

ESSAY

FEAR, LEGAL INDETERMINACY AND THE AMERICAN LAWYERING CULTURE

by
*Michael Hatfield**

On August 1, 2002, then Assistant Attorney General Jay S. Bybee signed for President Bush a memorandum of law concluding that some torture was not necessarily illegal if the President ordered it. This Essay examines how Bybee could arrive at a conclusion that is fundamentally at odds with both our national moral spirit and our law. In doing so, it cautions American lawyers to recognize the difference between what is “legal” and what is “arguably legal,” and to be aware of their own extra-legal biases when interpreting the law.

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18 U.S.C. Section 2340A, Torture.

(a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned

* Associate Professor of Law, Texas Tech University School of Law. For their comments, I would like to thank Jonathan Boyarin, the Robert M. Beren Distinguished Professor of Modern Jewish Studies, University of Kansas; Associate Professor of Law John T. Parry, Lewis & Clark Law School; William R. Casto, the Alvin R. Allison Professor of Law, Texas Tech University School of Law and Calvin Lewis, Associate Professor of Law, Texas Tech University School of Law. The opinions and errors are mine.

for any term of years or for life.

(b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—(1) the alleged offender is a national of the United States; or(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

I. VOICE: THE POWER OF LAWYERS

Despite our usual talk about what the law *says* on some subject, the law does not *say* anything. It is mute. It is lawyers who do the saying on behalf of the law. It is in legal *advice* that the law comes to life, or doesn't, as the case may be.

In understanding how torture of enemy prisoners came to be, at least for a brief period of recent history, not a covert, plausibly deniable American interrogation technique, but an allegedly legal one, the important question is not about American law. The important question is about the lawyer who failed to voice the law when asked. How is it that on August 1, 2002, then Assistant Attorney General Jay S. Bybee signed¹ for President Bush's guidance a (now infamous) memorandum of law concluding that torture was not illegal—at least not always—if the President ordered it?² What went wrong with the lawyer, who was supposed to give voice to the law's prohibitions? The pivotal issues are not about American laws but American lawyers.

What follows is a cautionary tale for lawyers, not a legal critique. It is in response to the sentiment recently expressed by one scholar that the Torture

¹ Although Jay S. Bybee signed the memorandum, others were involved in drafting it. John Choon Yoo was substantially involved in the drafting of the memorandum. The addressee of the memo was Alberto Gonzales, who presumably had reviewed prior drafts and did not return the memorandum for further revisions or refining. After the memorandum was written, Bybee was appointed by the President to the U.S. Court of Appeals for the Ninth Circuit (the Senate confirmed him to this lifetime appointment within two months, though the memorandum was apparently unknown to members of the Senate at the time). Mr. Gonzales was appointed by the President to become the Attorney General of the United States. Professor Yoo returned to his position as a member of the faculty at Boalt Hall School of Law, University of California, Berkeley, from where he continues to assert almost universally condemned legal interpretations (supporting assassinations, for example) and continues to hear calls for his professional discipline for doing so. See, e.g., Paul M. Barrett, *A Young Lawyer Helps Chart Shift In Foreign Policy*, WALL ST. J., Sept. 12, 2005, at A1; Dana Priest et al., *Justice Department Memo Says Torture "May Be Justified"*, WASH. POST, June 13, 2004, at A3. However, since Bybee was the official author of the memorandum, he will be referenced as the author.

² Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter *Torture Memo*], available at <http://files.findlaw.com.news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>.

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Memo “shook my faith in the integrity of the community of American jurists.”³ I believe that those of us shaken and repulsed by Bybee’s legal conclusions should pause long enough to see a bit of ourselves at work in his lawyering. We should admit that we perceive legal analysis not as a system of reasoning closed to our own extra-legal judgments as to right or wrong, but as a system that begins with our own personal judgments and ends with legal ones. While the benefit of this approach to legal reasoning includes being free from the dead hands who wrote the law without appreciating the living situations in which it would need to be applied, one of the costs is we forget that there are reasons laws are written as they are. While the law’s purpose may be to serve humanity rather than humanity’s purposes being to serve the law, as lawyers we must bear in mind that law serves us best when we presume its wisdom rather than our own.

To explore these issues, this Essay assumes that, as a moral matter, we ought not to torture and that there is a determinative consensus among American lawyers that torture is illegal.⁴ This Essay explores how it is a particular lawyer, Bybee, could arrive at a conclusion fundamentally at odds with both our national moral spirit and our law. This is not about legal analysis but about the legal analyzer. Rather than dismissing Bybee as a political hack or dishonest lawyer, we can learn much about how we all think, both as humans responding to threats of violence and insecurity and as lawyers educated and operating in a professional mindset that does not presume the law’s wisdom.

II. THE TORTURE MEMO⁵

In response to a Central Intelligence Agency request for legal advice regarding standards of conduct for interrogation,⁶ Bybee, as a member of the Office of Legal Counsel (OLC) to the President, signed a memorandum of law.⁷ As a legal matter, the purposes of an OLC memo are to advise the

³ Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005).

⁴ See *infra* notes 14–20.

⁵ For a convenient summation of the memorandum’s history, purpose and contents, see Marisa Lopez, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005). See also Richard B. Bidler & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689 (2004); David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL’Y 449 (2005).

⁶ See Priest, *supra* note 1.

