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## Advising Clients after Critical Legal Studies and the Torture Memos

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# ADVISING CLIENTS AFTER CRITICAL LEGAL STUDIES AND THE TORTURE MEMOS

Milan Markovic\*

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## I. INTRODUCTION

While serving in the Office of Legal Counsel (“OLC”) during the Bush administration, John Yoo, Jay Bybee, and other attorneys authored memoranda that sanctioned the perpetration of water-boarding and other highly controversial tactics in connection with the Bush administration’s “coercive interrogation program.” These memos—known ubiquitously as the “Torture Memos”<sup>1</sup>—have been almost universally condemned,<sup>2</sup> with even former Bush administration lawyers criticizing the Torture Memos as “insane,” a “slovenly mistake,” and a “one-sided effort to eliminate any hurdles posed by anti-torture law.”<sup>3</sup> The legal advice was so egregious that some legal scholars, including the author, have argued that Yoo and Bybee might be criminally liable for aiding and abetting the abuse of detainees in U.S. custody.<sup>4</sup>

Despite the furor over the Torture Memos, there have been minimal consequences for the Memos’ authors.<sup>5</sup> In a memorandum to Attorney General Eric Holder, David Margolis, the Associate Deputy Attorney General in the Department of Justice, recently reversed the findings of the Department’s Office of Professional Responsibility (the “OPR”) and concluded that Yoo and Bybee

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<sup>1</sup> OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 6 (July 29, 2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf> [hereinafter OPR REPORT].

<sup>2</sup> The literature addressing the misconduct of attorneys involved in the coercive interrogation program is voluminous. Notable works include: Jose E. Alvarez, *Symposium: Torture and the War on Terror: Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 195 (2006); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1455–56 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1684–85 (2005); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 83 (2005). *But see* Eric A. Posner & Adrian Vermeule, *A ‘Torture’ Memo and Its Torturous Critics*, WALL ST. J., July 6, 2004, at A22, available at <http://www.ericposner.com/torturememo.html>.

<sup>3</sup> See OPR REPORT, *supra* note 1, at 160.

<sup>4</sup> See Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347 (2007); see also Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration*, 62 ME. L. REV. 155 (2010); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193 (2010); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 811 (2005) (“Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.”).

<sup>5</sup> Bybee is currently a sitting judge on the United States Circuit Court of Appeals for the Ninth Circuit while Yoo is on the faculty of the University of California, Berkeley School of Law, as well as a frequent legal commentator.

should not be referred to their state bars for disciplinary action (the “Margolis Memo”).<sup>6</sup>

How is it possible that legal advice that has been so widely decried has been found to be in accordance with the professional responsibility rules? This article will argue that the Torture Memo controversy has exposed a fundamental problem with the current state of the legal ethics: the ethical provisions concerning attorneys’ duties *qua* advisors are among the least enforced and least understood.

According to the Margolis Memo, the professional responsibility rules do not prohibit attorneys from providing controversial and one-sided legal advice to their clients as long as they believe their legal advice.<sup>7</sup> Since Yoo and Bybee apparently subscribed to the arguments that they made in the Torture Memos, they could not be subject to professional discipline no matter how questionable their legal advice may have appeared to other attorneys.<sup>8</sup> The Margolis Memo has already been embraced by some legal scholars.<sup>9</sup>

Even some of the Torture Memos’ harshest critics appear resigned to Margolis’s analysis of the professional responsibility rules. Professor Balkin, for example, responded to the Margolis Memo by bemoaning the lax nature of professional responsibility:

[L]awyers often make arguments that are bad or even laughably bad, and this by itself does not violate the very low standard set by rules of professional responsibility. These rules are set up by jurisdictions to weed out the worst offenders, leaving the rest of the legal profession to make entirely stupid, disingenuous and asinine arguments that normal people with functioning moral consciences would not make. That is to say, rules of profession-

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<sup>6</sup> David Margolis, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 64, 65 (Jan. 5, 2010), available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf> [hereinafter Margolis Memo].

<sup>7</sup> *Id.* at 26.

<sup>8</sup> *Id.* at 66.

<sup>9</sup> See Julian Ku, *The End of the War Over the Torture Memos?*, OPINIO JURIS (Feb. 20, 2010, 6:10 AM), <http://opiniojuris.org/2010/02/20/the-end-of-the-war-over-the-torture-memos/>; see also John Steele, *DOJ Report on Torture Is Finally Out*, LEGAL ETHICS FORUM (Feb. 19, 2010, 8:39 PM), <http://www.legalethicsforum.com/blog/2010/02/doj-report-on-torture-memos-is-finally-out.html> (“The Margolis Memo seems to support the comments I had offered . . . that although Yoo’s performance fell below the standard of care as described in the statement by former OLC lawyers and as described in Jack Goldsmith’s book, it would be difficult to find those standards in the ethics rules.”). But see David Luban, *David Margolis is Wrong*, SLATE, Feb. 22, 2010, <http://www.slate.com/id/2245531>; W. Bradley Wendel, *Legal Indeterminacy and the Torture Memos*, LEGAL ETHICS FORUM (Feb. 25, 2010, 10:09 AM), <http://legalethicsforum.com/blog/2010/02/legal-indeterminacy-and-the-torture-memos.html>.

al misconduct are aimed at weeding out sociopaths. . . . [T]hey do not guarantee that lawyers will do right by their clients. . . . This is how the American legal profession simultaneously polices and takes care of its own.<sup>10</sup>

I will argue that the professional responsibility rules do not, in fact, permit the kind of one-sided legal advice that was a hallmark of the Torture Memos. To understand why this is so, it is necessary to analyze Model Rule of Professional Conduct 2.1 (“Rule 2.1”), which concerns the attorney’s role *qua* advisor and requires attorneys to “exercise independent professional judgment and render candid advice.”<sup>11</sup> The Margolis Memo is one of the only in-depth discussions of Rule 2.1 because the Rule had rarely been interpreted or enforced until the Torture Memo controversy.<sup>12</sup> Consequently, despite the understandable temptation to move beyond this “unfortunate chapter”<sup>13</sup> in this nation’s history, Margolis’s defense of the Torture Memos—and lawyers’ potential acceptance of the substance of that defense—could have great significance for the legal profession. Most lawyers will not advise on issues that are as grave as interrogation policy but lawyers are often asked to explain what the law permits, and it is crucial to understand what lawyers’ obligations are in these situations.

Margolis’s reasoning has the potential to extend far beyond its original context because his analysis does not depend on special considerations concerning government lawyers and does not rely on the claim that professional responsibility rules were “quaint” after September 11th.<sup>14</sup> Rather, as this article will demonstrate, Margolis ultimately declined to refer Bybee and Yoo for sanction because he claimed that the applicable ethical rules, as well as U.S. law with

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<sup>10</sup> Jack Balkin, *Justice Department Will Not Punish Yoo and Bybee Because Most Lawyers Are Scum Anyway*, BALKINIZATION (Feb. 19, 2010, 7:46 PM), <http://balkin.blogspot.com/2010/02/justice-department-will-not-punish-yoo.html>; see also William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 67 (1991) (claiming that Model Rules lead attorneys to “obviate complex, creative judgment . . .”). But see Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 848 (2002) (criticizing the Model Rules as overly ambitious).

<sup>11</sup> The rule also arguably requires attorneys to give non-legal advice to their clients. See Larry O. Natt Gannett II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 419 (2005) (“[A]ttorneys may be ethically obligated at times either to advise clients on the nonlegal issues that relate to the legal issues in the representation, or at a minimum, to raise the nonlegal issues with their clients . . .”).

<sup>12</sup> See Discussion *infra* Part I; see also Margolis Memo, *supra* note 6, at 24.

<sup>13</sup> Margolis Memo, *supra* note 6, at 67.

<sup>14</sup> Former Attorney General Alberto Gonzales had famously argued that Geneva Conventions were “quaint” with respect to the treatment of detainees seized as part of the War on Terror. See, e.g., Ronald Watson, *Geneva Accords Quaint and Obsolete, Legal Aide Told Bush*, THE TIMES, May 19, 2004, <http://www.timesonline.co.uk/tol/news/world/iraq/article426900.ece>.

respect to torture, are unclear and ambiguous—this is to say “indeterminate.”<sup>15</sup> In Margolis’s view, Yoo and Bybee could not be sanctioned where the ethical rules do not impose a definite standard on attorneys and where Yoo and Bybee simply had different views on how to interpret U.S. anti-torture law than other attorneys.<sup>16</sup> If one accepts this logic, it is unclear under what circumstances an attorney could ever be sanctioned solely for the content of his or her legal advice. Indeed, as Legal Realists and Critical Legal Theorists have long emphasized, every area of law can be described as “indeterminate” because any source of law can plausibly be interpreted in more than one way. Anti-torture law is hardly unique in this sense.<sup>17</sup>

If legal ethics is to do more than “weed[] out sociopaths,”<sup>18</sup> attorneys must recognize that even though the law is to some extent—perhaps even a great extent—indeterminate does not mean that attorneys commit misconduct only when they offer advice that they suspect or believe to be false.<sup>19</sup> An ethical lawyer who believes that there may be multiple answers to a particular legal question should not and would not offer the kind of one-sided legal analysis that was the hallmark of the Torture Memos.<sup>20</sup>

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<sup>15</sup> Margolis does not actually use the word “indeterminate” but by consistently emphasizing that the ethical rules concerning legal advice are unclear and/or ambiguous and that anti-torture law can be interpreted in various plausible ways, this is his strong implication. See, e.g., Margolis Memo, *supra* note 6, at 25 (criticizing OPR for failing to find a “known” and “unambiguous” standard for Rule 2.1); *id.* at 34 (arguing that “torture” is a subjective term). The indeterminacy argument has been explicitly made by Professor Yin. See Tung Yin, *Great Minds Think Alike: The “Torture Memo,” Office of Legal Counsel, and Sharing the Boss’s Mindset*, 45 WILLAMETTE L. REV. 473, 475 (2009) (“The latter criticism [of Yoo] assumes, however, that neutral analysis not only exists but would be recognized as correct in all instances by liberals and conservatives. Given the indeterminate nature of law, this assumption cannot be valid in all instances.”).

<sup>16</sup> In this regard, it is noteworthy that many defenses of Yoo and Bybee focus not on the merits of their work but rather on the allegedly bad precedent that would be created in punishing these attorneys. See Jack Goldsmith, *No New Torture Probes*, WASH. POST, Nov. 26, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/25/AR2008112501897.html> (arguing that second-guessing Yoo and Bybee would make attorneys less likely to give their honest legal opinions in the future); see also *The Lawfulness of the Interrogation Memos*, Testimony of Professor Michael Stokes Paulsen, Distinguished University Chair and Professor of Law, the University of St. Thomas Law School, before the Subcommittee on Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary 8 (May 13, 2009), <http://www.stthomas.edu/law/academics/curriculum/paulsensenatetestimony.pdf>.

<sup>17</sup> But see Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 79–80 (2010) (claiming that the definition of torture is “broken” and relies on “vague standards”).

<sup>18</sup> Balkin, *supra* note 10.

<sup>19</sup> See, e.g., Margolis Memo, *supra* note 6, at 26.

<sup>20</sup> Indeed, even Yoo and Bybee’s defenders do not claim that they fully considered competing viewpoints. See, e.g., *id.* at 68 (Yoo’s analysis “slanted towards a narrow interpretation of the torture statute at every turn”); see also OPR REPORT, *supra* note 1, at 160 (quoting Professor Goldsmith’s observation in his interview that the Memos were a “one-sided effort to eliminate any hurdles posed by anti-torture law”).

