. MED. 6, 6–8 (2005) (discussing medical privacy as a customary international law presumption).

182. Leonard Rubenstein et al., *Coercive U.S. Interrogation Policies*, 294 JAMA 1544 (2005).

journal, called on health care workers who had witnessed ill-treatment at the Abu Ghraib and Guantánamo prisons to break their silence,[183] and later noted "the repugnance felt by the wider USA medical community" toward unprincipled military doctors.[184]

The International Committee of the Red Cross ("ICRC")—a private, independent humanitarian agency that acts during war or conflict whenever intervention by a neutral body is necessary—issued a report that prisoners at Guantánamo Bay have been subject to unremitting abuse that is sometimes "tantamount to torture" and that medical personnel have been used to help interrogators obtain information. [185] The ICRC also backs the Declaration of Tokyo.[186]

Military psychiatrists and psychologists at Guantánamo Bay provided advice on how to conduct coercive interrogations. The American College of Physicians, the American Psychiatric Association, and the American Psychological Association have gone on record endorsing Senator McCain's proposal to prohibit the "cruel, inhuman or degrading treatment" of detainees.[187] A Physicians for Human Rights ("PHR") report disapprovingly "infer[red] that psychological torture was central to the interrogation process . . . ."[188] PHR has also condemned physical torture, such as the force-feeding of hunger strikers by doctors at Guantánamo Bay—something detainees have told a federal judge involves forcing finger-thick feeding tubes through their noses without painkillers or sedatives[189]—as being in direct violation of international codes of medical ethics,[190] including the Declaration of Tokyo, which was elaborated in the 1991 WMA Declaration of Malta on Hunger Strikers.[191]

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183. *See* Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, 364 THE LANCET 725 (2004).

184. Michael Wilks, *A Stain on Medical Ethics*, 366 THE LANCET 429, 429 (2005).

185. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

186. Stephanie Nebehay, *ICRC Says Hunger Strike at Guantánamo Bay "Serious"*, REUTERS, Oct. 7, 2005.

187. C. Anderson Hedberg et al., Letter to the Editor, *Torture Detainees? Not in Our Name*, N.Y. TIMES, Nov. 4, 2005, at A26.

188. Bob Herbert, *With the Gloves Off*, N.Y. TIMES, May 26, 2005, at A29 (quoting Physicians for Humans Rights report regarding U.S. use of psychological torture). Physicians for Human Rights had earlier criticized even the *revised* memorandum on torture, claiming the OLC's interpretation undermines the federal torture statute's definition of severe mental pain.

189. Charlie Savage, *Guantanamo Medics Accused of Abusive Force-Feeding*, BOSTON GLOBE, Oct. 15, 2005, at A4. "At least 131 Guantánamo inmates began a hunger strike on August 8 to protest their indefinite confinement, and more than two dozen are being kept alive only by force-feeding." *Rebellion Against Abuse*, *supra* note 136.

190. Physicians for Human Rights, *supra* note 180.

191. *Id.*

Even a former White House physician has spoken out against making medical personnel into accessories for mistreatment, explaining that torture "perverts the role of medical personnel from healers to instruments of abuse."[192] Although the Pentagon has defended doctors involved in interrogations, particularly those in units known as Behavioral Science Consultation Teams,[193] in June 2005, it issued new guidelines that psychologists who advise interrogators are not to be involved in *treating* detainees.[194]

Even the majority of average citizens in our country disfavor torture. Although not a primary indicator of a national consensus, the High Court on occasion looks to "opinion polls in reaching its conclusion" regarding an evolving standard of decency.[195] Public opinion research abounds on the issue of torture. According to a CNN/USA Today/Gallup poll, "[n]early three-quarters of Americans say the mistreatment of Iraqi prisoners by U.S. soldiers depicted in widely broadcast photographs was unjustified under any circumstances[.]"[196]

Finally, the "[Supreme] Court's decision to place weight on . . . religious organizations" also informs the Eighth Amendment's analysis of "the evolving standards of decency."[197] The Muslim community worldwide has denounced the abuses at Abu Ghraib[198] and the World Council of Churches accused the U.S. of violating "the norms and standards of international humanitarian and human rights law"[199] in its treatment of prisoners being held on Guantánamo Bay. Rabbis for Human Rights North America, in a letter to the President and Congress, were explicit about the torture memoranda:

> What is the most disturbing . . . is that the documents that have been made public . . . demonstrate that the use of torture and other cruel, inhuman and degrading treatment had been approved at the highest levels of the Administration . . . . We are not addressing the technical legal arguments that characterize this discussion. Rather, we want to express our moral concerns about the human situation—concerns that

192. Burton J. Lee III, *The Stain of Torture*, WASH. POST, July 1, 2005, at A25.

193. Eric Schmitt, *Army Finds Few Lapses in Health Care of Prisoners*, N.Y. TIMES, July 8, 2005, at A9.

194. *New DOD Rules Issued for Medical Personnel*, AP, June 16, 2005.

195. Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting).

196. *Poll: 73 Percent Say Iraqi Abuse Unjustified*, CNN.COM, May 10, 2004, http://www.cnn.com/2004/ALLPOLITICS/05/10/poll.iraq.abuse/.

197. *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting).

198. Lawless, *supra* note 179.

199. *World Churches Say U.S. Violates Law at Guantanamo*, REUTERS, Feb. 21, 2005.

> stem from the heart of America's values, the essence of democracy, and the soul of Jewish tradition.[200]

In the religious realm, there is no hesitation about blending official government policy and morality.

The diversity of torture opponents is striking and includes supporters and opponents of the death penalty, Republicans and Democrats, conservatives and liberals, judges, prosecutors and victims of terrorism. Recently, the *Washington Post* endorsed taking an Eighth Amendment approach to interrogation tactics.[201] Under all the standards employed by the Court in *Atkins* and *Roper* that rendered the execution of the mentally retarded and juveniles unconstitutional, the same indicia apply with equal or greater force to torture, making it a morally perilous question.