⁷ The Assistant Attorney General in charge of the Office of Legal Counsel assists the Attorney General in his function as legal advisor to the President and all the executive branch agencies. The OLC drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the executive branch, and offices within the Department of Justice. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement. The OLC also is responsible for providing legal advice to the executive branch on all constitutional questions and reviews pending legislation for constitutionality. All executive orders and proclamations proposed to be issued by the President are reviewed by the OLC for form and legality, as are

President as to the state of the law and to serve as a legal interpretation binding on the Executive Branch of the Federal Government.⁸ Thus, until the Torture Memo was withdrawn two years later,⁹ it was legally binding on the Executive Branch. The memo reasoned as follows:

18 U.S.C. section 2340A does not prohibit as “torture” merely cruel and inhuman interrogation techniques, but only those interrogation techniques that inflict pain akin in severity to death or organ failure.¹⁰ But if we are wrong, to the extent 18 U.S.C. Section 2340A prohibits interrogation techniques the President approved, the law would violate the American Constitution. This is because it is inherent in the Presidential office to determine what interrogation techniques shall be used, and neither Congress nor the Supreme Court has a greater power than the President on the subject.¹¹ However, if the President’s commands were found subject to 18 U.S.C. Section 2340A without violating the Constitution, then, nevertheless, the President’s endorsement of such interrogation techniques could still be justified as a matter of necessity and self-defense, being the moral choice of a lesser evil: harming an individual enemy combatant in order to prevent further Al Qaeda attacks upon the United States.¹²

Whereas moral philosophers must isolate the single governing principle to determine right and wrong, lawyers, of course, are free to assemble a jumble of principles and back-up arguments. And this is what Bybee did. He cited seven *different* dictionaries¹³ to split-out an allegedly legal distinction between *merely*

various other matters that require the President’s formal approval. In addition to serving as, in effect, outside counsel for the other agencies of the executive branch, the OLC also functions as general counsel for the Department of Justice itself. It reviews all proposed orders of the Attorney General and all regulations requiring the Attorney General’s approval. It also performs a variety of special assignments referred by the Attorney General or the Deputy Attorney General. U.S. Dep’t of Justice Office of Legal Counsel, About OLC, <http://www.usdoj.gov/olc/> (last visited Feb. 2, 2006).

⁸ For a discussion, see Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000). See also William R. Casto, *Executive Advisory Opinions and the Practice of Judicial Deference in Foreign Affairs Cases*, 37 GEO. WASH. INT’L L. REV. 501 (2005).

⁹ On December 30, 2004, the OLC issued a memorandum to replace the Bybee Torture Memo. In the Replacement Memo, the OLC defined torture more broadly than it did in the Bybee Torture Memo and concluded that it was unnecessary to address issues of presidential powers because the President had unequivocally stated that the United States would not participate in torture. See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., (Dec. 30, 2004) [hereinafter Replacement Memo], available at <http://www.usdoj.gov/olc/dahmemodagmemo.pdf>.

¹⁰ Torture Memo, *supra* note 2, at 1–13, 46.

¹¹ *Id.* at 1–2, 33–39, 46.

¹² *Id.*

¹³ In eight pages of the Torture Memo Bybee cites WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1935); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992); IX THE OXFORD ENGLISH DICTIONARY (1978); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1988); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1986) (note this is the 1986 edition rather than the 1988 edition); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1999); and BLACK’S LAW DICTIONARY (7th ed. 1999). Torture Memo, *supra* note 2, at 5–13.

cruel and inhuman interrogation practices (those that did not feel like death or organ failure) and *extremely* cruel and inhuman practices (those that did). It is only the latter, Bybee concludes, that is prohibited “torture.”¹⁴ He constructed an aggressive constitutional argument that the President is not subject to the law only by failing to mention any reasoning, law or history to the contrary.¹⁵ Finally, he rested his legal argument upon a claim to the moral high ground: since it would be morally necessary to harm an individual enemy combatant in order to prevent further Al Qaeda attacks upon the United States, it must be legal.¹⁶

The OLC later disclaimed the memo,¹⁷ and the legal profession’s response to it has been an exceptionally deep and widespread expression of dismay.¹⁸

¹⁴ For a criticism of Bybee’s attempts to narrow the definition of “torture” in order to expand its use, see Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9, 23–30 (2005).

¹⁵ For criticism of the Torture Memo’s evasion of any counter-arguments on this point, see, e.g. Bilder & Vagts, *supra* note 5; Casto, *supra* note 8, at 503–05. See also Memorandum from Thomas J. Romig, Major Gen., U.S. Army, Judge Advocate Gen., to Gen. Counsel, Dep’t of the Air Force, Draft Report and Recommendations of the Working Group to Access Legal, Policy and Operational Issues Related to Interrogations of Detainees Held by the U.S. Armed Forces in the War on Terrorism, 151 CONG. REC. S8794 (daily ed. July 25, 2005).

¹⁶ For a criticism of the moral necessity argument in the Torture Memo, see Kimberly Kessler Ferzan, *Torture, Necessity and the Union of Law & Philosophy*, 36 RUTGERS L. J. 183 (2004).

¹⁷ See Replacement Memo, *supra* note 9. Additionally, in December 2004, in response to the concerns raised by the Torture Memo, nineteen former lawyers of the OLC drafted guidelines for memoranda. *Principles to Guide the Office of Legal Counsel*, 81 IND. L.J. 1345 (forthcoming Fall 2006). These guidelines are to be published as part of a symposium issue of the Indiana Law Journal, *War, Terrorism and Torture: Limits on Presidential Power in the 21st Century*. The American Constitution Society sponsored the symposium along with Indiana University School of Law at Bloomington.