In Part I of this article, I will explain the various reasons that attorneys follow the professional responsibility rules. In Part II, I will argue that many of these reasons do not apply in the case of Rule 2.1 and that it is in the self-interest of attorneys to fail to “exercise independent professional judgment” and “render candid advice.”<sup>21</sup> The Torture Memos illustrate this phenomenon. In Part III, I will explore the OPR’s rationale for referring Yoo, as the primary author of the Torture Memos, for sanction and why the OPR was ultimately overruled by Margolis. As I will demonstrate, Margolis shared the OPR’s low regard for the work of Yoo, but ultimately disagreed as to what Rule 2.1 requires of attorneys. In Part IV, I will dispute the Margolis Memo’s subjectivist reading of Rule 2.1, and will argue that the kind of legal advice Margolis seeks to protect has little social value. In Part V, I will offer an alternative view of Rule 2.1 that requires attorneys to inform their clients of differing views of the law. In Part VI, I will argue that the perceived indeterminacy of legal doctrine does not mean that attorneys cannot be subject to discipline for the content of that legal advice. An attorney who takes indeterminacy seriously would address competing interpretations of the law in order to assist the client in determining whether his or her proposed conduct is likely to be viewed as unlawful. Lastly, in Part VII, I will address possible objections to this article’s interpretation of Rule 2.1.

## II. THE MODEL RULES, ENFORCEMENT, AND WHY LAWYERS OBEY

The Model Rules were adopted by the ABA’s House of Delegates on August 2, 1983.<sup>22</sup> As of the date of this Article, the Rules have been adopted by forty-seven states, with minor variations.<sup>23</sup> Under the Model Rules, all attorneys—government lawyers included—are subject to professional discipline.<sup>24</sup> However, as described below, the Model Rules contain different kinds of rules, and not all rules are enforced to the same degree. Furthermore, while it is generally in the self-interest of attorneys to comply with most rules, Rule 2.1 is a clear exception.

### A. *The Underenforcement of Professional Responsibility Rules*

The Model Rules generally consist of three types of rules: mandatory rules, which require certain actions, prohibitory rules, which preclude certain

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<sup>21</sup> See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2011).

<sup>22</sup> See *id.* Preface.

<sup>23</sup> A full chronological list of the states adopting the Model Rules is available on the ABA’s website. See *Chronological List of States Adopting Model Rules*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/chrono\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html) (last visited Sept. 17, 2011).

<sup>24</sup> See *id.* Pmb1 ¶ 12 (“Every lawyer is responsible for observance of the Rules of Professional Conduct.”).

actions, and finally permissive rules, which state that lawyers can but need not perform certain actions.<sup>25</sup>

An example of a mandatory rule is Rule 1.1, which requires competence of all attorneys.<sup>26</sup> An example of a prohibitory rule is Rule 1.7, which prohibits an attorney from representing one current client against another current client in an adversary proceeding. An example of a permissive rule is Rule 1.6(b) which allows, but does not require, an attorney to reveal client confidences to prevent “reasonably certain death or bodily harm” or “substantial injury to the financial interests or property of another.”<sup>27</sup>

The Model Rules also address attorneys in various capacities, and the Preamble contemplates that lawyers perform a variety of functions.<sup>28</sup> Article 2 concerns the attorney as a counselor and advisor, for example, whereas Article 3 concerns the attorney as an advocate. Although not specifically noted in the Model Rules, Article 7 seems to address the lawyer as a business person by regulating his or her conduct with potential clients and addressing such considerations as his or her communications about his or her services (Rule 7.1) and advertising (Rule 7.2).

Despite the widespread acceptance of the Model Rules, it is unclear why attorneys obey the professional responsibility rules. Many scholars are of the view, for example, that the rules have only been “marginally effective . . . due to lack of resources and self-protective attitudes.”<sup>29</sup> Professor Zacharias has argued:

[P]rofessional discipline is not all it is cracked up to be. . . . In practice, most jurisdictions have focused on lawyer mishandling of client funds, to the exclusion of most other misconduct. The result is that many rules simply go unenforced or are patently underenforced. . . . But one could safely hazard the assertion that few rules truly are enforced in a way that makes lawyers fear discipline for violating them.<sup>30</sup>

Empirical data substantiates Professor Zacharias’s claim that states seem to predominately focus on criminal or fraudulent conduct such as the mi-

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<sup>25</sup> See M.H. Hoeflich, “*The Good Lawyer*” and Rule 2.1, 69 J. KAN. B. ASS’N 38, 38 (2000).

<sup>26</sup> *Id.*

<sup>27</sup> MODEL RULES OF PROF’L CONDUCT R.1.6(b).

<sup>28</sup> See *id.* Pmb1 ¶ 2 (addressing lawyer’s functions as advisor, advocate, negotiator, and evaluator).

<sup>29</sup> Judith A. McMorow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 958, 980 (1991); see also Judith Kilpatrick, *Regulating the Litigation Immunity: New Power and a Breath of Fresh Air for the Attorney Discipline System*, 24 ARIZ. ST. L.J. 1069, 1097 (1992) (noting that critics have criticized attorney discipline as “generally under the direct control of other lawyers, resulting in self-interested decisions that are unresponsive to citizen complaints . . .”).

<sup>30</sup> Zacharias, *supra* note 10, at 861–62.



shandling of client funds.<sup>31</sup> For example, Massachusetts adopted the Model Rules on June 9, 1997.<sup>32</sup> Since that date, there have been one hundred instances of attorneys being sanctioned for violations of Massachusetts Rule of Professional Conduct 8.4(b) (“Mass. Rule 8.4(b)”), which is identical to Model Rule 8.4(b), and states that “it shall be professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>33</sup> There have also been three hundred and forty disciplinary opinions concerning Mass. Rule 8.4(c) (Model Rule 8.4(c)) which reads that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” One hundred and eighty-seven of these cases specifically involved the mishandling of client funds. Whether or not this reflects Massachusetts’s determination to focus on these types of violations, many other significant ethical rules such as Rule 2.1 are not enforced to the same extent as illustrated in Table A:

TABLE A<sup>34</sup>

| Rule of Professional Conduct                        | Cases Concerning Violation of Rule Since Adoption of Model Rules |
|---|--|
| 1.1 (Competence)                                    | 263  |
| 1.6 (Confidentiality of Information)                | 31   |
| 2.1 (Advisor)                                       | 0  |
| 3.1 (Meritorious Claims and Contentions)            | 12   |
| 7.1 (Communications Concerning a Lawyer’s Services) | 10   |
| 8.4(b) (Criminal Conduct)                           | 100  |
| 8.4(c) (Fraud or misrepresentation)                 | 340  |

Other states may be more aggressive in enforcing a wider variety of professional responsibility rules. As few states have made all of their disciplinary decisions available publicly, it is almost impossible to determine whether this is the case.<sup>35</sup> But to the extent that attorneys do comply with professional responsibility rules, it would not appear to be because states are particularly zealous in enforcing most professional responsibility rules.

<sup>31</sup> *Id.* at 861.

<sup>32</sup> See *Alphabetical List of States Adopting Model Rules*, A.B.A., [http://www.Americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.Americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Sept. 17, 2011).

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(b) (2011). The Rule states that “it shall be professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

<sup>34</sup> Figures for this chart are as of May 29, 2011.

<sup>35</sup> Aside from Massachusetts, only the disciplinary decisions of Arizona, Colorado, Illinois, Texas, Washington, and Virginia are available on Westlaw, for example.

Nevertheless, this does not mean that most attorneys fail to comply with their ethical obligations. Much compliance with professional responsibility rules undoubtedly occurs because individual lawyers strive to be ethical and will comply with the ethical rules regardless of whether or not they are likely to be enforced. Law students, of course, are indoctrinated in the importance of legal ethics through professional responsibility classes and through standardized tests such as the Multi-State Professional Responsibility Examination. Moreover, after years of study and practice, most lawyers develop a strong sense of professionalism and take pride in their work. Failing to fulfill the minimum expectations of the ethical rules could lead to feelings of shame and low self-worth.

Professionalism cannot be assumed on the part of all attorneys, however. Consider, for example, the famous Holmesian bad man who is “interested only in avoiding legal penalties that might attach to his conduct.”<sup>36</sup> A Holmesian bad man who happened to be an attorney would act ethically only insofar as he would need to do so to avoid sanction or discipline from the jurisdiction in which he is admitted. Consequently, the Holmesian bad attorney (“HBA”) would comply with a particular ethical rule if it might be enforced against him by the state disciplinary authorities. When certain rules—such as Rule 2.1—are not enforced, what is the incentive for the HBA to obey?

#### *B. Compliance and Self-Interest*

Absent a commitment to professionalism, many attorneys, including the HBA, may seek to comply with the rules out of self-interest. For example, although Professor Zacharias may be correct that few lawyers truly fear discipline for violating the ethical rules, the risk of suspension and disbarment—remote though it may be—could be great enough to lead the HBA to comply with a particular rule.

There are also powerful structural motivators for attorneys to comply with the Model Rules. By way of example, Article 3 of the Model Rules concerns attorneys as advocates. Whether or not state disciplinary authorities are likely to enforce Rule 3.3(a)(1), which forbids an attorney from “knowingly mak[ing] a false statement of fact or law to a tribunal,” the HBA may comply with the Rule because his adversary is likely to point out any falsehood he makes to the tribunal or the judge may discover it on his or her own.<sup>37</sup> The risk of being found out and incurring the attendant consequences such as sanctions is great enough that the HBA may decide to comply with the ethical rules that concern him as an advocate.

Other factors may also ensure the HBA’s compliance with the Model Rules. Consider the case of an attorney who is a neophyte in real estate law, but nevertheless wishes to take on a relatively complex real estate matter without

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<sup>36</sup> W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. REV. 1167, 1176 (2005).

<sup>37</sup> See *id.* at 1198–99 (2005).

planning to commit to the “necessary study” or to associate himself with a “lawyer of established competence.”<sup>38</sup> Even if the state disciplinary authorities are not particularly aggressive in enforcing attorney competence, the HBA might be deterred from such a representation because of the possibility that he might subsequently face a malpractice suit.<sup>39</sup> Even an unsubstantiated allegation of malpractice can be costly because it might raise an attorney’s malpractice insurance rates.<sup>40</sup>

Similarly, even in the absence of a possible malpractice suit, the HBA may be motivated to adhere to the profession’s legal rules so as to avoid losing business. An attorney who is agnostic about providing competent representation may not be subject to discipline and/or a malpractice suit, but the client—particularly a legally sophisticated client—is unlikely to hire him/her again to work on another matter. This is yet another reason that the HBA may comply with the Model Rules.

Consequently, it is not necessary to hold that “lawyers are especially good citizens” to believe that attorneys will follow some of the profession’s ethical rules.<sup>41</sup> Rather, lawyers may comply with the ethical rules for a variety of reasons. Some may genuinely take their ethical obligations seriously out of a sense of professionalism whereas others may determine that the risk of sanctions, however remote, would be devastating if they were actually assessed by the disciplinary authorities. In the litigation context, attorneys will be motivated to adhere to the rules so as to avoid angering the judge. Even in situations where attorneys are not acting as advocates before a tribunal, attorneys may comply with the ethical rules to forestall a possible malpractice suit or to avoid losing clients.

Although attorneys may comply with the ethical rules even when these rules are underenforced or haphazardly enforced, there will be instances when an attorney’s self-interest is such that compliance with a given rule is disadvantageous. In the next section, I will address why attorneys are unlikely to comply with Rule 2.1, notwithstanding the importance of the Rule.

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<sup>38</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2 (2011).

<sup>39</sup> Professor Fischer has suggested that although Rule 1.1 contemplates attorneys practicing in areas of law in which they are not specialists, increasingly attorneys would be dissuaded from assuming such representations because of the requirements of their malpractice insurers. James M. Fischer, *External Controls over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 66–67 (2006) (“The ideal lawyer remains for many (and for the professional codes), the classically trained liberal arts major, familiar and conversant with a wide range of ideas, techniques, and skills. This is a view of law practice that insurers neither share nor embrace.”).