Moreover, the democratic nations of the world are against torture as a normative matter. It is a violation of society's shared set of moral commitments.[202] Torture is *malum in se* and *malum prohibitum*, that is, conduct that is wrongful according to accepted morality and wrongful according to legal proscription. When John Yoo says that his work was merely "an abstract analysis of the meaning of a treaty and a statute," and accuses his critics of "confusing the difference between law and moral choice,"[203] he fails to realize that there is no difference when it comes to morally perilous questions like torture.

III. THE NEED TO VALUE THE "PUBLIC INTEREST" APPROACH OVER THE "AGENCY" APPROACH WHEN ADVISING ON "MORALLY PERILOUS QUESTIONS"

A. Where "Ethics" and "Morals" Merge

The torture memoranda "raise profound questions about the ethical and moral limits of what lawyers can and should do in advising their clients."[204] This article does not suggest that only government lawyers have a duty to be moral, nor does it suggest applying an Eighth Amend-

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200. Letter from Rabbis for Human Rights North America to President Bush and Members of Congress (Feb. 2005), http://ga4/rhrna/rabbinicletter.html.

201. *Congress Awakens*, WASH. POST, June 18, 2005, at A18. "As a general principle, interrogation tactics that would violate the Eighth Amendment if engaged in domestically should not be permitted." *Id.*

202. For more on the "common morality thesis," see Morgan & Tuttle, *supra* note 121, at 993.

203. Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, FIN. TIMES, June 10, 2004, at 7.

204. Liptak, *supra* note 1.

ment analysis to private lawyers' conduct. Rather, it submits that when it comes to morally perilous questions of human rights, civilized society and decency, lawyers in both public and private practice should aspire to be morally responsible.

In the 1990 Lincoln Savings & Loan financial scandal, the District Court for the District of Columbia remarked: "What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case."[205] In another private sector example of deafening lawyer silence, "[t]he endorsement . . . by the law firm of Vinson & Elkins of Enron's crooked accounting is a recent disgraceful instance, and it reflects the strain on professional morality caused by pressure from the marketplace."[206] There is "a transcending if vaguely conceived constituency beyond the immediate corporate incumbents: The corporation has a duty to the public; there is such a thing as corporate citizenship."[207]

This argument against keeping mum when faced with unethical conduct is *a fortiori* in the context of government lawyers because of their special responsibilities to the public. When lawyers opine on subjects as serious as depleting employees' entire life savings, or worse, torturing prisoners, the two concepts of ethics and morals dovetail. "Legal ethics questions are often confused with questions of moral responsibility. The two are distant cousins, but here [in the context of advising on torture] they converge."[208] Torture is problematic "at the moral level, at the legal level and [at the pragmatic level]."[209] A lawyer's moral responsibility goes beyond ethical duties—it is something "more." The lawyers who wrote the torture memoranda "believe that being a lawyer conveys a certain moral immunity. Fortunately for us all, it doesn't."[210]

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205. Lincoln Sav. & Loan Ass'n v. Wall, 743 F.Supp. 901, 920 (D.D.C. 1990) (quoting U.S. Dist. Judge Sporkin).

206. Caplan, *supra* note 3.

207. HAZARD, *supra* note 5, at 53 (internal quotation marks omitted). Hazard goes on to say:

> In recent years, some critics of the legal profession have suggested that a lawyer for a corporation is responsible for its conduct in at least two related respects: his advice to such a client should consist not merely of what the client legally might do but also of what the client morally ought to do; and he should not serve a client who is not disposed to follow advice of that character.

Id. at 143.

208. Gillers, *supra* note 3, at 66. *See also* Liptak, *supra* note 1 ("These memos . . . raise profound questions about the ethical and moral limits of what lawyers can and should do in advising their clients.").

209. *Modern Uses of Torture*, *supra* note 115 (quoting Jeremy Waldron, Dir., Ctr. for Law and Philosophy, Columbia Law Sch.).

210. Luban, *supra* note 35.

Ethical duties can be, and are, codified—reduced to written rules. Ethics approaches behavior from both a philosophical and practical standpoint. It stresses more objectively defined, but essentially idealistic, standards of right and wrong. Moral duties are intuitive, concerned with the judgment principles of right and wrong in relation to human action and character. Morality arises from conscience. It informs personal behavior measured by prevailing standards of rectitude.

Ethicists in the post-Enron world disagree with drawing a sharp distinction between ethics and morals.

> "Ethics" often connotes shared standards that have become publicly applicable, official or legal; or standards of responsibility that pertain to specific social roles or professions. . . . Professionals acting in their professional capacities are bound by ethical principles devised by industry associations or built into employment policies and laws . . . . "Morality" often connotes, by contrast, personal or group standards that may be deeply cultural or religious. . . . In business and the professions, the popular practice is to refer to ethics or professional ethics rather than to morality. . . . [However,] [e]thical standards adopted by lawmakers, business and professional associations are often specialized applications of general moral standards.[211]

It is reductionism in light of today's complex moral hazards to use the old formula that ethics are something public but morals are something personal and private.

The main argument against wading into the realm of morality is that it is so subjective and instinctual as to be impossible to define. But when something results in communal outcry and universal condemnation, there exists a consensus about what is "moral." The legal community's outrage over the torture memoranda arose because the memoranda failed to offer the independent counsel, practical wisdom, and *moral guidance* that the best lawyers provide their clients.[212] As the radical post-September 11th legal regime is beginning to weaken, "current and former officials have criticized it on pragmatic grounds . . . [b]ut some of the criticism also has a *moral* tone."[213] In the case of torture, a worldview exists, and it is possible to discern a national moral consensus.

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211. ANITA L. ALLEN, THE NEW ETHICS: A TOUR OF THE 21ST CENTURY MORAL LANDSCAPE 131–32 (2004).