¹⁸ See, e.g., W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005). Calling it a legal analysis of which no one “could be proud,” on page 68, Wendel cites several sources identifying not only ethical lapses but blatant incompetence in the preparation of the memo, such as: a statement by Harold Hongju Koh, Dean, Yale Law School, that “in my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read,” quoted in *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005), available at <http://www.access.gpo.gov/congress/senate/senate14ch109.html>; Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department’s Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3 (criticizing “stunning legal contortions” in the memo); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (quoting Cass Sunstein’s opinion that the legal analysis in the memos was “very low level, . . . very weak, embarrassingly weak, just short of reckless”); Ruth Wedgewood & R. James Woolsey, Op-Ed., *Law and Torture*, WALL ST. J., June 28, 2004, at A10 (concluding that the memos “bend and twist to avoid any legal restrictions” on torture and ignore or misapply governing law). For an exceptionally strong reaction by an international law scholar and former military lawyer, see Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811 (2005) (“Not since the Nazi era have so many

Many have argued that Bybee is subject to professional discipline for failing to accurately advise the President as to the true state of the law.¹⁹ Perhaps with only limited hyperbole, David B. Rivkin, Jr., a White House lawyer during the Reagan administration, claimed that “if you line up 1,000 law professors, only six or seven would sign up to [the Torture Memo’s viewpoint].”²⁰

III. WHY?

Why would an otherwise professionally competent lawyer like Bybee prepare a memo so fundamentally at odds with both the prevailing moral and legal consensus? Dismissing bad faith or other *ad hominem* theories, and adopting a measured sympathy with his situation at the time, one explanation is that he succumbed to the distortions in moral reasoning that tempt each of us as a human when we face a fearful moral choice.

John Howard Yoder, the late theologian at The University of Notre Dame,²¹ identified four ways in which moral consideration of imminent violence distorts our reasoning: unmitigated individualism, naïve determinism, a belief that we have complete knowledge (omniscience) and a belief that we have complete control (omnipotence).

Unmitigated Individualism.²² Fear distorts our reasoning towards an unmitigated individualism. Fear convinces us that the relevant decisions to be made and the consequences that follow are exclusively personal

lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.”). For an introduction to these issues, see Bilder & Vagts, *supra* note 5.

¹⁹ See Richard L. Abel et al., Lawyers’ Statement on Bush Administration’s Torture Memos, available at <http://www.afj.org/spotlight/0804statement.pdf> (last visited Feb. 2, 2006). See also Bilder & Vagts, *supra* note 5; Lopez, *supra* note 5.

²⁰ R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, WASH. POST., July 4, 2004, at A12. Even among the hyperbolically alleged “six or seven” defenders, there is little defense for the Torture Memo *per se* but rather a defense either of Bybee’s role in writing the memo as a “legal technician” who was not obligated to be influenced by moral or other considerations. See Eric Posner & Adrian Vermeule, *A ‘Torture’ Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22. For a theoretical defense of torture in specific situations, see, e.g., Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581 (2005); Sanford Levinson, *“Precommitment” And “Postcommitment”: The Ban On Torture In The Wake of September 11*, 81 TEX. L. REV. 2013 (2003). Or for a general condemnation of torture as illegal combined with justification of the moral necessity defense for individual torturers in certain situations, see John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743 (2002); John T. Parry, *What Is Torture, Are We Doing It, and What if We Are?* 64 U. PITT. L. REV. 237 (2003). Alan Dershowitz is the most widely-known defender of torture in certain situations, though his defenses are not defenses of the Torture Memo. See, e.g., Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan 22, 2002, at A19.

²¹ Peter Steinfels, *John H. Yoder, Theologian At Notre Dame, Is Dead at 70*, N.Y. TIMES, Jan. 17, 1998, at A17. Professor Yoder was world famous for his work in ethics, peace studies and theology. His New York Times obituary is available at http://www.nd.edu/~theo/research/jhy_2/writings/NYTobit.html (last visited Feb. 2, 2006).

²² JOHN HOWARD YODER, *WHAT WOULD YOU DO?* 16, 17–20 (expanded ed. 1992).

matters. What matters when we are afraid is only what happens to *me*, *my* wife, *my* husband, *my* child, *mine*. Of course, this ignores the social, religious and institutional contexts in which we live, denying that there is any relevance or value to someone or anything other than *me* and *mine*. It implies that we, as individuals, rather than other individuals or our social and religious institutions are morally qualified to settle the matter because the matter is *ours*.

Naïve Determinism.²³ Another distorting effect of fear on moral reasoning is that it over-simplifies our understanding of causation, probabilities and possibilities. In a fearful situation, we come to believe that there are two pre-programmed tracks on which events can go and that our role is simply to choose which of two tracks to send the events down. This is a distortion of reality in that it denies that anyone else has any determinative effect in the outcome, exaggerating our role as personal decision maker into the role of exclusive decision maker. In fact, of course, in any situation, all of the parties involved are making interlocking and contradictory decisions about how to act, each impinging on the other, each acting at the same time, changing the situation by their actions. Situations are never static, but fear makes them seem so—and makes it seem as if there are only two outcomes from the situation with *our* choice (and no one else's) being the determining cause. Fear clouds our perception of the fluidity and dynamics of a situation, and inhibits our ability to see creative alternatives. Fear keeps us from observing any options other than fleeing or fighting.²⁴

Complete Control.²⁵ Fear convinces us that we can have sufficient control of a situation, if we are only willful enough to do it. Anyone with more than a televised acquaintance with reality, and especially how violence transpires in the physical world, knows, of course, that our *willingness* to control a situation rarely, if ever, translates into an *ability* to control it. Marital arts and quick draws restore order out of fearful situations in electronic popular culture, but are not the usual means in reality. Failure to be successful in our attempt to control a frightening situation is a serious possibility, and a serious moral concern rarely weighed when we are afraid. So serious is it in the Roman Catholic moral tradition, the probability of success in a war is one of the elements necessary for its moral justification.²⁶ Of all we might allege, that we will defeat the bad guys in the world if we are simply willing to do it must be among the most empirically baseless.

²³ *Id.* at 12–13, 17–10.

²⁴ Yoder catalogs a variety of examples in which creative alternatives (that is, those other than fleeing or fighting) have been used to escape violent threats. *See id.* at 27–29, 32–36. Non-resistant Christians have a history of cataloging anecdotal instances of “third way” non-resistant responses to violent threats.

²⁵ *Id.* at 13–15, 17–20.

²⁶ *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, PASTORAL LETTER, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (1983), *available at* <http://www.osjspm.org/cst/cp.htm>.