<sup>40</sup> See *id.* at 65–66.

<sup>41</sup> See Zacharias, *supra* note 10, at 847.

## III. MODEL RULE 2.1 AND THE PROBLEM OF COMPLIANCE

The Model Rules purport to regulate attorneys in their capacities as advisors via Model Rule 2.1.<sup>42</sup> The Rule reads as follows:

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.

The Rule is actually made up of two separate rules: A mandatory rule requiring attorneys to "exercise independent professional judgment and render candid advice" and a permissive rule that permits attorneys to refer to "other considerations such as moral, economic, social and political factors."<sup>43</sup> For purposes of this article, I am primarily concerned with the former, although a neat delineation between the two rules is likely impossible.<sup>44</sup>

As noted in Part II.A., Massachusetts has not issued a single disciplinary decision concerning Rule 2.1 since it adopted the Model Rules. It is hardly alone in this regard. The few disciplinary cases concerning an attorney's violation of Rule 2.1 are based on the attorney's judgment having been clouded by, for example, having a sexual relationship with the client.<sup>45</sup> Nor does any publicly available ethics advisory opinion offer any substantive analysis of Rule 2.1. The few scholarly articles that meaningfully address Rule 2.1 focus entirely on the second prong.<sup>46</sup> As Margolis noted in his memorandum that overruled the OPR Report on the issue of Bybee and Yoo's misconduct:

OPR has not cited, and I have not located, any case in any jurisdiction that reaches a finding of violation of Rule 2.1 where an attorney provided the client advice free of any discernable conflict or in which a court considered an alleged violation of Rule 2.1 that was not collateral to violations of other Rules of Conduct.<sup>47</sup>

This lack of attention to Rule 2.1 is both puzzling and problematic. There is nothing more fundamental to the profession than advising clients as to

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<sup>42</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011).

<sup>43</sup> Hoeflich, *supra* note 25, at 39.

<sup>44</sup> See Ganntt, *supra* note 11, at 373 (describing distinction as "artificial").

<sup>45</sup> See, e.g., *In re DeFrancesch*, 877 So. 2d 71 (La. 2004); *In re Halverson*, 998 P.2d 833 (Wash. 2000); *Musick v. Musick*, 453 S.E.2d 361 (W. Va. 1994); see also Margolis Memo, *supra* note 6, at 24 (citing additional cases).

<sup>46</sup> See, e.g., Ganntt, *supra* note 11, at 373; Hoeflich, *supra* note 25, at 38.

<sup>47</sup> Margolis Memo, *supra* note 6, at 24.

the law,<sup>48</sup> and this is something that all lawyers do regardless of practice area. Moreover, as Professor Levinson has observed, “[M]ost legal events are in fact never litigated. . . . The advice lawyers feel free to give their clients has far more to do with structuring our legal system than does the legal opining of judges in specific cases.”<sup>49</sup> If lawyers do not seek to serve a gate-keeping function by exercising “independent professional judgment” and “rendering candid advice,” there would also seem to be little logic to having lawyers occupy a privileged position vis à vis other kinds of advisors such as financial advisors and accountants.<sup>50</sup> The entire basis for attorney-client confidentiality is premised on the view that: “Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct . . . almost all clients follow the advice given, and the law is upheld.”<sup>51</sup> To the extent society expects clients’ behavior to be constrained by attorneys’ legal advice, attorneys must take their obligation to “exercise independent professional judgment and render candid advice” seriously.

Some legal scholars would dispute that there is a difference between a lawyer’s role as an advisor versus his or her role as an advocate. Professor Freedman has argued that attorneys should always function as part of the adversary system, even in non-litigation settings, because “[t]he advice given to a client and acted upon today may strengthen or weaken the client’s position in negotiations or litigation next year.”<sup>52</sup> Professor Freedman’s argument would seem to presuppose that all legal positions are liable to be tested at some point in time. But even if this is true, regardless of whether an attorney’s primary duty should be to the law or to the client, there is still some conduct that a lawyer cannot sanction.<sup>53</sup> Under Professor Freedman’s account, for example, attorneys should counsel clients only regarding their lawful choices and help them to

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<sup>48</sup> See Judith D. Fischer, *The Role of Ethics in Legal Writing*, 9 SCRIBES J. LEGAL WRITING 77, 80 (2004) (“A lawyer who fails to state the law accurately . . . has failed at the very essence of lawyering.”).

<sup>49</sup> Sanford Levinson, *Frivolous Cases: Do Attorneys Know Anything At All?*, 24 OSGOODE HALL L.J. 353, 366 (1986).

<sup>50</sup> See David Luban, *Selling Indulgences*, SLATE (Feb. 14, 2005, 6:07 PM), <http://www.slate.com/id/2113447>.

<sup>51</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2011).

<sup>52</sup> Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 469 (1992).

<sup>53</sup> See also William Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 217–18 (1996); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 11–12 (1988) (“Some attorneys . . . think they should have just as much leeway to pursue client interests . . . . Others vehemently disagree, arguing that the duties of loyalty to client interests must be balanced against and sometimes overridden by broad, more amorphous obligations, such as the lawyer’s duties as “officer of the court,” [and] to uphold the rule of law. . . . [T]his description of the dispute tends toward the vacuous, because the most zealous advocates know they must follow some rules and obey official instructions given pursuant to those rules.”).

achieve only lawful goals.<sup>54</sup> Therefore, Rule 2.1 would seem to require that attorneys, at minimum, refer to something other than client interests to determine whether certain actions are legally permissible.<sup>55</sup>

In the absence of effective enforcement of Rule 2.1, can we expect attorneys to discharge their duties as advisors and “exercise independent professional judgment and render candid advice”? This article argued in Part II that attorneys may comply with the ethical rules out of either a sense of professionalism or self-interest. Some attorneys may in fact carry out their obligations as advisors out of a sense of professionalism. However, we can expect that others will not, particularly since *considerations of self-interest would suggest that attorneys should violate Rule 2.1*. If this is so, the lack of enforcement of Rule 2.1 by disciplinary authorities and sanctioning bodies is problematic in light of possible incentives for attorneys to serve as “indulgence sellers” by sanctioning illegal conduct.<sup>56</sup>

Rule 2.1 concerns an attorney as an advisor and in this capacity he or she is not necessarily expecting to appear before a tribunal. There is no other legal actor like a judge to reject or question a tendentious legal argument.<sup>57</sup> This in effect makes the attorney the “law-giver from the client’s point of view. . . . [with] the power to shape the law for good or for ill.”<sup>58</sup> Indeed, as a result of attorney-client privilege and confidentiality rules, absent unusual circumstances such as the disclosure of privileged communications to a third party, no one will even know what advice the attorney offered to the client.

A lawyer who violates Rule 2.1 is also unlikely to be in jeopardy of either a malpractice suit or losing his or her client because the lawyer is likely enabling conduct in which the client would like to engage. This notion is contained in the commentary to Rule 2.1, which recognizes that an attorney should provide his or her “honest assessment” of the law even though it may be “unpalatable” to a client.<sup>59</sup> The commentary also recognizes that “[l]egal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.”<sup>60</sup> Consequently, so as to please the client and to protect his or her business interests, an attorney may avoid presenting “unpalatable” truths and

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<sup>54</sup> Freedman, *supra* note 52, at 471.

<sup>55</sup> Professor Freedman’s argument is also undermined by the current rules of professional conduct. For example, there is no reference to “zealous advocacy” in the text of the Model Rules. Although the Preamble notes that “[a]n advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system,” MODEL RULES OF PROF’L CONDUCT Pmb1 ¶ 2 (2011), the Preamble envisions a different role for a lawyer *qua* advisor: “A lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains the practical implications.” *Id.*

<sup>56</sup> Luban, *supra* note 50.

<sup>57</sup> See Wendel, *supra* note 36, at 1199.

<sup>58</sup> *Id.*

<sup>59</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1 (2011).

<sup>60</sup> *Id.*

“unpleasant facts and alternatives” and tell a client only what he/she wants to hear, particularly when the client may turn to a less scrupulous attorney if he or she does not receive the advice he or she is looking for.

Less than a decade ago, for example, attorneys were involved in a number of corporate accounting scandals.<sup>61</sup> One of the most notable was the Enron accounting scandal. Enron was able to hide its true economic condition from the outside world because of the efforts of lawyers and accountants who created dubious special purpose entities (“SPE’s”) to which Enron would “sell” assets.<sup>62</sup> Through these transactions, Enron was able to book monetary transfers from one Enron entity to another as sales.<sup>63</sup> When Vinson & Elkins, LLP, Enron’s long-time outside counsel, eventually began to raise concerns about whether some of the most dubious related-party transactions complied with the accounting rules, Enron began to switch more of its legal work to another law firm, Andrews & Kurth.<sup>64</sup>

More recently, a former partner of Mayer Brown, LLP, was sentenced to seven years in prison for his role in assisting Refco, Inc., in executing a \$2.4 billion fraud that eventually bankrupted the company.<sup>65</sup> The lawyer and his subordinates drafted loan documents to route money from Refco and various third parties to a holding company controlled by Refco’s principal prior to every financial reporting period. The money would then be used to pay loans owed to Refco.<sup>66</sup> The loans would be reversed after the end of each reporting quarter.<sup>67</sup> This had the effect of making the amount of money owed by the holding company to Refco seem significantly smaller than it was, and consequently less of a threat to Refco’s financial health.<sup>68</sup> Although Collins claimed that he had no knowledge of any wrongdoing, prosecutors asserted that there was no business purpose for these loans and Collins was motivated to assist in Refco’s fraud because Refco was Collins’s biggest client and had paid \$40 million to Mayer Brown since 1997.<sup>69</sup>

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<sup>61</sup> Wendel, *supra* note 36, at 1167.

<sup>62</sup> *See id.* at 1220–21.

<sup>63</sup> *See id.* at 1220. These transactions were arguably permitted under the accounting rules since the SPE’s were only ninety-seven percent owned by Enron. *See id.*

<sup>64</sup> Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 *BUFF. L. REV.* 1067, 1123–24 (2007). *See also* William H. Simon, *The Market for Bad Legal Advice*, 60 *STAN. L. REV.* 1555, 1556 (2008).

<sup>65</sup> *See* Press Release, Dep’t of Justice, Refco’s Principal Outside Attorney Sentenced in Manhattan Federal Court to Seven Years in Prison for \$2.4 Billion Fraud (Jan. 14, 2010), *available at* <http://www.justice.gov/usao/nys/pressreleases/January10/collinsjosephrefcosentencingpr.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See id.*

<sup>69</sup> Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 *FLA. L. REV.* 129, 130 (2011).

Enron and Refco were clearly less interested in receiving the best legal advice as they were in justifying a desired result—masking its true financial health through related-party transactions.<sup>70</sup> Of course, not all clients are like Enron or Refco. There are undoubtedly many clients that would want their attorneys to dissuade them from potential disastrous conduct.<sup>71</sup> However, clients are likely to accept something less than the best legal advice, and attorneys are more willing to tell clients what they wish to hear when a legal position is unlikely to be litigated or subjected to public scrutiny.<sup>72</sup> Clients tend to seek tendentious legal advice because it permits them to do things that they wish to do, and in the event that their actions are challenged, the legal advice may at least constitute evidence of good faith.<sup>73</sup>

An area of law where this phenomenon is particularly prevalent is tax law.<sup>74</sup> Many high net-worth individuals are willing to rely on favorable, but dubious, interpretations of the Tax Code because there is over a 98% probability that these interpretations will never be challenged as part of an audit or criminal proceeding.<sup>75</sup> If these interpretations are challenged, a lawyer's opinion could help establish “good faith” and “reasonable cause” and provide a basis to avoid penalties for underpayment.<sup>76</sup>

Like the corporate attorneys discussed in this section, Yoo and Bybee provided legal advice that permitted their clients to achieve their desired ends. By arguably narrowing the prohibition against torture, they provided the Bush administration with maximum flexibility in terms of interrogation policy.<sup>77</sup> They

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<sup>70</sup> See Simon, *supra* note 64, at 1556; see also Wendel, *supra* note 36, at 1220 (“[T]he lawyers and accountants were directed to create a duck, even though the transactions (in more than one sense!) were a dog.”).