212. *See* Caplan, *supra* note 3.

213. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (emphasis added).

B. Giving Primacy to the "Public Interest" Approach

This article does not suggest a new formulation of the public interest approach,[214] but rather suggests that government attorneys should privilege the public interest approach over the agency approach with morally perilous questions. As an example, the torture memoranda have been justified by a classic agency approach:

> [T]o the extent that [the torture memoranda have] been defended, the defense has been this: This is what lawyers do. Its authors, the argument goes, weren't making a *value judgment* for or against torture but were simply providing objective counsel, exploring how far the law would let the administration go. The client, after all, needs to know the full range of his options, argued John Yoo, one of the lawyers who worked on the memo in the Office of Legal Counsel, and to offer any less would have been irresponsible.[215]

Yoo himself admits that the memorandum "did not discuss the pros and cons of any interrogation tactic,"[216] but maintains that he was properly doing his job. "What the lawyers in the government were struggling with is what constitutes torture . . . A lawyer representing the Secretary of Defense or the President is required—duty and ethically-bound—to take those words and give the best . . . interpretation they possibly can."[217] But the interpretation best for the client is not necessarily ethical.

This is where the agency approach fails. "[T]he content of the memos speaks to a culture of aggressive lawyering in which attorneys acted not as sober naysayers, but as the bricklayers of the administration's counterterror tactics—often endorsing flat-out noncompliance with international treaties and federal statutes under the auspices of national security."[218] This is especially dangerous when the OLC speaks because "the Office of Legal Counsel often has the last word on gray areas of the

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214. *See, e.g.*, Berenson, *supra* note 76, at 817–21 (applying the work of William Simon to create a framework within which government lawyers can make discretionary judgments). *See generally* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

215. Caplan, *supra* note 3 (emphasis added). *See generally* John Yoo, *With "All Necessary and Appropriate Force,"* L.A. TIMES, June 11, 2004, at B13.

216. Yoo, *supra* note 79.

217. *To the Point: U.S. Practicing Torture?* (PRI radio broadcast, Jan. 10, 2005), http://www.kcrw.org/cgi-bin/db/kcrw.pl?show_code=tp&air_date=1/10/05&tmplt_type=show (quoting Brian Cunningham, former National Security Adviser to Condaleeza Rice).

218. Blum, *supra* note 46, at 1.

law."[219] Moreover, it serves as "the conscience of the Justice Department."[220]

Bruce Fein, who was with the OLC during the Reagan years, explains that:

> OLC's customary role was to provide neutral legal advice to other agencies or Congress on constitutional issues. It was not to suggest devious ways an agency's operational goals might elude legal constraints. It was not intended to advocate an agency's policies or to oppose [them], but simply to evaluate [them] for constitutionality under prevailing case law. Under Bush, it seems OLC is now acting as retained counsel to agencies to present [the] best defense of their actions from the perspective of an advocate, not as an impartial lawyer.[221]

Fein's observation underlines how the agency approach is better suited to advocates, not advisors. Other OLC veterans agree, as evidenced by a December 21, 2004, memorandum that a group of them sent to former Attorney General John Ashcroft and others:[222] "The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the

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219. *Id.*

220. Cornelia Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005) (describing OLC as the constitutional conscience of the Executive Branch); John W. Dean, *The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales's Confirmation Hearings*, FINDLAW, Jan. 14, 2005, http://writ.news.findlaw.com/dean/20050114.html. *See also* Fahy, *supra* note 66.

221. E-mail from Bruce Fein to Jesselyn Radack (Sept. 21, 2004) (on file with author). In the interest of full disclosure, Bruce Fein represented the author against government retaliation for blowing the whistle in the case of the "American Taliban," John Walker Lindh. *See also* Golden, *supra* note 213 ("In past administrations, officials said, the Office of Legal Counsel usually weighed in with opinions on questions that had already been deliberated by the legal staffs of the agencies involved. Under Mr. Bush, the office frequently had a first and final say.").

222. Principles to Guide the Office of Legal Counsel (Dec. 21, 2004), http://www.acslaw.org/OLCGuidelinesMemo.pdf [hereinafter "OLC Principles"]. Parts of my proposal in this article, which was written before the former OLC members issued their guidance, are reflected in their first three principles (accurate and honest appraisal, thorough and forthright advice that reflects all legal constraints, and advice unlikely to be subject to judicial review). *Id.* at 1–2. Their remaining seven principles (OLC advice should "reflect the institutional traditions and competencies of the executive branch"; OLC advice should show "due respect for the constitutional views of the courts and Congress"; OLC opinions should be publicly disclosed; OLC "should maintain internal [quality control] systems and practices"; OLC "should seek the views of all affected agencies and components of the Justice Department"; OLC should "maintain good working relationships with [OLC's] client agencies" and the White House Counsel's Office; and "OLC should be clear whenever it intends its advice to fall outside [the office's] typical role"), *id.* at 2–6, are not part of what this article proposes, which is aimed at the ethical and not programmatic role of government attorneys.

President's constitutional obligation to ensure the legality of executive action."[223]

The agency approach is also better suited to private practitioners than to government attorneys, especially legal advisors.

> To get around the inconvenience of the Geneva Conventions, the administration twisted the roles of the legal counsels of the White House, the Pentagon and the Justice Department beyond recognition. Once charged with giving unvarnished advice about whether political policies remained within the law, the Bush administration's legal counsels have been turned into the sort of cynical corporate lawyers who figure out how to make something illegal seem kosher—or at least how to minimize the danger of being held to account.[224]

The torture memoranda were more than just a perversion of the role of the government lawyer, they were a distortion of the rule of law itself. Government advisors serve as the agency's legal experts. They are responsible for providing complete information and evenhanded analysis necessary to understand the legal consequences of proposed courses of action.[225] The duty of zealous advocacy predominant in the agency approach works well in the adversary system. The agency approach's central tenet is that "justice can best be achieved by the battle of two zealous advocates before a neutral decision maker."[226] But, "the notion that adjudication should proceed by means of competitive presentation"[227] is not the best concept in the advisory realm. As law professor and legal ethicist Stephen Gillers notes:

> [A] lawyer's job is to tell clients their legal options, with the client alone responsible for its choices. Whatever the validity of this view for ordinary work, however, it is wrong when the advice is from government lawyers . . . . [A] gladiator role for lawyers may be tolerable in litigation, where it is balanced by an opposing gladiator and supervised by a judge, and where court records are presumptively public.