Complete Knowledge.²⁷ Finally, but perhaps most influential only next to the belief that we can control any situation if we are willful enough, is the belief fear gives us that we have all the relevant knowledge to make a decision. Not only does fear make us into naïve determinists that events will unfold in one of two inevitable ways based upon our personal decision (and nothing else), fear convinces us that we know what the unfolding of those events will be ahead of time. Social situations are far more complex, and, we all know, life rarely turns out the way we predict. However, when afraid, we convince ourselves that we can predict exactly what will happen next as a result of what we choose to do now. We come to believe we have complete and certain knowledge.

The effects of fear on our moral reasoning are to convince us that we are omnipotent, omniscient and of greater value than anyone or anything else. Fear convinces us that our willingness to ignore our inabilities, our uncertainties, our limitations, our humanity and everyone and everything else is what will preserve us. In other words, if we let it, fear will overcome every moral, religious and civic impulse we claim to cherish when we are not afraid.

IV. BYBEE'S FEARS AND THE TORTURE MEMO

That Bybee wrote his memo in a fearful time and place is undeniable. While today we (rightly) read the memo with the images of Abu Ghraib in our mind, the images cited by Bybee in his memo were that of the fallen Twin Towers, the punched Pentagon, and Osama Bin Laden, Al Qaeda, and the Taliban poised to destroy.²⁸ Even if we believe President Bush to be unwise or immoral in his choices of how to handle the threats to national security after September 11, we cannot deny that President Bush and every other American had good reason to be afraid.

Mindful of the fear of the time, we can see that the distortions of the reasoning in the Torture Memo approximate those Yoder would expect in many fearful person's moral reasoning.

Unmitigated Nationalism. The only measure of moral or causal relevance Bybee used in his memorandum was his perception of immediate American interests. The potential the memorandum had for having any effect on the billions of individuals who live outside of American borders went un-noted. Also un-noted was how the memorandum's conclusions compared with American moral, religious or civic institutions and histories. Everything Americans claim to cherish when we're not afraid—due process, presumption of innocence, humane treatment—was dropped in order to focus on a nationalized version of *me* and *mine*. Everything else was too abstract, and thus irrelevant.

Naïve Determinism. In a fearful situation, we come to believe that there are two pre-programmed tracks on which events can go and that our role is simply to choose which of two tracks to send the events down. The

²⁷ YODER, *supra* note 22, at 15–16.

²⁸ See, e.g., Torture Memo, *supra* note 2, at 31–33.

moral calculus that was the ultimate grounds of the memo presented two options: being attacked again by Al Qaeda or not being attacked. The sole causal distinction between the two was whether or not enemy combatants were tortured in order to secure information. There was no consideration that torture might consistently lead to more inaccurate information than accurate information, or that Al Qaeda might change its plans because it knew so-and-so had been captured and was subjected to torture. Bybee reduced all of the factual, legal and moral questions to one neat but naïve option: being attacked because we did not torture or being protected because we did.

Complete Control. Bybee concluded the problem was one that could be solved simply by our willingness to do something admittedly morally distasteful in order to avoid something worse being done to us. He exaggerated the degree of control Americans have, failing to consider unintended consequences, such as the effects of radicalizing Muslim men and women into violent fundamentalism; damaging international relations and world opinion; and the effects on those Americans who did the torturing, as well as the culture and self-image of the military. In short, Bybee's conviction was simple and blunt: all that was necessary to secure Americans was the willingness to be tough enough to torture.

Complete Knowledge. Bybee's analysis was premised on the assumption that Americans would know who had valuable information and who did not; what kind of torturous interrogation would deliver valuable information in an accurate way; and when the interrogation had failed or succeeded to do just that. The inconsistent assumption was that "America" had perfect knowledge of who knew what and how to get them to disclose it, even though we did not know what it was they knew.

Bybee's moral mistakes are rather common. In considering this issue, one colleague of mine thought he had isolated the moral issue I should consider by bluntly asking: what if you knew your daughter would be molested and killed unless you were willing to torture an accomplice who would provide you the information to stop it? The colleague was confident he had isolated—and resolved—the issue in his question. This way of framing the issues is an almost universal knee-jerk response to moral questions of violence.²⁹

The question, however, obscures the most relevant issues under the guise of isolating the issue of willingness as central: if you are but willing to inflict this violence, your daughter will be rescued. Assumed into the question is that I

²⁹ The use of such contrivances in legal literature is well-known and rightly criticized. See, e.g., Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 265 (2004) (criticizing Alan Dershowitz). Yoder characterized as uncanny how often this type of question was posed to conscientious objectors as a test of their sincerity when, in fact, it represents the world working in a way no one would ever dream it to work. Yoder, *supra* note 22, at 12–17. William Jennings Bryan reportedly attempted to test Leo Tolstoy's commitment to pacifism with a contrived hypothetical, to which Tolstoy replied that while in all of his seventy-five years he had never met the fantastic hypothetical brigand who would murder or molest a child before his eyes, whereas millions of men had killed and been killed in war. Bryan, Tolstoy said, "did not let me finish, laughed, and agreed that my argument was satisfactory." ERNEST J. SIMMONS, LEO TOLSTOY 623 (1946).

would have sufficient control over this accomplice and abductor and all third parties and everyone else involved to bend them to my will, if only my will to violence were sufficiently resolute. These assumptions are entirely inconsistent with any reasonable assessment of how reality works.

Yet, this type of unreflective response to the threat of violence is how torture is always justified.³⁰ Throughout the Torture Memo, Bybee's apparently sincere though mistaken belief that torturing prisoners would increase rather than decrease American security determined the reasoning. It certainly wasn't the law that did. Fearful of the results of concluding the law demanded otherwise, he concluded it permitted torture when it clearly did not.

In his defense, perhaps we can say his situation was nearly *sui generis*. Who among us mere mortal lawyers, after all, has ever been called to give a legal opinion on such a matter? Most lawyers' legal opinions for clients are limited to real estate sales, taxes, divorces, probate, and, perhaps, whether to plea bargain or go to trial against the prosecutor. There are fearful clients in all those situations, but nothing that compares to Bybee's situation: deciding an issue of national security with fresh memories of September 11 and the knowledge that Osama Bin Laden was still free.