<sup>71</sup> As suggested to me by Professor Klass, one explanation for the lack of enforcement of Rule 2.1 is that clients that truly seek to receive “independent professional judgment” and “candid advice” likely request it, meaning that the Rule is truly only important when clients seek legal advice to facilitate potential misconduct.

<sup>72</sup> See Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511, 525 (2006); see also Levinson, *supra* note 49, at 355–56.

<sup>73</sup> See Simon, *supra* note 64, at 1556–57.

<sup>74</sup> See Whelan, *supra* note 64, at 1199 (“Transactional and planning situations are distinctive precisely because there is no impartial referee to resist the lawyer’s client-centered construction of the law.”). For a discussion of recent efforts by the tax bar to confront ethical wrongdoing by its members in establishing tax shelters, see Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006).

<sup>75</sup> Levinson, *supra* note 49, at 356 (citing B. WOLFMAN & J. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* 59 (2d ed.1985)); see also Simon, *supra* note 64, at 1556 (criticizing attorneys at Jenkins & Gilchrist, LLP, for tax opinion letters that “substanceless transactions” were an acceptable way to reduce taxes).

<sup>76</sup> Simon, *supra* note 64, at 1557.

<sup>77</sup> See OPR REPORT, *supra* note 1, at 57 (noting that certain arguments were inserted into the Bybee Memo after the Department of Justice refused to provide declination of future prosecutions for CIA interrogators); see also Simon, *supra* note 64, at 1557 (noting that the Bush administration was “happy” to receive this advice because it made it easier to torture detainees).



had every incentive to offer this type of legal advice to further their careers<sup>78</sup> and never expected their work to become public.<sup>79</sup> Although the legal advice contained in the Torture Memos has been widely criticized, even some of the Torture Memos' harshest critics accept the notion that the Memos confer immunity on interrogators and policy-makers who relied on this legal advice.<sup>80</sup>

Absent a strong commitment from lawyers to comply with Rule 2.1, we can expect that lawyers will often shirk from their responsibility to exercise independent professional judgment and render candid advice when their clients are seeking a particular kind of legal advice. Unfortunately, as illustrated by the Department of Justice's handling of The Torture Memo controversy, there is little consensus as to what Rule 2.1 requires.

#### IV. THE TORTURE MEMO CONTROVERSY AND RULE 2.1

In the months that followed September 11, 2001, Bush administration officials entrusted the OLC with the task of determining the legal parameters of the war on terror.<sup>81</sup> Although OLC lawyers wrote numerous memoranda on a wide host of issues, the most controversial topic addressed by the OLC was the interrogation of suspected al-Qaeda members. Indeed, when the Washington Post obtained a copy of a memorandum, dated August 1, 2002, from Jay Bybee to Alberto Gonzales concerning standards for conduct of interrogations under 18 U.S.C. §§ 2340–2340A (the “Bybee Memo”), the resulting backlash was swift and immediate,<sup>82</sup> with members of Congress,<sup>83</sup> as well as a group of prominent lawyers, law professors, and retired judges,<sup>84</sup> calling for an investigation. In the following sections I will briefly explain the background of the Bybee Memo and

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<sup>78</sup> See generally Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 27–28 (2009). It is noteworthy that shortly after signing two of the Torture Memos, Jay Bybee, Yoo's superior, was nominated to sit on the Ninth Circuit Court of Appeals. See Bradley Lipton, Note, *A Call for Institutional Reform of the Office of Legal Counsel*, 4 HARV. L. & POL'Y REV. 249, 256 (2010). Lipton argues the problems of the OLC go beyond individual attorneys and that the institution should be reformed so that it is less political. *Id.* at 249–50.

<sup>79</sup> See Hatfield, *supra* note 72, at 525–26 (“One type of fear that Bybee did not have to face was the fear of ‘getting caught.’ . . . 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.”).

<sup>80</sup> See, e.g., Marty Lederman, *A Dissenting View on Prosecuting Waterboarders*, BALKINIZATION (Feb. 8, 2008, 3:33 AM), <http://balkin.blogspot.com/2008/02/dissenting-view-on-prosecuting.html> (arguing that it would be unconstitutional to prosecute interrogators who relied on the legal advice of the OLC); see also Margolis Memo, *supra* note 6, at 59 (noting that interrogator who used interrogation techniques specifically authorized by the OLC may have a public authority defense).

<sup>81</sup> See Margolis Memo, *supra* note 6, at 4.

<sup>82</sup> See *id.* at 3.

<sup>83</sup> *Id.* (noting that Congressman Frank Wolf asked OPR to investigate the memo on or around June 21, 2004).

<sup>84</sup> See Fran Davies, *Probe Urged Over Torture Memos*, MIAMI HERALD, Aug. 5, 2004, at 6A.

the other “Torture Memos” and how they were analyzed by both the OPR and Associate Attorney General Margolis.

*A. Background*

The Bybee Memo was principally the work of John Yoo, although it was reviewed and signed by his superior Jay Bybee.<sup>85</sup> The Bybee Memo concerned the federal anti-torture statute, 18 U.S.C. § 2340A, which the White House had asked the OLC to construe.<sup>86</sup> An act constitutes torture under the statute if

(1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant’s custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) the act inflicted severe physical or mental pain or suffering.<sup>87</sup>

At the request of the White House, Yoo and Bybee focused on the fourth and fifth elements.<sup>88</sup> Yoo and Bybee also understood that the Bybee Memo was necessary because questions had “arisen in the context of the conduct of interrogations outside of the United States.”<sup>89</sup>

I have criticized the Bybee Memo in earlier work.<sup>90</sup> In brief, the Bybee Memo argued that, for an act to be torture, the interrogator must purposely intend to inflict severe pain as opposed to solicit information.<sup>91</sup> However, the interrogator may inflict some pain on the detainee as long as the interrogator stays away from “the most heinous acts.”<sup>92</sup> Only those heinous acts that produce pain that rises to “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions” qualify as torture.<sup>93</sup> The Bybee Memo also suggested possible common law defenses in the event of a prosecution under 18

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<sup>85</sup> OPR REPORT, *supra* note 1, at 1 (attributing drafting of the Bybee Memo and other interrogation-related memoranda to John Yoo).

<sup>86</sup> Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002), <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memo].

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1.

<sup>90</sup> Markovic, *supra* note 4, at 349–50.

<sup>91</sup> Bybee Memo, *supra* note 86, at 3.

<sup>92</sup> *Id.* at 22.

<sup>93</sup> *Id.* at 6.

U.S.C. § 2340A such as necessity and self-defense.<sup>94</sup> Lastly, the Bybee Memo advanced the argument that the anti-torture statute was unconstitutional because it conflicted with the President's power as Commander-in-Chief to set interrogation policy as part of the war with al-Qaeda.<sup>95</sup>

The consensus among legal scholars is that the Bybee Memo was remarkably poor and shoddy work.<sup>96</sup> Yoo's own colleagues and successors in the OLC have described the Bybee Memo as "insane," "riddled with errors," and "a slovenly mistake"<sup>97</sup> and suggested that some of the more extreme arguments would have benefited from "adult leadership."<sup>98</sup> In December 2004, the Department of Justice repudiated the Bybee Memo.<sup>99</sup>

Although the Bybee Memo has received the bulk of the criticism, Yoo and Bybee also drafted two other classified memoranda concerning interrogation policy.<sup>100</sup> One of the memoranda, dated the same day as the Bybee Memo, purported to analyze the legality of ten specific interrogation techniques that had been conceived by the CIA for use on a high-ranking and recalcitrant al-Qaeda operative named Abu Zubaydah ("CIA Memo").<sup>101</sup> The CIA Memo addressed the following techniques: "(1) attention grasp,<sup>102</sup> (2) walling,<sup>103</sup> (3) facial hold,

<sup>94</sup> *Id.* at 39–46.

<sup>95</sup> *Id.* at 33–39.

<sup>96</sup> See, e.g., Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14; see also Lawrence Rosenthal, *Those Who Can't, Teach: What the Legal Career of John Yoo Tells Us About Who Should Be Teaching Law*, 80 MISS. L.J. 1563, 1566–67 (2011) ("Among legal scholars 'the memorandum was roundly, almost uniformly condemned,' often in terms unusually harsh for academics." (quoting M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo "Torture and Power" Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639, 640 (2009))); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1708 (2005) ("The quality of Bybee's legal work here is a disgrace."). But see Posner & Vermeule, *supra* note 2, (defending Yoo's position on Executive power); The Lawfulness of the Interrogation Memos, *supra* note 16, at 3–4 (agreeing with the Torture Memos' narrow definition of torture and position on Executive power).

<sup>97</sup> OPR REPORT, *supra* note 1, at 160 (quoting former Assistant Att'y Gen. Daniel Levin and Att'y Gen. Michael Mukasey).

<sup>98</sup> *Id.* (quoting Assistant Att'y Gen. Stephen Bradbury).

<sup>99</sup> Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice 2 (Dec. 30, 2004), <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf> [hereinafter Levin Memo].

<sup>100</sup> OPR REPORT, *supra* note 1, at 6.

<sup>101</sup> See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John Rizzo, Acting Gen. Counsel, CIA 1 (Aug. 1, 2002), [http://media.luxmedia.com/aclu/olc\\_08012002\\_bybee.pdf](http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf) [hereinafter CIA Memo].

<sup>102</sup> "The attention grasp consists of grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator." *Id.* at 2.

<sup>103</sup>

(4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box,<sup>104</sup> and (10) the waterboard.”<sup>105</sup> There is some evidence that the CIA had already been using these techniques prior to requesting a formal opinion from the OLC on their legality.<sup>106</sup>

According to the CIA Memo, “[t]he interrogation team would use these techniques in some combination to convince Zubaydah that the only way he [could] influence his surrounding environment [was] through cooperation.”<sup>107</sup> The CIA Memo noted that “these techniques [were] to be used in some sort of escalating fashion, culminating with the waterboard, though not necessarily ending with this technique.”<sup>108</sup> According to the CIA Memo, none of these enhanced interrogation techniques would cause a sufficient level of physical pain or suffering to qualify as torture for purposes of the anti-torture statute, even if the techniques were used in combination.<sup>109</sup>

The third memorandum, dated March 14, 2003, and signed by John Yoo, was entitled *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (“Yoo Memo”).<sup>110</sup> The Yoo Memo addressed whether the Fifth and Eighth Amendments might be implicated in the interrogation of detainees held outside of the United States.<sup>111</sup> It also addressed whether other federal criminal statutes such as those prohibiting assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), and interstate stalking (18 U.S.C. § 2261A) might apply.<sup>112</sup> The Yoo Memo ultimately concluded that the Fifth and Eighth Amendments did not apply to detainees held abroad and that “generally applicable criminal laws do not apply to the military interrogation of alien unlawful

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For walling, a flexible false wall will be constructed. The individual is placed with his heels touching the wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual’s shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash.

*Id.*

<sup>104</sup> Abu Zubaydah apparently had a fear of insects, and the CIA was proposing to place him in a “physically uncomfortable” confinement box with an insect. *Id.* at 3, 14.

<sup>105</sup> *Id.* at 2.