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223. *Id.* at 1.

224. Andrew Rosenthal, Editorial, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004, at A22.

225. Michael Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel, in* GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS, *supra* note 15, at 147–50.

226. Lanctot, *supra* note 23, at 985 (internal quotation marks omitted). *See also* HAZARD, *supra* note 5, at 120 ("The adversary system has deep roots in the Anglo-American legal tradition. Its antecedent is often said to be the Norman trial by battle, wherein issues in doubt were resolved by the outcome of a duel.").

227. HAZARD, *supra* note 5, at 122.

> But office advice is different. It is given in private and beyond adversarial challenge or judicial review . . . ."[228]

The "hired gun" who will do anything to further the interest of the client, regardless of the public interest, is dangerous in the advisory role. A militant, win-at-all-costs,[229] "no-holds-barred advocacy common in the private sphere"[230] does not translate well for the lawyer who carefully evaluates whether the client's goals are "fair" and "just." Discussing such issues with the client is purely optional,[231] and often disfavored, under the agency approach where client primacy reigns.[232] The agency approach, where "the advocate is a streetfighter—aggressive, guileful, exploitative"[233] and does not sit in judgment of the client's cause,[234] can even prove fatal,[235] as evidenced by the twenty-one prisoners who were victims of homicide in Iraq and Afghanistan.[236]

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228. Gillers, *supra* note 3, at 65–66.

229. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1037 (1975) ("The business of the advocate, simply stated, is to win if possible without violating the law.").

230. Liptak, *supra* note 1 (quoting Philip Lacovara, who served in the Nixon administration and as a Watergate prosecutor).

231. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003) ("[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

232. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 579 (1986) ("[Z]eal for a client is not only important but is given primacy, sometimes a startling primacy when client interests come into conflict with the interests of other persons.").

233. HAZARD, *supra* note 5, at 134.

234. *See* E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 584 (1961) (noting that the decision as to what is just is to be made by the court and jury).

235. *See* John Hendren, *List of Deatinee Death Inquiries Expanded to 37*, L.A. TIMES, May 22, 2004, at A1.

236. Autopsy reports on 44 prisoners who died in U.S. custody in Iraq and Afghanistan indicate that 21 were victims of homicide, including eight who appear to have been fatally abused by their captors. John Hendren, *Autopsies Support Abuse Allegations*, L.A. TIMES, Oct. 25, 2005, at A4. CIA personnel have been implicated in the deaths during interrogation of at least four Afghan and Iraqi detainees. *Vice President for Torture*, *supra* note 136. This article is not the first to suggest that the torture memoranda were causally related to the abuse of prisoners. There is a widespread perception that attorneys were complicit in the government's abuse of prisoners. *See, e.g.*, Editorial, *Mr. Gonzales's Record*, WASH. POST, Nov. 22, 2004, at A18 ("Investigations have determined that some U.S. interrogators who tortured Iraqi detainees at the Abu Ghraib prison reasonably believed that their actions had been authorized by a memorandum from the headquarters of Lt. Gen. Ricardo S. Sanchez . . . 'using reasoning from the president's memorandum of February 7, 2002 . . . .'"); John D. Hutson, *Systemic Inquiry Needed*, NAT'L L.J., July 26, 2004, at 22 ("The abuses may be the result of command climate and confusion created by the attitude of the senior leadership; we saw that attitude reflected in the now infamous U.S. Department of Justice and Department of Defense memos examining the powers of the commander-in-chief, the definition of torture and its legal defenses.").

Both the agency and the public interest conceptions are valid, but the public interest approach is more appropriate for advisors. Even Hazard, father of the agency approach, recognizes that "if the matter at hand is of major consequence in morals or policy,"[237] the lawyer must refer to morals and policy. The position that the public interest approach should guide government legal advisors was validated by the December memorandum from OLC alumni.[238] It stated clearly and unequivocally that the advocacy model of lawyering inadequately promotes the legality of executive action.[239]

C. Specific Drawbacks of the "Agency Approach" in Advising on "Morally Perilous Questions"

Even though the agency approach theoretically makes the ethics rules easier to apply to government lawyers by treating them no differently than private lawyers, "[t]he legal profession's rules of ethics provide what is perhaps worse than no guidance."[240] There are few provisions of the Model Rules that are specific to government attorneys,[241] and none dealing with the government lawyer acting as an advisor or counselor rather than as an advocate.[242] Moreover, Model Rule 1.13 in particular, which governs the organization as a client, offers little guidance to lawyers for organizations when the organization's interests are in conflict with those of its representatives or the public.[243] Finally, the Model Rules cannot possibly cover the complete ethics landscape. By focusing on categorical ethical imperatives, they leave large areas of attorney conduct unregulated. These factors render the easy applicability of the Model Rules illusory.

In addition, the promise of democratic accountability is a weak benefit of the agency approach. It is a stretch to say that even senior agency officials bear any true democratic accountability, especially when the former OLC chief who signed the main torture memorandum, Jay Bybee, received a lifetime appointment as a federal judge.[244]

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237. HAZARD, *supra* note 5, at 148.

238. OLC Principles, *supra* note 222.

239. *Id.* at 1.

240. HAZARD, *supra* note 5, at 45.

241. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2003); Berenson, *supra* note 76, at 798–99; Lanctot, *supra* note 23, at 971–73.