While only a few American lawyers can claim to have ever lawyered the type of situation in which Bybee found himself, what is notable is that those lawyers most experienced in this type of situation quickly and loudly came down on the other side. Whereas Bybee had no experience with these types of issues, the American military lawyers did. Military lawyers have been actively campaigning against torturing prisoners. Though ignored by the civilian leaders and civilian lawyers in the Pentagon and the Bush Administration, these military lawyers have prepared legal memoranda against torture, testified before Congress against torture, and otherwise attempted to publicize their concerns that torture does not increase American security but rather decreases it.³¹ Five of these lawyers have been honored with Medals of Liberty by the American Civil Liberties Union.³²

In July, 2005 Senator Lindsey Graham, himself a reservist Air Force Judge Advocate General (JAG) corps lawyer, read six declassified memos into the Congressional Record. The memos had been written in 2003 by JAG corps lawyers from every branch of the military in response to the OLC Torture Memo and related memoranda.³³ These military lawyers criticized torturous interrogation techniques as criminal,³⁴ inconsistent with how U.S. forces had

³⁰ The response has even been given an appearance of scientific certitude with a formula intended to "map" the "strength of the case in favor of torture." See Bagaric & Clarke, *supra* note 20, at 613.

³¹ Many of these activities are reflected in 151 CONG. REC. S8772-S8803 (daily ed. July 25, 2005) and generally described in the popular press. See Lisa Hajjar, *An Army of Lawyers*, THE NATION, Dec. 26, 2005, <http://www.thenation.com/doc/20051226/hajjar>; Josh White, *Pentagon Studies Raising Military Lawyers' Rank*, WASH. POST, Dec. 21, 2005, at A29.

³² Hajjar, *supra* note 31.

³³ *Id.*

³⁴ 151 CONG. REC. S8772, S8796 (daily ed. July 25, 2005).

been trained since Vietnam;³⁵ inconsistent with how U.S. forces had operated in recent history;³⁶ inconsistent with the “legal and moral ‘high-road,’”³⁷ risking adverse impact on American interests worldwide;³⁸ subjecting the U.S. to international criticism that the “U.S. is a law unto itself;”³⁹ putting service personnel at far greater risks than they had been,⁴⁰ risking lowering the culture and self-image of the U.S. forces;⁴¹ and would likely be a disaster if the information became public in terms of international and domestic support for the war on terrorism, as well as the public perception of the U.S. military.⁴² Senator Graham summarized these memoranda:

[Y]ou have to understand . . . what the law actually says. The DOJ’s interpretation of the torture statute *from a lawyer’s point of view* was absurd. And the JAGs were telling the policymakers: If you go down this road, you are going to get your own people in trouble. You are on a slippery slope. You are going to lose the moral high ground And they were absolutely right. (emphasis added).⁴³

While Bybee’s fears distorted his moral reasoning in the Torture Memo, it is clear that not all lawyers put into the same situation of advising (or trying to advise) the President have succumbed to the same temptations Bybee did. The military lawyers deferred to the law as an accumulation of hard-won institutional wisdom. They believed the law against torture to be a reality-based warning to keep us from being doomed to learn the same lessons (usually referred to as “those from Vietnam”) again and again.⁴⁴ Bybee apparently did not. Instead, he voiced his own calculation of what should be done rather than the laws’ demands of what should not be done, which did doom the world to learn lessons “we” have already learned: increasing barbarism decreases security.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at S8795.

³⁸ *Id.* at S8794.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at S8797.

⁴⁴ Although “Vietnam” may be foremost in the American awareness of why violence must be limited even in times of war, it was after World War II that the nations of the world began codifying the obligations between combatants they believed civilization required. The drafters of these obligations—the Geneva Conventions—were individuals who knew about terrorism and terrorist tactics, as guerilla warfare, reprisals against civilians, terrorism and sabotage were endemic in World War II. For a discussion of the Geneva Conventions (which some have recently declared “obsolete,” having failed to remember that World War II was the worst conflict thus far in human history), see Gottlieb, *supra* note 5, at 450.

V. LEGAL INDETERMINACY AND THE AMERICAN LAWYERING
CULTURE

Bybee did not respect the law as an external stop on his personal instinct of what was best to be done. However, to criticize Bybee for incorporating his extra-legal moral calculations into this legal analysis is not to suggest that there is no place where moral and legal reasoning come together. Rather, it is to point out that the conclusions of the Torture Memo could only be sustained if one ignores that the moral and legal reasoning on torture dovetail in the statute itself. In this instance, even if not in others, the hard-earned practical wisdom and the historical moral consensus were preserved—not threatened—in the words he was asked to read for his client, the President. This situation was the inverse of one in which a lawyer may be morally bound to inform his client that mere reliance on the letter of the law is not advisable because it is so at odds with the moral spirit. Instead, when presented with the letter of the law reflecting the moral spirit, Bybee ignored both to report to the President not what was legal but what was *arguably legal*.⁴⁵

But perhaps the distinction between what is *legal* and what is merely *arguably legal* is too quaint for American lawyers these days. After the 20th century's realist-turn in legal scholarship,⁴⁶ most legal scholars argue as to the degree but agree on the fact that law is, in some sense or another, at one time or at all times, indeterminate—insufficient on its own terms to generate one unique legal conclusion over another.⁴⁷ Some limit indeterminacy to appellate cases, noting that in those cases there are, by definition, two equally reasonable interpretations of the law but only one will win.⁴⁸ Others extend that observation with the claim that the one that wins out does so by a judge's bias,

⁴⁵ I owe this concisely complex term to William R. Casto. Casto, *supra* note 8, at 501–02.