<sup>106</sup> Marty Lederman, *CIA “Enhanced Interrogation Techniques” Revealed*, BALKINIZATION (Nov. 21, 2005, 10:17 AM), <http://balkin.blogspot.com/2005/11/cia-enhanced-interrogation-techniques.html>.

<sup>107</sup> CIA Memo, *supra* note 101, at 2.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 10–11.

<sup>110</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. 1 (March 14, 2003), [http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf) [hereinafter Yoo Memo].

<sup>111</sup> *Id.* at 6–10.

<sup>112</sup> *See id.* at 23–32.

combatants held abroad. Were it otherwise, the application of these statutes to the interrogation of enemy combatants undertaken by military personnel would conflict with the President's Commander-in-Chief power."<sup>113</sup>

In December 2003, a mere ten months after the Yoo Memo was issued, the newly confirmed Assistant Attorney General for the OLC, Jack Goldsmith, informed the Department of Defense that the Yoo Memo was "'under review' by OLC and 'should not be relied upon for any purpose.'"<sup>114</sup> Goldsmith, who began to serve in the OLC shortly after the Torture Memos were written, has since referred to the Memos' reliance on the Commander-in-Chief argument as a "golden shield" and "blank check" for interrogators.<sup>115</sup>

A full discussion of the Torture Memos, the context in which they were written and their many errors, is beyond the scope of this article. What is not in dispute is that the Torture Memos contained erroneous legal advice—as the OLC itself acknowledged in repudiating them.<sup>116</sup> Although he declined to refer Yoo and Bybee for sanction, Associate Deputy Attorney General Margolis was also careful not to defend the work of these attorneys:

[T]hese memoranda represent an unfortunate chapter in the history of the Office of Legal Counsel. . . . [and I] conclude the same thing that many others have concluded, to wit that these memos contained some significant flaws. . . . [M]y decision not to adopt OPR's misconduct finding should not be misread as an endorsement of the subjects' efforts.<sup>117</sup>

## B. *The OPR Report*

### 1. The Investigation and OPR's Standards

In June 2004, a member of Congress asked the OPR to begin investigating the Bybee Memo.<sup>118</sup> The OPR was originally focused only on the Bybee Memo, but during the course of its investigation, the OPR learned of the exis-

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<sup>113</sup> *Id.* at 81.

<sup>114</sup> Marty Lederman, *Silver Linings (or, the Strange but True Fate of the Second (or Was It the Third?) OLC Torture Memo)*, BALKINIZATION (Sept. 21, 2005, 6:08 PM), <http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html>; accord OPR REPORT, *supra* note 1, at 112 (quoting Letter from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. (Feb. 4, 2005), <http://www.justice.gov/olc/docs/aclu-ii-020405.pdf>) (noting that Goldsmith had contacted the Department of Defense in December 2003 to note that the Yoo Memo should not be relied upon).

<sup>115</sup> OPR REPORT, *supra* note 1, at 197.

<sup>116</sup> See Levin Memo, *supra* note 99, at 2.

<sup>117</sup> Margolis Memo, *supra* note 6, at 67–68.

<sup>118</sup> OPR REPORT, *supra* note 1, at 4.

tence of the CIA Memo and the Yoo Memo.<sup>119</sup> The investigation subsequently extended to memoranda drafted by new Deputy Assistant Attorney General Stephen Bradbury in 2005 and 2007.<sup>120</sup> The final OPR Report analyzes the Bybee Memo, the CIA Memo, and the Yoo Memo, as well as later OLC memoranda authored by Bradbury concerning interrogation policy. The OPR recommended that Bybee and Yoo be referred for sanction but did not recommend sanctions against either Bradbury or any other Department of Justice attorney who worked with Yoo or Bybee.<sup>121</sup>

This article will not purport to offer a full analysis of the lengthy OPR Report. Rather, I will focus only on the OPR's conclusions with respect to whether the Torture Memos violated Rule 2.1. Because the Torture Memos were primarily the work of John Yoo, with Jay Bybee having played a limited supervisory role,<sup>122</sup> I will focus predominately on Yoo's compliance with Rule 2.1 and compare the conclusions reached by Margolis and the OPR concerning Yoo's conduct.<sup>123</sup>

The OPR can find ethical misconduct only when an attorney either intentionally violates an unambiguous rule or standard or acts with reckless disregard of his or her unambiguous obligation or standard.<sup>124</sup> Because the OPR's procedures "require[] proof of a guilty mental state over and above what the ethics rules themselves require,"<sup>125</sup> it is generally more protective of attorneys than state disciplinary systems, which generally require only that the attorney violate the applicable rule.<sup>126</sup> If the OPR finds misconduct by preponderance of evidence, it notifies the state bar in the jurisdiction in which the attorney is admitted.<sup>127</sup>

To determine the operative professional responsibility rules, the OPR applies the ethical rules of the jurisdiction in which the attorney is admitted.<sup>128</sup> Yoo was and is a member of the Pennsylvania Bar.<sup>129</sup> Pursuant to Pennsylvania Rules of Professional Conduct Rule 8.5, Pennsylvania applies the rules of pro-

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<sup>119</sup> *Id.* at 6.

<sup>120</sup> *Id.* at 7–9.

<sup>121</sup> *See id.* at 260–61.

<sup>122</sup> *See id.* at 251, 255.

<sup>123</sup> This is not to say that Bybee's role in approving and signing two of the memoranda does not merit scrutiny. However, as the OPR Report notes, Bybee apparently did not know that the Torture Memos were incomplete or one-sided. *See id.* at 256. In addition, neither the OPR Report nor the Margolis Report offers an in-depth analysis of his compliance with Rule 2.1.

<sup>124</sup> OPR REPORT, *supra* note 1, at 18.

<sup>125</sup> Luban, *supra* note 9.

<sup>126</sup> *See id.*

<sup>127</sup> OPR REPORT, *supra* note 1, at 18, 20 n.21.

<sup>128</sup> *Id.* at 19–20 (noting that, where there is no pending case, OPR will look to the jurisdiction where the attorneys are admitted).

<sup>129</sup> *Id.* at 20.

fessional conduct of the jurisdiction in which the lawyer's alleged misconduct occurred.<sup>130</sup> Since the Torture Memos were written while Yoo was a member of the OLC, the OPR Report analyzed Yoo's conduct under the District of Columbia Rules of Professional Conduct ("D.C. Rules").<sup>131</sup> As the D.C. Rules and the Model Rules are substantially similar, I will simply refer to the rule number except when there is a difference between the D.C. Rules and Model Rules.

The OPR noted that Yoo was acting in an advisory capacity when he wrote the Torture Memos to advise the CIA and other agencies on federal law, with the attendant duty to "exercise independent professional judgment and render candid advice"<sup>132</sup> pursuant to Rule 2.1. In the course of its Rule 2.1 analysis, the OPR also analyzed whether Yoo violated Rule 1.1.<sup>133</sup> Notably, the OPR Report did not consider whether Yoo and Bybee violated D.C. Rule 1.2(e) (Model Rule 1.2(d)), which prohibits an attorney to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."<sup>134</sup>

## 2. The OPR's Findings

Once the OPR identified Rules 2.1 and 1.1 as the operative professional responsibility rules, it then determined what these rules required. The OPR found that, at minimum, Rule 2.1 required that "the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged."<sup>135</sup> The OPR also observed that legal memoranda "should include the strengths and weaknesses of the client's position and should identify any counter arguments."<sup>136</sup> Somewhat controversially, the OPR did not base these considerations solely on the text of Rule 2.1.<sup>137</sup> Rather, it reasoned that since OLC attorneys operated outside of the adversarial system and their legal opinions would not be contested in the normal course, OLC attorneys should be required

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<sup>130</sup> PA. RULES OF PROF'L CONDUCT R. 8.5 (2008). *See also* OPR REPORT, *supra* note 1, at 20.

<sup>131</sup> Yoo had argued that the Pennsylvania Rules of Professional Conduct applied. Margolis Memo, *supra* note 6, at 12 n.7. These rules differed significantly from the D.C. Rules. For example, the Pennsylvania Rules stated at the time that a lawyer "should exercise independent professional judgment and render candid advice." PA. RULES OF PROF'L CONDUCT R. 2.1 (1987) (amended 2004). PA. RULES OF PROF'L CONDUCT R. 2.1 now conforms to the Model Rule.

<sup>132</sup> OPR REPORT, *supra* note 1, at 21 (quoting MODEL RULES OF PROF'L CONDUCT R. 2.1).

<sup>133</sup> *Id.* at 22.

<sup>134</sup> D.C. RULES OF PROF'L CONDUCT R. 1.2(e) (2007). For an incisive criticism of OPR's focus on D.C. Rules 2.1 and 1.1 at the exclusion of D.C. Rule 1.2(e), see Scott Horton, *More Investigations for the Torture Lawyers*, HARPER'S MAGAZINE (Feb. 25, 2010, 6:14 PM), available at <http://harpers.org/archive/2010/02/hbc-90006603>.

<sup>135</sup> OPR REPORT, *supra* note 1, at 22 (quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 85-352 (1985)).

<sup>136</sup> *Id.* at 24.

<sup>137</sup> *See* Steele, *supra* note 9.

to address competing viewpoints.<sup>138</sup> It analogized to Model Rule 3.3(d), which requires attorneys in an *ex parte* proceeding to inform the tribunal of all material facts, including those that are adverse.<sup>139</sup>

In finding that Yoo violated Rule 2.1, the OPR Report referred to numerous instances where Yoo appeared to deliberately slant his analysis.<sup>140</sup> For example, it noted that Yoo had been told by a colleague that the Commander-in-Chief argument was “aggressive” and that it should be taken out of the Bybee Memo.<sup>141</sup> Another colleague, former Assistant U.S. Attorney General and Secretary of Homeland Security General Michael Chertoff, told Yoo that this argument could be interpreted as conferring “blanket immunity”<sup>142</sup> and that he would not feel comfortable signing on to that part of the opinion.<sup>143</sup> Yoo not only left this section in the Bybee Memo but failed to convey that his expansive view of the Commander-in-Chief power was controversial and was disputed by many attorneys, including ones within the Administration.<sup>144</sup> The OPR also referred to evidence that Yoo had inserted the Commander-in-Chief argument into the Bybee Memo at the insistence of White House officials after other Department of Justice attorneys had refused to provide an advance declination of prosecution of CIA interrogators involved in coercive interrogations.<sup>145</sup>

In a similar vein, the OPR Report also noted that Yoo had been told by colleagues that the law on what constituted specific intent was “awfully confused” and that the Bybee Memo’s analysis on this point was “incorrect.”<sup>146</sup> However, Yoo “did not convey any of the uncertainty or ambiguity of this area of the law.”<sup>147</sup> The consequence was that the Bybee Memo created the impression that it was a relatively settled question that an interrogator could never be

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<sup>138</sup> OPR REPORT, *supra* note 1, at 17. Although many of OPR’s observations concerning OLC attorneys are intuitive, it is undoubtedly the case that OPR should have relied more on the text and commentary of Rule 2.1 to support the view that attorneys should address competing viewpoints instead of general considerations about attorneys *qua* advisors and the nature of the OLC. See Margolis Memo, *supra* note 6, at 12–15 (criticizing OPR’s failure to identify a clear standard in the three drafts of its report and its reliance on non-traditional sources).

<sup>139</sup> OPR REPORT, *supra* note 1, at 17 (citing MODEL RULES OF PROF’L CONDUCT R. 3.3(d)). Although this argument may have some intuitive appeal, the D.C. Rules do not have a Model Rule 3.3(d) equivalent.

<sup>140</sup> *Id.* at 251–54.