242. *See, e.g.*, Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449, 2452–55 (1999).

243. MODEL RULES OF PROF'L CONDUCT R. 1.13.

244. Jay Bybee is now a judge on the U.S. Court of Appeals for the Ninth Circuit.

Moreover, "presidents don't win elections because they comply generally with the Marquis of Queensbury rules."[245] In point of fact, "[during] a very, very contentious political campaign, [n]either President Bush, nor Senator Kerry, for their own quite different political reasons, saw fit to raise the topic [of torture]."[246] President Bush's recent "victory in the Electoral College was the third-narrowest finish in more than a century[,]"[247] and the winners of the previous three presidential elections did not garner a majority of the popular vote.[248] It is debatable whether the executive acts in furtherance of an electorally sanctioned mandate.[249]

Lastly, the "agency" belief that administrative agencies should be focused on implementing presidential policy is a hotly contested proposition in administrative law,[250] not a foregone conclusion. Similarly, the notion that the agency approach provides clear lines of accountability is shown to be false by all the buck-passing occurring in the Abu Ghraib prison abuse scandal.

The Abu Ghraib scandal is exacerbated by the fact that President Bush claims "[t]he United States is committed to the world-wide elimination of torture,"[251] and then with a wink and a nod, the message is conveyed to the people on the ground that they can do whatever they need to do to "soften up" detainees to obtain maximum intelligence. These conflicting messages led to, and exacerbated, the events that occurred at Abu Ghraib. Accountability is essential in a democracy, and senior military and administration officials have assidiously resisted accepting blame for allowing abuse to take place on their watch. While nine junior soldiers have undergone courts-martial, no one in the rarefied atmosphere of the Bush war cabinet or the military top brass, with the exception of Colonel Thomas Pappas and Brigadier General Janis Karpinski, has been charged or otherwise held responsible for their role in

245. *Modern Uses of Torture*, *supra* note 115 (quoting Alan Dershowitz, Felix Frankfurter Professor of Law, Harvard Law Sch.).

246. *Id.* (quoting Sanford Levinson, Professor of Law and Gov't, Univ. of Tex. at Austin).

247. Walter Shapiro, *Dems Must Decide Which Faction Will Revive Them*, USA TODAY, Nov. 10, 2004, at 6A.

248. *See* Archives.gov, U.S. Electoral College, Historical Election Results, http://www.archives.gov/federal-register/electoral-college/historical.html (last visited Sept. 15, 2005).

249. *See* Meet the Press (NBC television broadcast Nov. 14, 2004), http://www.msnbc.msn.com/id/6485241/ (Tim Russert, James Carville and Mary Matalin debating whether President Bush has a mandate).

250. *See generally* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

251. Statement by the President, U.N. Int'l Day in Support of Victims of Torture (June 26, 2003), http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html.

authorizing or creating conditions that allowed crimes against humanity to fester.

While the Bush administration is very hierarchal, which is in keeping with the agency approach, it cannot be said that hierarchy is necessarily a positive attribute because there were abuses occurring at the top of the pyramid.[252] Shifting discretion from the lawyer to the agency did not effectively put the discretion in different and more responsible hands. The top lawyers and the agency both had the same political agenda: "To the policy's architects, . . . the strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism . . . . [I]t was guided by a desire to strengthen executive power."[253]

Moreover, the agency approach certainly failed to remove discretionary judgments from maverick individual attorneys:

> "O.L.C. was definitely running the show legally, and John Yoo in particular," a former Pentagon lawyer said. "He's kind of fun to be around, and he has an opinion on everything. Even though he was quite young, he exercised disproportionate authority because of his personality and his strong opinions."[254]

Ironically, this is exactly what proponents of the agency approach fear: individuals imposing their idiosyncratic views on institutions. But shortcomings of the agency approach are not the point. It is not a matter of "fixing" the problematic components of the agency-as-client model. Instead, it is a matter of giving primacy to the public interest approach. In advising on morally perilous or suspect issues such as torture, the agenda of the government lawyer's agency should only be valued to the extent that that interest coincides with the public interest.

IV. PROPOSAL: STATE BAR ASSOCIATIONS SHOULD ADOPT A RULE GOVERNING THE SPECIAL RESPONSIBILITIES OF A GOVERNMENT ATTORNEY ADVISOR

The three leading ethical codes of the twentieth century, and the legal ethics experts who have emerged over the past two decades,[255] never

252. *See generally* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

253. Golden, *supra* note 213.

254. *Id. See also* HAZARD, *supra* note 5, at 53 ("Their sense of duty was strong, which means the question of direction of duty was correlatively more dilemmatic.").

255. *See, e.g.*, Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 244 (1985) (noting the recent emergence of experts in the area of legal ethics).

contemplated a global war on terrorism. This "new kind of war" calls for an ethical prescription for government attorneys acting in an advisory capacity. Leading ethicists have stated that "[f]or the ethical violations that take place in the world of high finance . . . the heavy hand of the law to create specific guidelines may be essential."[256] This was borne out in the passage of the Sarbanes-Oxley Act of 2002, new SEC rules, and the broadening of the ethics rule on confidentiality to include an exception in order to prevent client frauds reasonably certain to cause substantial economic injury.[257] Such an argument in favor of specific guidelines has even greater force in the world of war, especially an indefinite and undefined war such as the one on terrorism. The problem is, America *does* have laws governing war—plenty of them—which are being evaded, skirted and ignored.[258] Self-regulation through the adoption of ethical rules for government attorney-advisors is sorely needed to cure, or at least curb, the "loose professionalism"[259] that has afflicted top government lawyers.