⁴⁶ Professional philosophers devote their careers to debating the existence of schools of thought such as realism; what those schools taught; who was or was not a member; and what their influence was. Rather than engaging such a project for this Essay, I have deferred to the philosophical experts chosen to address these issues in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* (Martin P. Golding & William A. Edmundson eds., 2005). At best, these conclusions as to the influence of these schools of thoughts are true; at the very least, the generalizations are reasonable assessments under the standards of professional philosophers, which are standards neither I nor most of the Essay's readers could aspire to meet on these specific topics.

⁴⁷ The American legal realism movement was the most influential 20th century development in American jurisprudence, but it impacted American legal education and scholarship even more profoundly than formal jurisprudence itself. The realist emphasis on legal indeterminacy pushed legal education and scholarship into accepting the role of non-legal forces in judicial decisions with the result that lawyers, law professors, law students, and even courts now openly discuss “policy” issues as legal ones. So pervasive has been the revolution, that many today might not realize how radical it really is in historical terms. Indeed, most legal scholars today follow a realist agenda (e.g., empirical research) without feeling the need to self-identify as “realists.” Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 59–65 (Martin P. Golding & William A. Edmundson eds., 2005).

⁴⁸ This is the root claim of classical Realism. *Id.* at 51–53.

education or personal history and quirks.⁴⁹ Others claim the indeterminacy is much deeper than appellate cases, and not as obvious as the role of human bias but as a result of something deep within language itself.⁵⁰ Whatever the source of indeterminacy, there are arguments that the choices that do or should actually determine the decisions come from race, politics, class, economics, or business custom.⁵¹ Whatever the degrees, origins and limits of indeterminacy, the shared agreement is that the law itself is somehow insufficient to generate all the legal conclusions needed.⁵²

While law professors and other scholars might appreciate the subtleties of the various approaches and consequences of legal indeterminism, what appears un-studied is how the classroom discussion of indeterminacy affects those who are being educated in *the vocation of lawyering*. How has the 20th century's emphasis on indeterminacy and the turn of legal scholarship away from the study of doctrine to the various inter-disciplinary "law and" social science approaches affected law students who are training to be lawyers and not philosophers or economists or sociologists? It may be taken by neophyte lawyers as good reason—and reason with an academic imprint—to view the role of a lawyer simply as that of a hired gun.⁵³ While non-lawyers have always expressed concern about the ethics of being a lawyer, in the 20th century the guardians of the legal profession themselves came to embrace a deep skepticism in the value of the *doctrines* of law as sufficient to the profession.⁵⁴

⁴⁹ There are differing theories as how best to explain how legal decisions are made, assuming they are not made exclusively with reference to legal doctrines. *Id.* at 54–56.

⁵⁰ Some Critical Legal Studies theorists argue indeterminacy is rooted in language. *Id.* at 62.

⁵¹ These differing responses to indeterminacy can be justified in the moderate terms of Realism itself or in the more radical terms of Critical Legal Studies or those of the law and economics movement. *See id.*; Lewis A. Kornhauser, *Economic Rationality in the Analysis of Legal Rules and Institutions*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 67 (Martin P. Golding & William A. Edmundson eds., 2005); Mark V. Tushnet, *Critical Legal Theory*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 80 (Martin P. Golding & William A. Edmundson eds., 2005).

⁵² Subsequent to the development of American legal realism much of the disputes between legal theorists can be understood in terms of the nature and degree of indeterminacy. The Critical Legal Studies theorists probably exaggerated the nature and role of indeterminacy, while anti-realists such as H.L.A. Hart (who did more than anyone else to limit the movement's progress among theorists) conceded indeterminacy but argued it was a marginal phenomenon. Nevertheless, taking indeterminacy seriously (or even admitting its existence) is the enduring legacy of the realists. Leiter, *supra* note 47, at 61–65. Of course, more classical legal theorists remain in opposition. *See, e.g.*, Mark C. Murphy, *Natural Law Theory*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 15 (Martin P. Golding & William A. Edmundson eds., 2005).

⁵³ The students might not be too far astray in their assessment. Legal realist Karl Llewellyn's advice to lawyers was to use facts to persuade the judge your case is sound and then to provide a technical ladder so that the judge can reach the result, while legal realist Jerome Frank endorsed the view that lawyers ought to make the judge want to decide the case in their favor and then, and only then, to cite precedents to justify the judge's determination. Leiter, *supra* note 47, at 53.

⁵⁴ It is one phenomenon for a religion's critics to charge its adherents with rampant hypocrisy, but another for its chief clerics to publicly announce it to be fundamentally

If a law student absorbs from one professor the idea that the law is a tool of the economically privileged; from another the idea that the law is a series of arbitrary choices between reasonable alternatives; from another that the law must be interpreted with reference to economics or business custom; and from another that the law is inherently this or that or the other, it is quite understandable for the student to conclude that there is no difference between what is *legal* and what is *arguably legal*, and it is the lawyer's job to make sure.

As lawyers, we cannot simply pretend that we have not noticed the insufficiency of the doctrines of the law in understanding the law as a subject. But we cannot be the eternal sophomore, who having just discovered the humanity of social institutions—whether it is that human hands have written our religious texts or that our laws did not drop ready-made from the sky—concludes that our social institutions are arbitrary. The dual insight of the mature lawyer is that the law is human, and as such, necessarily frail and fallible—but not necessarily arbitrary.

The JAG corps lawyers involved in criticizing the Torture Memo had that dual insight. They understood the laws against torture as institutionalized historical wisdom warning future generations away from the mistakes of past ones. Perhaps they have it because many of them, if not all of them, had lived through those past mistakes, so casually referred to throughout their memoranda simply with references to Vietnam.