<sup>141</sup> *Id.* at 252; Margolis Memo, *supra* note 6, at 44. Margolis argues that the fact Yoo consulted with his colleagues shows good faith on his part even though he not only failed to heed his colleagues’ advice, but did not even acknowledge their concerns in the Torture Memos. See *id.* at 67; see also OPR REPORT, *supra* note 1, at 197.

<sup>142</sup> OPR REPORT, *supra* note 1, at 58.

<sup>143</sup> *Id.* at 59.

<sup>144</sup> *Id.* at 252.

<sup>145</sup> *Id.* at 51–52.

<sup>146</sup> *Id.* at 253.

<sup>147</sup> *Id.*



found guilty of torture if he or she committed torture solely to procure information from a detainee.<sup>148</sup>

Lastly, a junior attorney<sup>149</sup> had told Yoo that the argument that common law defenses such as necessity and self-defense might be available to an interrogator accused of torture under 18 U.S.C. § 2340A was dubious.<sup>150</sup> Indeed, the Reagan Administration had considered adding an understanding that such defenses would be available prior to the Senate's ratification of the Convention Against Torture<sup>151</sup> ("CAT"), but the proposed understanding was dropped by the Bush Administration when the CAT was actually ratified.<sup>152</sup> The junior attorney informed Yoo that this had been done so as "[t]o make clear that torture cannot be justified."<sup>153</sup> Despite this, Yoo did not alter his argument that there may be common law defenses to a prosecution under 18 U.S.C. § 2340A and did not even attempt to explain the ratification history.<sup>154</sup>

In assessing these and other alleged errors made by Yoo, OPR ultimately concluded that "the memoranda did not represent thorough, objective, and candid legal advice, but were drafted to provide the client with a legal justification for an interrogation program that included the use of certain [enhanced interrogation techniques]."<sup>155</sup>

### C. *The Margolis Memo*

The Margolis Memo rejects the OPR's recommendation that Yoo and Bybee should be referred to their state bars for disciplinary proceedings because it disagrees with the OPR's interpretation of Rule 2.1 and did not view the arguments in the Torture Memos as so indefensible that they violated Rule 2.1 and other ethical rules.<sup>156</sup>

<sup>148</sup> *Id.* at 252.

<sup>149</sup> This junior attorney has since been identified as Jennifer Koester Hardy, currently a partner at Kirkland Ellis LLP in Washington, D.C. See Zachary Roth, *The Torture Memo Author You've Never Heard Of*, TALKING POINTS MEMO (Feb. 22, 2010, 11:28 AM), [http://tpmmuckraker.talkingpointsmemo.com/2010/02/the\\_torture\\_memo\\_author\\_youve\\_never\\_heard\\_of.php](http://tpmmuckraker.talkingpointsmemo.com/2010/02/the_torture_memo_author_youve_never_heard_of.php).

<sup>150</sup> OPR REPORT, *supra* note 1, at 253.

<sup>151</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>152</sup> OPR REPORT, *supra* note 1, at 217–18.

<sup>153</sup> *Id.* at 253; see also *id.* at 217 ("[N]o circumstances can justify torture.") (quoting Letter from Janet G. Mullins, Assistant Sec'y, Legislative Affairs, U.S. Dep't of State, to Sen. Larry L. Pressler (Apr. 4, 1990), reprinted in S. EXEC. REP. NO. 101-30, app. b at 40–41 (1990)).

<sup>154</sup> *Id.* at 253.

<sup>155</sup> *Id.* at 226.

<sup>156</sup> Margolis Memo, *supra* note 6, at 67–69.

## 1. Standards Applied

Although the Margolis Memo criticizes the OPR Report on numerous grounds, it neither defends the work product of Yoo nor takes issue with the OPR Report's conclusion that Yoo had distorted his analysis. Margolis observes, for example, that Yoo's legal analysis "slanted toward a narrow interpretation of the torture statute at every turn"<sup>157</sup> and "overstat[ed] the certainty of their conclusions and underexpos[ed] countervailing arguments."<sup>158</sup> The Margolis Memo also does not contest the OPR's view that OLC attorneys are legal advisors and not advocates for the Executive Branch and are subject to Rule 2.1.<sup>159</sup> Consequently, although there has been a great deal of scholarly work addressing whether OLC attorneys like Yoo should serve the Executive or the public generally,<sup>160</sup> this debate is largely irrelevant in assessing the conclusions of the Margolis Memo. Rather, the central questions over which the OPR Report and Margolis Memo differ are what Rule 2.1 requires and how poor work product must be for it to constitute evidence that an attorney was not providing candid advice or exercising independent legal judgment.

The Margolis Memo contests the OPR's claim that the professional responsibility rules, and Rule 2.1 in particular, require attorneys to acknowledge viewpoints different than their own when providing legal advice.<sup>161</sup> Margolis points out that the limited case law does not support OPR's reading of Rule

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<sup>157</sup> Margolis Memo, *supra* note 6, at 64.

<sup>158</sup> *Id.* at 68.

<sup>159</sup> *See id.* at 26. *But see id.* at 18 ("[S]hould OLC be more like giving an attorney's advice to a client about what you can get away with . . .") (quoting Interview by Office of Prof'l Responsibility, U.S. Dep't of Justice, with Jack Goldsmith, former Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice). For a general discussion of whether OLC attorneys should be subject to standard professional responsibility rules, see Marty Lederman, *What's the OPR Investigation About, Anyway?*, BALKINIZATION (Nov. 14, 2007, 6:11 AM), <http://balkin.blogspot.com/2007/11/whats-opr-investigation-about-anyway.html> (arguing that OLC attorneys are lawyers who "provid[e] advice to the President in furtherance of his constitutional obligation to faithfully execute the law" and should not be subject to ethical criticism when they provide good faith legal advice that is consistent with the President's view of the law). *But see* David Luban, *Why Even OLC Attorneys Ought To Be Ethical*, BALKINIZATION (Nov. 15, 2007, 11:25 PM), <http://balkin.blogspot.com/2007/11/why-even-olc-lawyers-ought-to-be.html> (suggesting that ethical duties of candor and independence are even more important for OLC attorneys because they provide legal advice in secret and their legal advice can bind the Executive Branch).

<sup>160</sup> *See, e.g.*, Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L & COMP. L. REV. 275, 286–87 (2009) (suggesting that OLC attorneys should act only as consultants to the Executive Branch); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–37 (2006) (suggesting that the OLC should act as neutral decision-maker and not as an advocate for the Executive Branch); W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1341–42 (2009) (suggesting that the duty should be to the Executive Branch but that attorneys should nevertheless maintain fidelity to the law).

<sup>161</sup> Margolis Memo, *supra* note 6, at 23.

2.1<sup>162</sup> and that such a duty to disclose contrary views of the law cannot be inferred because, pursuant to Rule 1.4, an attorney should only provide information to the client consistent with the duty to act in the best interests of the client and taking into account the client's overall objectives.<sup>163</sup> He reasons that "it would have been a 'best practice' [for Yoo] to disclose contrary viewpoints, but it is not at all clear in this context that a known, unambiguous obligation required those disclosures."<sup>164</sup>

Margolis then conducts his own analysis of what Rule 2.1 requires.<sup>165</sup> Margolis begins by noting that an attorney's obligation to provide candid advice is not defined in the text of Rule 2.1.<sup>166</sup> He then equates the duty to render candid advice to a client to "an attorney's obligation of candor toward a tribunal" under Rule 3.3.<sup>167</sup> He focuses in particular on Rule 3.3(a)(1),<sup>168</sup> which states that "a lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal."<sup>169</sup> Margolis claims that

[i]t seems likely that an attorney's duty of candor toward his client as an advisor would be no higher than his duty of candor to the court, and therefore the requirement of candor in Rule 2.1 at most prohibits an attorney from knowingly or recklessly making a false statement of material fact or law to a client.<sup>170</sup>

In terms of the duty to exercise independent professional judgment, Margolis argues that the duty should be seen in light of Rule 1.2(a)'s requirement that the client set the objectives of the representation.<sup>171</sup> He writes:

The requirement . . . that an attorney exercise independent [ ] judgment must be read in conjunction with other obligations of the attorney and cannot mean that the attorney is supposed to exercise judgment independent of the client's objectives, but rather that the attorney should not provide dishonest advice to satisfy the client's objectives nor should the attorney provide ad-

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<sup>162</sup> *Id.* at 24.

<sup>163</sup> *Id.* at 23 (citing D.C. RULES OF PROF'L CONDUCT R. 1.4 cmt. 3 (2007)).

<sup>164</sup> *Id.* at 45; *see also id.* at 26.

<sup>165</sup> *Id.* at 26.

<sup>166</sup> *See id.*

<sup>167</sup> *See* Margolis Memo, *supra* note 6, at 26.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (quoting D.C. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007)).

<sup>170</sup> Margolis Memo, *supra* note 6, at 26. Margolis determines that, based on case law, a statement that is recklessly false, as opposed to known to be false, may be sufficient to establish a violation of Rule 3.3(a)(3) and, consequently, may also be sufficient to establish a violation of Rule 2.1. *See id.*

<sup>171</sup> *See id.*

vice when the attorney is encumbered by a conflicting personal interest or an inappropriate relationship with the client.<sup>172</sup>

Margolis finds further support for his analysis in D.C. Rule 1.2(e) (Model Rule 1.2(d)).<sup>173</sup> The Rule provides that a “lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,” but is permitted to “counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.”<sup>174</sup> Margolis states that Yoo was engaged in the latter activity and that Rule 2.1 cannot be read so broadly that it would prevent attorneys like Yoo from assisting clients in making good-faith determinations as to the scope and meaning of U.S. anti-torture law.<sup>175</sup> Consequently, Margolis concludes that Rule 2.1 can only prohibit an attorney from providing advice that is knowingly or recklessly false<sup>176</sup> or otherwise issued in bad faith.<sup>177</sup>

## 2. Application to Yoo

According to the Margolis Memo, since the ethical rules do not clearly require an attorney to identify contrary views of the law for the client, the relevant question in assessing whether Yoo fulfilled his duties under Rule 2.1 is whether he genuinely believed his legal advice.<sup>178</sup> For example, Margolis describes the Torture Memos’ discussion of the President’s Commander’s-in-Chief powers as “one-sided and conclusory,” but notes that Yoo’s “expansive view of executive power did not begin when he joined the OLC.”<sup>179</sup> Consequently, “it was less than clear at the time that Yoo was obligated as a matter of professional responsibility to disclose those viewpoints that contradicted his firmly held belief.”<sup>180</sup>

In other sections of the Memo, Margolis focuses explicitly on the ambiguity in the underlying law of torture. He justifies the Bybee Memo’s determination that only extreme and unusually cruel practices constitute torture by claiming that “any effort to provide prospective guidance on the meaning of a purely subjective term ran risks of misinterpretation.”<sup>181</sup> Margolis makes a simi-

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 22.

<sup>174</sup> D.C. RULES OF PROF’L CONDUCT R. 1.2(e) (2007).

<sup>175</sup> See Margolis Memo, *supra* note 6, at 22–23.

<sup>176</sup> See *supra* text accompanying notes 167–169.

<sup>177</sup> Margolis Memo, *supra* note 6, at 26.

<sup>178</sup> See, e.g., *id.* at 67–68.

<sup>179</sup> See *id.* at 45, 65.

<sup>180</sup> *Id.* at 45.