The Federal Bar Association's Model Rules of Responsibility for Federal Lawyers[260] follows the agency approach, but even they contain some important caveats about how "the Government lawyer has a responsibility to question the conduct of agency officials more extensively than a lawyer for a private organization would in similar circumstances."[261]

Critics will say that the political system intends for the check on improper government behavior to be the ballot box or the courtroom.[262] Indeed, this reflects John Yoo's thinking that "[o]ur system has a place for the discussion of morality and policy. Our elected and appointed officials must weigh these issues in deciding on how it [sic] will conduct

256. ALLEN, *supra* note 211, at 145.

257. *See generally* Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 132–33 (2003).

258. For an interesting discussion of why countries ratify and then ignore treaties prohibiting torture, see Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, *in* TORTURE: A COLLECTION, *supra* note 32, at 199–212.

259. *See* Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, *in* TORTURE: A COLLECTION, *supra* note 32, at 299–305 (defining "loose professionalism" as "the phenomenon of legal discourse that slips dangerously toward the known-to-be-wrong.").

260. *See* Fed. Bar Ass'n, Model Rules of Prof'l Conduct for Fed. Lawyers (1990).

261. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 6 (2003).

262. Note, *Professional Ethics in Government Side-Switching*, 96 HARV. L. REV. 1914, 1915 (1983) (arguing that the government must be permitted to switch sides in litigation because "forcing the government to continue suits instituted by a previous administration would represent a dangerous limitation of the majority's ability to express its political preferences through a shift in the government's legal position.")

interrogations."[263] But the critics are wrong because judicial and legislative solutions occur after the fact, are remedial, and often take a long time, whereas good executive policymaking is prospective and preventive.

Two main problems emerge when considering ethics rules as a solution. The first problem is that ethical codes furnish guidance for litigators seeking to reconcile their conflicting duties to clients, courts and third parties. But a government lawyer has a unique role within the justice system, and the role of a government advisor is even more so. The second problem is that the torture memoranda reflect today's lower standards for lawyers.

> As a result of the lowering of professional standards by the American bar during the past generation and of the line-blurring between legal and political judgments, what many find deplorable about the torture memo is just one high-profile example of the kind of law that is being practiced today all across the country.[264]

This race to the bottom is another problem that should be considered in formulating a new rule for government advisors. The twofold problem of recognizing the unique role of government advisors and elevating the standard for their conduct can be cured by a revision to the Model Rules.

A. Proposed Rule

The Model Rules "have only a few special rules for lawyers in government service, such as Rule 1.11, 'Successive Government and Private Employment' and Rule 3.8, 'Special Responsibilities of a Prosecutor,'"[265] which are scattered throughout the list. My proposed revision would logically go in Section 2, which contains the rules governing lawyers as counselors.[266] Conveniently, there is an opening for a Rule 2.2,

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263. Yoo, *supra* note 79.

264. Caplan, *supra* note 3.

265. Thomas K. Byerley, *Unique Ethics Concerns for the Government Lawyer*, 77 MICH. B.J. 76 (1998). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 ("[W]hen the client is a governmental organization, a different balance may be appropriate . . . for public business is involved.").

266. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1–2.4. *Cf.* Russell G. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 FORDHAM L. REV. 1805, 1807 (2002) (proposing the adoption of a Model Rule stating that "lawyers are morally accountable for their conduct as lawyers"). My proposal differs in that it is only applicable to government advisors, focuses on the lawyer's role and not personal conduct, and would provide a basis for discipline.

which used to govern issues relating to lawyers acting as intermediaries, but was deleted in 2002 because these issues are dealt with in the Comment to Rule 1.7.[267] The vacancy can be meaningfully filled by adding a provision to deal with the special responsibilities of government legal advisors.[268] This provision would go beyond the rule governing advisors found in the permissive Rule 2.1, which is not mandatory, not specific to government attorneys, and not specific as to when "other considerations such as moral . . . factors" should come into play.[269]

RULE 2.2: *Special Responsibilities of a Government Attorney in an Advisory Role*

The government attorney in an advisory role shall:
(a) not give advice that is either illegal or unethical;
(b) refrain from rendering advice that the attorney knows is likely to lead to a violation of existing law;
(c) give an accurate, complete and balanced analysis of the law that:
    (1) makes the majority legal position known when advocating a minority, close, contrary or novel legal position;
    (2) makes adverse case law known;
(d) add advice on the wisdom and morality of what the client is considering, especially when the advice is unlikely to be subject to judicial review.

This proposed language would ensure that government lawyers advising on morally perilous questions would give advice that is legal, ethical, moral, complete, balanced and unlikely to lead to a violation of current law. Yet it would also leave government attorneys free to render advice that is not completely supported by existing law when an agency

267. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. Intermediation and the conflict-of-interest issues it raises are no longer treated separately from any other multiple-representation conflicts. For further explanation of the deletion of Rule 2.2, see ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 2.2., Reporter's Explanation of Changes.

268. This would be a counterpart of sorts to Model Rule 3.8, which governs "Special Responsibilities of a Prosecutor." It recognizes that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

269. MODEL RULES OF PROF'L CONDUCT R. 2.1. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social and political factors, that *may* be relevant to the client's situation." *Id.* (emphasis added).

has determined that existing law should be challenged. The government lawyer just has to be transparent about doing so.

Provision (a) seems it should go without saying, but unfortunately recent events demonstrate that it bears reduction to writing. The principles articulated by the former OLC attorneys felt it necessary to state the obvious, that "OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as *unlawful*."[270] As the *Economist* has written, discussion of torture in the U.S. has been all too "desultory."[271] The more concrete and explicit the rules governing advice on morally perilous questions, the better.