Bybee did not see the law's prohibition against torture as a warning away from torture, but rather as a requirement that he articulate what he thought his client wanted in language that kept it from being the prohibited "torture."⁵⁵ The President was given the power to give the law its meaning, rather than being told what it was the law meant. While a curious approach to the law for someone who claims to be an originalist,⁵⁶ it is not one any American lawyer could pretend to be shocked by. After all, he gave his client what he apparently thought his client wanted: a green light.

baseless (and yet another for them to announce it to be fundamentally baseless but still insist on their tithes and vestments). What has occurred in legal education during the 20th century is analogous to the latter two.

⁵⁵ There is no evidence that Bybee was expressly instructed to conclude certain techniques would not be considered "torture," but it seems reasonable to infer he at least thought these conclusions would be viewed favorably. Alberto R. Gonzales explained the standing orders from the President on the subject with an ambiguously-phrased directive he attributed directly to the President: "*Make sure it is lawful*. Make sure it meets all of our obligations under the Constitution, U.S. federal statutes and applicable treaties." Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3, available at <http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html> (emphasis added). The ambiguity is with the "make sure" command. Did it mean (a) constructing a legal analysis that concluded certain identified actions would be considered legal or (b) identifying certain actions as legal and others as illegal in order to ensure that only the former were taken?

⁵⁶ See JUDICIAL REVIEW PROJECT, STANFORD LAW SCHOOL, REPORT ON JAY S. BYBEE (Feb. 2, 2003), available at <http://judicialreview.stanford.edu/Reports/bybee.pdf>.

VI. WHAT CAN WE EXPECT OF AMERICAN LAWYERS?

If we, as lawyers, are honest with ourselves, would we expect other American lawyers to do what Bybee did? Probably. If he or she believes the President should be given what the President wants, I do not think most American lawyers working for a President would think twice about getting that done. It might take several all-nighters, various treatises and multiple binders of legislative histories, but, I suspect, most American lawyers would do the same. While we may abhor the substance of his conclusions, privately at least, we must admit his process was the same as any other American lawyer's.

In Bybee's situation, we can reasonably infer that there were two powerful forces at work to motivate him to focus on the arguably legal rather than the certainly legal. One was this idea of working as a hired gun to do the client's bidding, which I suspect—but cannot prove—is the practical consequence many law students draw from vocational education in an academic environment that not only admits but is fascinated with legal indeterminacy.⁵⁷ This provides the intellectual space in the "legal" argument for supplementing the law with substantial extra-legal considerations in arriving at a conclusion as to what the law requires.

The second force was giving into the common distortions in moral reasoning that often afflict us when we are scared of violence. This provides the lawyer's motivation to fill that open intellectual space in the argument provided by indeterminacy, and to fill it with the confidence that she knows what needs to be done and how to make it happen, ignoring her own inabilities, uncertainties, limitations and obligations to anyone or anything other than her client's objective. Whether or not lawyers are more inclined to ethical lapses when their clients are in dangerous or highly fearful situations—or when the lawyer has an empathetic sense of the client's fear—has apparently not been systematically studied. But it certainly seems likely.⁵⁸

One type of fear that Bybee did not have to face was the fear of "getting caught." Perhaps the greatest approximation of ethical behavior we have among American lawyers is their fear of clients losing because the lawyer's advice proves inadequate, and then those clients suing them for malpractice. Although academic legal indeterminacy may have helped convince generations of practicing lawyers that being a hired gun is intellectually honest, all of them know what they are being hired to do: to win. That keeps the legal advice from ever being excessively aggressive or idiosyncratic, even when the lawyer has an empathetic fear for the client. After all, even the family lawyer wanting to protect a battered spouse from further abuse would think twice about falsifying

⁵⁷ Perhaps legal indeterminacy is simply more interesting to most law professors than discussions of consideration in contracts, negligence in torts, capacity in wills, or income for tax purposes.

⁵⁸ Since clients only seek lawyers when they have some fear of loss (of money, business or freedom), the effect of fear in lawyers' ethics ought to be studied (as well as whether or not working in a pervasive context of fear has a significant part in lawyers' self-reported low quality of life and high risks of alcoholism and depression).

an affidavit, since it simply might not work to get the job done. Thus, in the world of lawyering, the motive to embrace mere willingness to win regardless of the law's demands is kept in check by the risk of failure.

When giving legal advice to the President, there is not the usual kind of counter-balancing fear of getting caught in a failure. By "usual kind," I mean the chance of being sued for malpractice, which doesn't affect government lawyers.⁵⁹ I also mean the special role government lawyers have in advising the government. It's a circular dynamic: the government's interpretation of the law becomes the de facto law for some practical purposes.⁶⁰ Government lawyers are subject to additional ethical rules to push them to focus on what is legal rather than merely arguably legal for exactly this reason.⁶¹ It is these special ethical rules for government lawyers that Bybee perhaps violated, and why technically he might be subject to disbarment. The risk of "getting caught" the government lawyer avoids is replaced by a much more dangerous type of "getting caught," such as what happened at Abu Ghraib. It's a public risk, not a private one. It's also a risk Bybee deemed so low that he was willing to be what is, in hindsight, excessively aggressive and idiosyncratic in his legal analysis.

VII. WHAT CAN WE EXPECT OF AMERICANS?

Perhaps the empirical answer to what we can expect of American lawyers is the same as what we can expect of Americans. So long as there are American leaders willing to order, encourage or permit torture; Americans willing to carry it out; and couches full of TV and internet-addicted Americans who believe our will to violence is our will to security, there is no reason to believe that there are not American lawyers in proportion. The electronic information and entertainment culture strengthens the mistaken responses to reality that justifying torture requires. With physical social world experience being replaced by digitalized, isolated, smell-free, two-dimensional images over which Americans have instant and complete (remote) control, how can this not encourage feelings of complete control over reality? With TV and radio stations and web sites flooding Americans with data, information, opinions and political spin, how can this not encourage feelings of complete knowledge about reality? With endless cultural images of the good guys overcoming bad guys simply because they are tough enough to do it, how can this not encourage individualism and determinism among us? Once we believe we know everything we need to know, and that our willingness to defeat evil is

⁵⁹ Of course, government lawyers do run a risk of social and professional embarrassment for having their positions reversed upon review by courts. However, private sector lawyers have that same risk but also the risk of losing their retirement and their children's college education. Judge Bybee has been able to endure whatever level of embarrassment he has suffered with the security and the perspective of the federal bench.