<sup>181</sup> *Id.* at 34; see also Lewis, *supra* note 17, at 106 (arguing that the practical meaning of torture lies in the eye of the beholder”). Lewis purports to offer an “objective” and “straightforward” definition of torture by claiming that “[a]ny stressor or form of physical treatment that a nation

lar argument to defend the Bybee Memo's discussion of alleged common law defenses to torture.<sup>182</sup> The OPR had argued that there were no common law defenses to a prosecution under the anti-torture statute because the CAT provides that "no exceptional circumstances whatsoever . . . may be invoked as a justification for torture."<sup>183</sup> The ratification history of the CAT tends to support this view because the first Bush administration had refused to enter an understanding to allow for such common law defenses,<sup>184</sup> and this was pointed out to Yoo by a junior attorney.<sup>185</sup> Margolis does not dispute these arguments but notes that no court had ruled on whether there were common law defenses to a prosecution under 18 U.S.C. § 2340A, and it was plausible that when Congress implemented the CAT and failed to address common law defenses, that it was rejecting the CAT's restriction of those defenses.<sup>186</sup> Margolis is unwilling to find bad faith or willful wrongdoing where Yoo simply had a "difference of opinion" with the OPR as to the significance of the ratification history.<sup>187</sup>

Lastly, Margolis seeks to explain the one-sidedness of the Torture Memos by referring to the context in which they were written. Margolis criticizes the OPR for failing to consider that the Torture Memos were intended for a sophisticated audience, where not every counter-argument would have to be explored in full.<sup>188</sup> Margolis also notes throughout the Memo that the Torture Memos were written in a time of a national security crisis.<sup>189</sup> He consequently faults the OPR for demanding complete thoroughness in Yoo's work when the general mood after the September 11th attacks was one of virtual panic, and OLC attorneys literally thought that lives depended on their work.<sup>190</sup>

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uses in a non-punitive manner on its own trainees presumptively would not be considered torture when used on a detainee." *Id.* at 122. Setting aside the issue of whether one can even equate acts perpetrated in a training setting to those inflicted on detainees from hostile nations or groups, this definition is not "objective" given that Lewis concedes that this definition would allow different nations to treat detainees differently—essentially defeating the entire purpose of the CAT. *See id.* at 131. Nor is Lewis's definition of torture "clear" because Professor Lewis claims that additional acts such as mock executions and medical experimentation that are not clearly prohibited under it would nevertheless constitute torture. *Id.* at 122. Consequently, he supplements his definition with a list of bright line prohibitions. *Id.* Professor Lewis fails to explain, however, how the distinction between medical experimentation and legitimate medical study (for example) is less controversial than the distinction between torture and cruel or degrading treatment. *Id.* at 122–23.

<sup>182</sup> *See generally* Margolis Memo, *supra* note 6, at 54–55.

<sup>183</sup> *See* OPR REPORT, *supra* note 1, at 217.

<sup>184</sup> *See id.* at 217–19.

<sup>185</sup> *Id.* at 218, 253.

<sup>186</sup> *See* Margolis Memo, *supra* note 6, at 55–56.

<sup>187</sup> *See id.* at 57.

<sup>188</sup> *See, e.g., id.* at 54 (stating that other administration attorneys would have understood that Yoo's reliance on the Commander-in-Chief argument was controversial).

<sup>189</sup> *See, e.g., id.* at 21, 67.

<sup>190</sup> *See id.* at 21.

If the Margolis Memo were primarily based on this final argument, the Memo's potential effect on legal ethics would be limited. Yoo's conduct, while certainly not exemplary, could be seen as an instance where it would be unfair to apply the "normal" professional responsibility rules because of the extraordinary nature of the threat the country was facing and the enormous pressure under which attorneys like Yoo were operating.<sup>191</sup> Whatever the merits of such a defense of Yoo's conduct, it is not the one offered by Margolis. Although Margolis clearly viewed the circumstances under which Yoo wrote the memos as a mitigating factor that helped explain the inclusion of some of the more dubious arguments,<sup>192</sup> he does not claim that Yoo was somehow exempt from the professional responsibility rules or that the circumstances alone justified Yoo's legal advice. For his part, Yoo has steadfastly claimed that his work product was not affected by the fearful climate after September 11th.<sup>193</sup>

#### V. THE MARGOLIS MEMO'S FLAWED ACCOUNT

Although the Margolis Memo offers some valid criticisms of the OPR Report,<sup>194</sup> the Margolis Memo also has significant flaws. It is not consistent in its reliance on indeterminacy, and its interpretation of Rule 2.1 does not necessarily follow from the text of the Rule. Margolis's interpretation of Rule 2.1 would also seem to protect legal advice that has little social value.

##### A. *Reliance on Indeterminacy*

Margolis's argument that Yoo did not violate any ethical rules can be summarized as follows. First, he argues that Rule 2.1 and other ethical rules are ambiguous, and Yoo was not obligated to discuss views that contrasted with his own. Second, he argues that the law which Yoo was purporting to interpret was unclear and therefore any errors found in the Torture Memos can be attributed to

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<sup>191</sup> Cf. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 3 ("In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical.").

<sup>192</sup> See Margolis Memo, *supra* note 6, at 17–18, 21. The context of the Torture Memos could, contrary to Margolis's contention, support the view that Yoo deliberately distorted his analysis. The state of crisis that existed after September 11th—where apparently OLC attorneys thought another attack was imminent, *see id.* at 21, raises the possibility that Yoo deliberately skewed his analysis out of a desire to give the administration full latitude to use whatever means necessary, including torture, to prevent another terrorist attack. The only evidence to which Margolis refers to rebut this proposition is statements from Yoo's colleagues that the legal views he expressed in the Torture Memos—however extreme—were nevertheless genuinely held and thought to be a true exposition of the law. *See id.* at 66. The reader may form his or her own conclusion as to whether it is appropriate in an investigation of professional misconduct to give such credence to unsupported statements of this type from an attorney's former colleagues.

<sup>193</sup> *See id.* at 17 (noting Yoo's denial that pressures after September 11th affected his work).

<sup>194</sup> In particular, Margolis is likely correct that the OPR should not have used OLC best practices to determine the content of Rule 2.1. *See id.* at 25–26.

a mere “difference of opinion” as to what the anti-torture statute and other laws required. Both of these arguments are in effect claims about the allegedly indeterminate nature of Rule 2.1 and anti-torture law.

Margolis’s first claim that Model Rule 2.1 has no determinate meaning is problematic in light of his other arguments. If Margolis is correct and Rule 2.1 does not suggest a clear rule of conduct, why does Margolis assess Yoo’s conduct under the standard that an attorney is only prohibited from providing advice that is knowingly or recklessly false or is otherwise issued in bad faith? Margolis does not fully explain why Yoo’s conduct is being assessed only by this standard as opposed to some higher standard such as that articulated by the OPR—namely that attorneys are required to give thorough, objective, and candid advice by, for example, identifying when a legal position is unlikely to be sustained by a court.<sup>195</sup> One would expect an attorney faced with an allegedly ambiguous ethical rule to act in such a way that his or her behavior is in conformity with a reasonable construction of that rule. Margolis simultaneously excuses the one-sidedness of Yoo’s analysis by asserting that there is no clear obligation pursuant to Rule 2.1 to identify “considered and rejected arguments for the client”<sup>196</sup> but ultimately assesses Yoo’s conduct by a standard of his own creation.

Even if one accepts Margolis’s argument that only legal advice that was knowingly or recklessly false or issued in bad faith is prohibited by Rule 2.1, it does not follow that Margolis’s conclusion with respect to Yoo is correct. Margolis focuses predominately on Yoo’s alleged lack of bad faith, but it is certainly possible to argue that by failing to identify foreseeable counter-arguments to some of the extreme positions he articulated in the Torture Memos that Yoo’s legal advice was “recklessly false.”<sup>197</sup> Margolis, in other words, uses indeterminacy to undermine the OPR’s analysis of the ethical rules but does not recognize that his interpretation of Rule 2.1 is sufficiently indeterminate to allow for the ethical criticism of Yoo for failing to raise highly foreseeable counter-arguments to his analysis.

Margolis’s second claim, concerning the allegedly indeterminate nature of the U.S. anti-torture statute, 18 U.S.C. § 2340A, also does not explain the Torture Memos. Even if Margolis is correct that attorneys can reasonably disagree as to the meaning of terms such as “torture” and “severe pain” in the statute, why did the Torture Memos “narrowly construe the [torture] statute at every turn”?<sup>198</sup> To be sure, Yoo clearly had strong opinions prior to joining the OLC concerning the scope of executive power so it is unsurprising that the Torture Memos favor an expansive view of executive power at the expense of the anti-

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<sup>195</sup> OPR REPORT, *supra* note 1, at 21–22.

<sup>196</sup> Margolis Memo, *supra* note 6, at 23.

<sup>197</sup> Margolis defined recklessness in this context as “conscious indifference to the consequences of one’s behavior” or “conscious disregard of a risk.” *Id.* at 26 (citing *In re Romansky*, 825 A.D.2d 311, 316 (D.C. 2003)).

<sup>198</sup> Margolis Memo, *supra* note 6, at 68.

torture statute. However, as Margolis acknowledges, prior to writing the Torture Memos, Yoo had no expertise or academic interest in fields such as criminal law<sup>199</sup> and yet the Memo defines specific intent very narrowly such that an interrogator can only commit torture if his motive is to inflict severe pain on a detainee.<sup>200</sup> Margolis cannot explain why Yoo consistently interpreted the anti-torture statute's various elements in such a way as to permit the Bush administration the greatest amount of leeway in terms of interrogation policy, notwithstanding the allegedly indeterminate nature of U.S. law with respect to torture.

*B. Does Margolis's Account of Rule 2.1 Follow from the Ethical Rules?*

The Margolis Memo assesses Yoo's conduct using a far more lenient interpretation of Rule 2.1 than the OPR. However, the standard identified by Margolis—that Rule 2.1 requires only that an attorney provide legal advice that was not knowingly or recklessly false or issued in bad faith<sup>201</sup>—is an equally controversial reading of the Rule. Margolis arrives at this standard by extrapolating from Rule 3.3 (Candor to Tribunal) and specifically Rule 3.3(a)(1), which states that “a lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal.”<sup>202</sup> But Rule 3.3(a)(1) and other ethical rules relied upon by Margolis may not fully determine the lawyer's obligations *qua* advisor.

Margolis seems to assume that Rule 3.3's definition of candor should be imported into Rule 2.1. However, he focuses on Rule 3.3(a)(1) to the exclusion of other parts of the Rule. For example, Rule 3.3(a)(2) provides that an attorney cannot “fail to disclose to the tribunal legal authority in the controlling jurisdiction . . . known to the lawyer to be directly adverse to the position of the client[.]”<sup>203</sup> and the commentary explains that a lawyer “must recognize pertinent legal authorities.”<sup>204</sup> Indeed, courts regularly sanction attorneys for failing to address and distinguish arguably adverse authority.<sup>205</sup> To the extent that Rule

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<sup>199</sup> See *id.* at 66.

<sup>200</sup> OPR REPORT, *supra* note 1, at 252–53; see also Markovic, *supra* note 4, at 351–52.

<sup>201</sup> Margolis Memo, *supra* note 6, at 26.

<sup>202</sup> See *id.* at 26 (citing D.C. RULES OF PROF'L CONDUCT R. 3.3(a)(1)).

<sup>203</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2011).

<sup>204</sup> MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 4.

<sup>205</sup> See, e.g., *Cousin v. District of Columbia*, 142 F.R.D. 574, 577 (D.D.C. 1992) (sanctioning attorney under Federal Rules of Civil Procedure, Rule 11 for failing to cite and distinguish adverse authorities); *In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000) (reprimanding and admonishing attorney for not having informed client of adverse authority); *Nacbaour v. Am. Transit Ins. Co.*, 300 A.D.2d 74, 76 (N.Y. App. Div. 2002) (affirming imposition of sanctions where attorney had failed to cite adverse authority to court from controlling jurisdiction); see also *S. Hammond Store Agency, Inc. v. Baear*, 414 S.E.2d 287, 288 (Ga. Ct. App. 1991) (affirming awarding attorney fees to opposing party where plaintiff's attorneys did not attempt to distinguish controlling authority to trial court); cf. OPR REPORT, *supra* note 1, at 204 (discussing Yoo's omission of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), from Bybee Memo).