Provision (b) is an extension of the first provision and takes it a step further. By stating that the government advisor should "refrain from rendering advice that the attorney knows is likely to lead to a violation of existing law," this provision is the most controversial because it introduces a knowledge requirement. But other ethics rules contain such a requirement, for example Rule 4.4, which governs respect for the rights of third persons.[272]

Provision (c) recognizes the role of the advisor and how it differs from the adversary. It is similar to the first principle that the former OLC attorneys suggested: "When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law . . . ."[273] The subsection of the rule that this article proposes, which mandates making adverse case law known, is echoed in their second principle that "OLC's advice should be thorough and forthright, and it should reflect all legal constraints . . . ."[274]

Provision (d) harkens back to some of the Ethical Considerations of the predecessor Model Code, which were aspirational in nature and nonbinding.[275] For example, EC 7-8 stated that "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."[276] EC 7-14 took into consideration "fairness" and "justice."[277] However, a comment to Provision (d) is necessary to spec-

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270. OLC Principles, *supra* note 222, at 2 (emphasis added).

271. Editorial, *Is Torture Ever Justified?*, ECONOMIST, Jan. 11, 2003, at 9, 9.

272. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4.

273. OLC Principles, *supra* note 222, at 1.

274. *Id.* at 2.

275. *Id.* at prelim. stmt. The Model Rules do not contain any counterparts to the Model Code of Professional Responsibility's Ethical Considerations.

276. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983).

277. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980). *See also* Lawry, *supra* note 64, at 629 (Although the ordinary duty of the advocate is not perceived as a duty to "jus-

ify that, consistent with the First Amendment, religion may not inform the moral aspect of a government lawyer's advice.[278]

Even though the Supreme "Court's decision to place weight on . . . religious organizations" informs the Eighth Amendment's analysis of "the evolving standards of decency," due to First Amendment concerns,[279] it cannot be part of the calculus used to determine what constitutes a morally perilous question for purposes of rendering advice, and cannot be looked to in this article's proposed rule. Government advisors cannot base their counsel on religious morality. Their advice must embrace the social, political and personal rights of all people. Moreover, ethics rules and civil laws that formulate communal moral and ethical standards must be secular and not derived from a religious belief system.

The Model Rules *permit* a lawyer to "refer not only to law but to other considerations as well, such as moral, economic, social and political factors, that may be relevant to the client's situation."[280] This proposal would *require* government attorney advisors to introduce moral considerations based on economic, social, political and other non-religious factors into their counseling of clients. After all, the Code of Ethics for Government Service states, "[a]ny person in Government service should . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party or Government department."[281] These "are normative standards beyond and presumably above the letter of the law."[282]

Provision (d) would allow for the fact that "[m]any attorneys would have steadfastly refused to facilitate the administration's desired ends

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tice" or "fairness," under the Model Code a government lawyer has a duty to these "magnificent abstractions.").

278. Between 1947 and 1971, three Supreme Court decisions formed the backbone of the church/state separation doctrine that remains largely in place today. The first, *Everson v. Board of Education*, 330 U.S. 1 (1947), upheld the use of public funds to pay for the transportation of children to religious schools. The second, *Engel v. Vitale*, 370 U.S. 421 (1962), was a "school prayer" decision in which Justice Black, for a near-unanimous Court, invalidated a state-mandated "non-denominational" prayer. The third case, *Lemon v. Kurtzman*, 411 U.S. 192 (1971), dealt with state financial aid to parochial elementary and secondary schools. Writing for the Court, Chief Justice Warren Burger established a three-part test that has been modified, criticized, and constantly reinterpreted but that remains a standard of analysis in virtually all church/state cases. *Id.*

279. Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting).

280. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983); *see generally* Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990) (proposing that lawyers deliberate with clients regarding third-party nonclients' interests as well as moral, policy, and social consequences of the legal action).

281. 5 C.F.R. § 1300 app. A (1990).

282. HAZARD, *supra* note 5, at 138.

through their legal analysis; indeed, many would have used the[ir] legal analysis as a tool to dissuade the administration from flouting perceived moral norms."[283] It would also cure the one-sidedness of the torture memoranda. John Yoo, author of one of the most controversial memoranda explained, "For example, if a police officer were to ask when the use of force is allowed, a lawyer would first explain that killing constitutes murder or manslaughter, but he should also explain when self-defense or necessity would permit the use of force without criminal sanctions."[284] The problem is, Yoo only did the latter analysis in the torture memoranda, purporting to solve the torture conundrum by reference to the legal doctrine of "necessity," which is open-ended, lawless and undemocratic.[285] Moreover, the fact that (d) would apply especially when the advice is unlikely to be subject to judicial scrutiny is reflected in the former OLC attorneys' third principle.[286] "Government lawyers have more complicated obligations than those in private practice do. The government lawyer's ultimate client, after all, is the public, and government lawyers have not infrequently told their bosses things they did not want to hear."[287]

Justice Department attorneys have stood up to presidents in the past.[288] Attorney General Francis Biddle opposed the internment of Japanese-Americans during World War II.[289] While President Franklin Roosevelt overruled him, at least Biddle openly objected.[290] Special prosecutor Archibald Cox, appointed by Attorney General Elliot Richardson, refused to curtail the Watergate investigation against President Richard Nixon's wishes.[291] Douglas Kmiec, when he led the OLC,

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283. Vischer, *supra* note 39, at 12.

284. Yoo, *supra* note 79.

285. For a discussion of the problems with the "necessity" defense, see Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION, *supra* note 32, at 260–62.

286. OLC Principles, *supra* note 222, at 2. "OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts." *Id.*

287. Liptak, *supra* note 1.

288. Gillers, *supra* note 3.

289. Liptak, *supra* note 1.

290. Yoo does not derive the same lesson from this episode. Instead, he observes that:

> An American leader would be derelict of duty if he did not seek to understand all his options in such unprecedented circumstances. President[] . . . Roosevelt in the lead-up to World War II sought legal advice about the outer bounds of [his] power—even if [he] did not always use it.

Yoo, *supra* note 79.

The point this article seeks to make is that Roosevelt was told no. Biddle told him he could not use his power. *See id.* In the case of the torture memoranda, the Justice Department provided no such check against President Bush's wishes.