⁶⁰ Because of this circular dynamic, the Torture Memo came to function as the virtual trigger for action that is usually reserved in our divided governmental system for judge's words, which are intended to be the only words of law that unleash the state's violence. Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1613-14 (1986).

⁶¹ See, e.g., Bilder & Vagts, *supra* note 5, at 693.

synonymous with our willingness to use violence, and we do not pause to ponder if we might be wrong, or if we might be ineffectual, or if we might not understand, then we are ready to torture. At that point, it's a mere syllogism to safety.

Perhaps the more determinative influence is the fact that Americans simply misunderstand violence, perhaps because most Americans live safely away from it. Americans notoriously over-estimate the prevalence of violence, mistaking these safest times in our history for the most violent.⁶² In their support for torture, they also over-estimate violence's effectiveness. The military lawyers know that violence must be the last resort not because it is so powerful or efficient but because it is unwieldy and unpredictable, including with respect to its effects on those who use it.⁶³ The military law's distinction between the naïve, crude and unmanageable violence of torture and the managed, channeled, and targeted violence of legitimate military operations is too refined for some Americans, all of whom no doubt are relatively safe from either kind.

A friend who served in the JAG corps earning a Bronze Star for his heroism during the Vietnam War told me of a disastrous dinner he had with a neighborhood friend after the Abu Ghraib abuses became public. Encouraged by the wine, the dinner date began to opine on the state of the world's affairs, bad-mouthing those terrorist-coddlers who did not understand that torture was simply a part of war. The decorated war veteran insisted that this was not true, that he had spent much of his war time career keeping these inhumane abuses from being considered a legitimate part of war. He tried to persuade her that torture made Americans less secure rather than more. She would have none of it. At this point, he suggested to her that if she were so committed, she should insist her son leave medical school to join the effort. This apparently made the conversation too personal, as she refused to continue it.

VIII. WHAT CAN WE LEARN?

George Santayana's claim that "[t]hose who cannot remember the past are condemned to repeat it"⁶⁴ is not quite right. The truth is messier. Some who know the lessons from history are doomed to suffer through them again because others refuse to learn. And some who refuse to learn are protected from the doom, while others who have yet had the chance to learn must suffer. The JAG corps lawyers' anxiety is because they have learned the lessons but are now (along with the rest of the world) doomed to suffer the consequences of ignorance yet again. Bybee seems quite likely to remain personally secure, but

⁶² See, e.g., JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME AND CRIMINAL JUSTICE (1997).

⁶³ The concern over how the use of torturous interrogation techniques might affect the self-image and culture of the U.S. military was expressed repeatedly by the various JAG Corps memoranda reported into the Congressional Record. See 151 CONG. REC. S8772-S8803 (daily ed. July 25, 2005).

⁶⁴ GEORGE SANTAYANA, THE LIFE OF REASON 82 (Charles Scribner's Sons 1954) (1905).

the world itself is less secure. Our children are doomed to learn through their experience of the increasing barbarity of the world what Bybee might have learned from simply reading the law: thou shall not torture.⁶⁵

But what are we, as lawyers to learn? We might generalize that there are situations in which “normal” lawyering is out of place. The type of lawyering Bybee employed in the Torture Memo—tightly defining significant terms to locate the spot on the continuum of possibilities where he wanted it—may be out of place in the government or with respect to certain activities, such as torture, domestic abuse and police brutality. Instead, we might ask ourselves, is there something wrong with “normal” lawyering—the kind of lawyering that envisions compliance with the law as a means to an end rather than an end in and of itself? If the distinction between “legal” and “arguably legal” is too quaint for lawyers in this post-modern era, the claim that there might be anything ultimate about the law—that the law might exist as an end unto itself—is likely more so.

What troubles most of us about the Torture Memo is that it does not treat the intentional infliction of private pain for public purposes as a violation of the inherently sacred. When the European Convention on Human Rights was proposed, Mr. F.S. Cocks, one of the United Kingdom’s delegates urging its acceptance argued, “I say that to take the straight beautiful bodies of men and women and to maim and mutilate them by torture is a crime against high heaven and the holy spirit of man. I say that it is a sin against the Holy Ghost for which there is no forgiveness.”⁶⁶ Far removed from any invocation of the Divine, the Torture Memo assumes there is a continuum of maiming and mutilating somewhere along which there is a line between “legal” and “illegal,” and the line is to be divined in the normal lawyering fashion, which presumes the law to be an obstacle for our navigation rather than a guide for our submission. Without this presumption, the Torture Memo could not have been written as it was—nor, we must admit, could most of the memoranda American lawyers write.

The law against torture is designed to deter torture when torture is most tempting, and it is most tempting when we fear for our safety and that of our families, friends and nation. It is to guide us to the right result even when we are pulled the other way by deep, human and powerful forces. But is the law against torture a special kind of law, or does it manifest the special-ness of law itself? Can we in an age of realist-saturated legal scholarship and a hired-gun self-perception among lawyers nurture among ourselves a deeper respect of the law? Perhaps the lesson is not only to remind us that increasing barbarism decreases security, but to force us to admit that we are not as shocked by Bybee’s lawyering as we may wish we were (or publicly pretend to be). Perhaps the lesson for lawyers is not to indulge in self-righteous condemnation

⁶⁵ 18 U.S.C. § 2340A (2000).

⁶⁶ Waldron, *supra* note 3, at 1710. Waldron’s article also includes an excellent discussion exploring the “sacredness” of the prohibition against torture without resorting to religious principles.

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of Bybee, but to realize his sins, though more public and of greater consequence than most lawyers', are no different in kind.