291. Gillers, *supra* note 3.

told President Ronald Reagan that he could not exercise an inherent line-item veto, even though Reagan desperately wanted it, because it was not implicit in the Constitution.[292]

The government legal advisor should evaluate a proposed course of conduct according to the letter of the law, its pragmatic implications, its possible outcomes, and its moral rightness. Jeh Johnson, former general counsel for the U.S. Air Force, explains:

> One view of the law and government . . . is that good things can actually come out of the legal system and that there is broad benefit in the rule of law. The other is a more cynical approach that says that lawyers are simply an instrument of policy—get me a legal opinion that permits me to do X. Sometimes a lawyer has to say, "You just can't do this."[293]

But lawyers in the George W. Bush administration, following a strict agency approach, appear unwilling or unable to set such limits. "Sometimes it's a lawyer's job to say no. But in the Bush administration's war on terror, it has been more about getting to yes. . . . [S]enior administration attorneys . . . said yes to the use of torture against suspected al Qaeda operatives held by the United States on foreign soil."[294] As Bruce Fein notes, "OLC is supposed to be a check on overzealousness . . . . The reason why you have OLC is to say, 'Here we draw the line.'"[295] Government lawyers at every level should be able and obligated to provide candid advice, even if it sometimes means saying no.

Some may argue that a weakness of codifying this duty in a new ethics rule is that the various state bars must enforce it. This could create irregular imposition of discipline. However, bar associations usually act reciprocally and have shown their willingness to discipline even the highest-level government officials in the past. After all, on the day be-

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292. Liptak, *supra* note 1. Justice Department attorneys have also stood up to each other. As an attorney with the Justice Department's Professional Responsibility Advisory Office, the author told the Criminal Division's Terrorism & Violent Crime Section that they could not ethically interview John Walker Lindh, the "American Taliban," without his counsel. Of course, there has been a steep price for rendering that advice. *See* ELAINE CASSEL, THE WAR ON CIVIL LIBERTIES 78–82 (2004); Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50, 58–59.

293. Andrew Rosenthal, Editorial, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004, at A22 (quoting Jeh Johnson).

294. Blum, *supra* note 46. Following September 11, 2001, "administration lawyers said yes to the mass roundup of Middle Eastern men on routine immigration violations[;] the incarceration and interrogation of foreign fighters outside the constraints of the Geneva Convention protections[; and] the indefinite detention of U.S. citizens" without charges, counsel, or judicial review. *Id.*

295. *Id.* (quoting Bruce Fein).

fore President Clinton left office, he "agreed to a five-year suspension of his Arkansas law license and his paying of a $25,000 fine to the Arkansas Bar Association."[296] Attorney General Ashcroft was referred to the bar for possible violations of Rule 3.6, which governs trial publicity, for prejudicial comments made during a press conference on John Walker Lindh, the "American Taliban."[297] Recently, the head of the U.S. Chapter of Amnesty International "called on state bar associations to investigate administration lawyers who helped prepare [the torture memoranda] for breach of their professional and ethical responsibilities."[298]

Others may argue that "imposing moral engagement under threat of discipline eviscerates the power of the endeavor by making it an externally oriented task to be completed, rather than an internally directed, ongoing exploration."[299] Maybe so. But setting moral engagement as an aspirational standard for lawyers, like we do for *pro bono* work, does not provide powerful enough notice and a forceful enough statement of the profession's expectations. A rule like the one proposed herein would provide a significant advance from the current void.

CONCLUSION

The agency approach and the public interest approach are both valid models of government lawyers' ethics. However, the agency approach is better suited to the advocate or litigator, and the public interest approach is better suited to the advisor. This is especially true when opining on morally perilous questions. Chief Justice Warren's elegant axiom re-

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296. Infoplease.com, William Jefferson Clinton, http://www.infoplease.com/ipa/A0760626.html (last visited Sept. 19, 2005).

297. Christopher Brauchli, Commentary, *Ashcroft Has Trouble With Lawyerly Ethics*, BOULDER DAILY CAMERA, Apr. 5, 2003, at 7A. This article is not the only one to suggest serious ethical lapses by the Justice Department in the name of fighting terrorism. *See, e.g.*, D. Mark Jackson, *Has Attorney General John Ashcroft, in Alleged Terrorism Cases, Violated Government Ethics Rules Governing Prosecutors' Comments About the Accused?*, FINDLAW, Jan. 30, 2003, http://writ.news.findlaw.com/commentary/20030130_jackson.html (arguing that Attorney General Ashcroft crossed ethical lines by issuing provocative and inflammatory statements, which have a substantial likelihood of prejudicing the accused, in frequent press conferences about enemy combatants); *see also* Elaine Cassel, *A Recent Judicial Reprimand of Attorney General Ashcroft Exposes a Pattern of Gag Order and Ethics Violations by His Office*, FINDLAW, Apr. 30, 2003, http://writ.corporate.findlaw.com/cassel/20030430.html (explaining that Ashcroft was reprimanded by U.S. District Judge Gerald Rosen for speaking to the media after the judge had issued a gag order and commenting that this was not the first time Ashcroft had made inappropriate public comments).

298. Jim Lobe, *Give Rumsfeld the Pinochet Treatment, Says U.S. Amnesty Chief*, INTER PRESS SERVICE NEWS AGENCY, May 25, 2005, *available at* http://www.ipsnews.net/interna.asp?idnews=28823.

299. Vischer, *supra* note 39, at 47.

garding "the evolving standards of decency"[300] that inform the Eighth Amendment is helpful in determining what constitutes a morally perilous question—for example, torture. Recommendations on moral questions by a government advisor must subordinate the interests of the client agency to those of the public. Finally, the Model Rules should adopt a provision governing the special responsibilities of government lawyers acting in an advisory capacity so that moral consideration will be required and not optional, and carry consequences, not excuses.

300. Trop v. Dulles, 356 U.S. 86, 101 (1958).