3.3 bears on Rule 2.1, the duty of candor would seem to involve more than simply refraining from making “false statement[s] of fact or law.”<sup>206</sup>

It is also possible that a lawyer may owe a greater duty of candor to his or her client than he or she does to a tribunal. Obviously an attorney should not mislead either his client or a tribunal. Nevertheless, under the professional responsibility rules, when an attorney is acting as an advocate, he or she is expected to advance the best possible case for his or her client that is not inconsistent with his or her other ethical obligations.<sup>207</sup> It is for this reason that attorneys are permitted under Rule 3.1 to make any argument to a tribunal that is not frivolous,<sup>208</sup> whereas, under Rule 2.1, a lawyer must provide his client with an “honest assessment.”<sup>209</sup> Contrary to Margolis’s contention, a lawyer’s duty of candor to his or her client seems to be greater than his or her duty to a tribunal.

Margolis’s discussion of a lawyer’s obligation to exercise independent professional judgment is also controversial. He argues that this requirement must be understood in relation to the client’s right to set the objectives of the representation.<sup>210</sup> Presumably this means that an attorney can exercise his independence only within the bounds set by the client. But the commentary to Rule 2.1 states that a lawyer should not be deterred from giving legal advice by the prospect that the advice will be unpalatable to the client<sup>211</sup> and seems to contemplate that the attorney’s legal advice will sometimes not be congenial to the client’s objectives.<sup>212</sup> Margolis’s argument also does not account for the drafting history of Rule 2.1. The preliminary draft of the rule provided that lawyers should “exercise independent and candid professional judgment, *uncontrolled by the interests or wishes of a third person, or by the lawyer’s own interests or wishes.*”<sup>213</sup> The final version of Rule 2.1, however, does not qualify or limit an attorney’s “independent judgment,” suggesting that the attorney may be required to maintain some independence from the client and his or her objectives.

Margolis’s ultimate conclusion that Rule 2.1 requires that an attorney only provide legal advice that is not knowingly or recklessly false or in bad faith also does not follow from D.C. Rule 1.2(e) (Model Rule 1.2(d)). D.C. Rule 1.2(e) prohibits an attorney from counseling a client to engage in conduct that he or she knows to be criminal. In Margolis’s view, Yoo did not counsel such

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<sup>206</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2011).

<sup>207</sup> MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (2011).

<sup>208</sup> *Id.*

<sup>209</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1 (2011).

<sup>210</sup> Margolis Memo, *supra* note 6, at 26.

<sup>211</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1.

<sup>212</sup> See also D.C. RULES OF PROF’L CONDUCT R. 1.2(e) (2011) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

<sup>213</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 (Discussion Draft 1980) (cited in STEPHEN GILLERS & ROY D. SIMON JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 148 (1993) (emphasis added)).

conduct.<sup>214</sup> Rather, he merely “assist[ed] [his] client[s] to make a good-faith effort to determine the validity, scope, meaning, or application” of U.S. anti-torture law, which is expressly permitted by D.C. Rule 1.2(e),<sup>215</sup> and since D.C. Rule 1.2(e) is “more specific” than Rule 2.1, Rule 2.1 can only apply to legal advice that is prohibited by D.C. Rule 1.2(e) (*i.e.* legal advice that is knowingly or recklessly false or otherwise given in bad faith).<sup>216</sup>

However, Margolis never analyzes whether Yoo in fact assisted his clients in making a “good faith” effort to interpret U.S. anti-torture law. Instead, he merely assumes that Yoo’s work was intended to serve this purpose. Moreover, if Margolis is correct that Rule 2.1 cannot apply to conduct that is not prohibited by D.C. Rule 1.2(e), Rule 2.1 would appear to be redundant. It is unclear why the ethical rules should be read in such a manner.<sup>217</sup> Margolis also does not explain why he uses the prohibitory D.C. Rule 1.2(e), which specifically disallows a narrow range of conduct, to define the full scope of the mandatory Rule 2.1.

The Margolis Memo’s interpretation of Rule 2.1 as only precluding attorneys from counseling conduct known to be illegal is contestable and does not necessarily follow from the text of the Rule.

### C. *Social Utility*

Although the Margolis Memo’s conclusion that Rule 2.1 requires only that an attorney refrain from providing legal advice that he or she knows is false, recklessly false, or otherwise provided in bad faith does not necessarily follow from the ethical rules, it will nevertheless be appealing to many lawyers because it allows lawyers to offer novel and aggressive interpretations of the law without fear of sanction. Indeed, since “there [may be] no position—no matter how absurd—of which an advocate cannot convince himself,”<sup>218</sup> Margolis’s interpretation of Rule 2.1 may completely preclude the possibility of sanction under the Rule. This may be an acceptable trade-off to many inside and outside of the legal profession in order to ensure that lawyers offer their true views of the law. For example, Professor Goldsmith has warned:

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<sup>214</sup> See Margolis Memo, *supra* note 6, at 22.

<sup>215</sup> *Id.*

<sup>216</sup> See *id.* at 22–23; see also Paulsen, *supra* note 16, at 7 (stating that it is “plain” that Yoo was endeavoring to assist the Bush administration in determining the meaning and scope of the U.S. anti-torture law).

<sup>217</sup> It is a fundamental principal of statutory construction that a statute should not be interpreted so as to render language within it as “mere surplusage.” See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting.”) (internal citations and quotations omitted).

<sup>218</sup> Levinson, *supra* note 49, at 373 (quoting *Wells v. Oppenheimer Co.*, 101 F.R.D. 358, 359 n.3 (S.D.N.Y. 1984) (Knapp, J.)).

Second-guessing lawyers' wartime decisions under threat of criminal and ethical sanctions may sound like a good idea to those who believe those lawyers went too far in the fearful days after Sept. 11, 2001. But the greater danger now is that lawyers will become excessively cautious in giving advice and will substitute predictions of political palatability for careful legal judgment.<sup>219</sup>

Professor Goldsmith is undoubtedly correct that there would be negative consequences were lawyers *qua* advisors to become "excessively cautious."<sup>220</sup> But this concern may be overstated given that attorneys will often find it in their self-interest to offer aggressive and tendentious legal advice when their clients desire it and thus are unlikely to become "excessively cautious" if Rule 2.1 were interpreted to disallow some "good faith" legal advice.

More importantly, Margolis's interpretation of Rule 2.1 does not only protect controversial legal arguments. It also protects an attorney's right to make such legal arguments *without identifying countervailing views of the law*. For example, although Margolis found Yoo's analysis of the scope of executive power to be "one-sided and conclusory," he was unwilling to find any wrongdoing because of Yoo's "expansive view of executive power."<sup>221</sup> While there may be value in enabling attorneys *qua* advisors to offer aggressive legal advice on the scope of executive power and other legal questions, what is the value in protecting an attorney's right to offer such legal advice without identifying countervailing considerations?

The idea that attorneys should communicate countervailing views of the law to their clients is hardly novel.<sup>222</sup> Attorneys are generally taught from their first days of law school that any objective analysis of a legal problem involves a discussion of adverse authority<sup>223</sup> and that legal memoranda should be predic-

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<sup>219</sup> Goldsmith, *supra* note 16; see also Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449, 456-57 (2009).

<sup>220</sup> Goldsmith, *supra* note 16.

<sup>221</sup> See Margolis Memo, *supra* note 6, at 45, 68.

<sup>222</sup> Margolis appears to concede that attorneys should identify countervailing considerations under the ethical rules, although he states that this duty is imposed pursuant to Rule 1.1. See Margolis Memo, *supra* note 6, at 23. However, he claims that the attorney is nevertheless not required to communicate these considerations to the client. See *id.* This view seems dubious as Rule 2.1 refers to the duty to "render candid advice," not merely the duty to exercise candor. See also *In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000) (holding that attorney violated Rule 1.4(b) by failing to communicate to the client that there was controlling authority in the jurisdiction that was adverse to attorney's arguments); cf. *Matthews v. Kindred Healthcare, Inc.*, No. 05-1091-T-AN, 2005 WL 3542561, at \*5 (W.D. Tenn. Dec. 17, 2005) (holding that failure to cite to adverse authority violates duty of candor to tribunal).

<sup>223</sup> See OPR REPORT, *supra* note 1, at 24 (citing WILLIAM STASKY, LEGAL RESEARCH AND WRITING: SOME STARTING POINTS 177-78, 278-79 (1999)).

tive so that the client has an accurate understanding of his or her situation.<sup>224</sup> Even when confronting relatively uncontroversial questions, attorneys often offer legal advice in the form of “I’m pretty sure you can do that, but there is a risk that a court won’t go along.”<sup>225</sup> Attorneys hedge their legal advice in this manner to avoid negative repercussions if their legal advice is later found to be incorrect by a court or administrative body. Perhaps to explain why the Torture Memos lacked even this minimal level of nuance, Yoo has admitted that he would have drafted the Torture Memos differently if he had expected his legal advice to become public.<sup>226</sup>

The Margolis Memo concedes that it would have been a “best practice” for Yoo to identify countervailing views of the law.<sup>227</sup> However, Margolis fails to explain why attorneys like Yoo who calculate that their legal advice is unlikely to be subject to public scrutiny should be free to provide one-sided legal advice that is “devoid of nuance.”<sup>228</sup>

One does not need to believe that the attorney’s function should be to serve some transcendent concept of law to be troubled when attorneys do not raise competing views of the law with their clients. One-sided legal advice also potentially undermines client autonomy. As the Supreme Court of Indiana has held, an attorney who does not acknowledge strong counter-arguments “divest[s] his client of the opportunity to assess intelligently the legal environment . . . and to make informed decisions regarding whether to go forward.”<sup>229</sup>

By way of example, if Yoo had acknowledged in the Bybee Memo that the law on specific intent was “awfully confused,”<sup>230</sup> Yoo’s superiors could have requested a clarification on the issue from the experienced criminal attorneys within the Department of Justice. Yoo’s one-sided analysis, that appears to have conflated specific intent with motive,<sup>231</sup> deprived the administration of this option. Margolis’s account of Rule 2.1 protects Yoo’s freedom to give such advice at the expense of an administration that may have been prevented from making informed decisions about interrogation policy.

More broadly, if Margolis is correct that Rule 2.1 essentially protects all legal advice that is given in good faith and that the professional responsibility rules do not require attorneys to communicate countervailing views of the law,

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<sup>224</sup> See LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 131 (3d ed. 2011) (“When you write an office memo, your role is predictive . . . [y]ou must take an objective view of the question you are asked. The client . . . need[s] an accurate understanding of the situation.”).

<sup>225</sup> Wendel, *supra* note 160, at 1346.

<sup>226</sup> JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 177 (2006).

<sup>227</sup> Margolis Memo, *supra* note 6, at 45.

<sup>228</sup> *Id.* at 68.

<sup>229</sup> *In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000).

<sup>230</sup> OPR REPORT, *supra* note 1, at 166, 253 (noting that Yoo had admitted that he had been advised that the law on specific intent was “awfully confused”).

<sup>231</sup> See, e.g., *id.* at 252–53.

there is little incentive for clients to retain lawyers with mainstream legal views outside of the litigation context. In fact, the incentive would be very much the opposite. In order to carry out acts of dubious legality, clients merely have to retain attorneys with idiosyncratic views concerning the permissibility of those acts. In the event that the acts come to light, the client can claim that he or she reasonably relied on the advice of counsel as to the legality of the alleged misconduct.<sup>232</sup>

## VI. AN ALTERNATIVE VIEW OF RULE 2.1

In this section, I will argue that Rule 2.1 can be read to require attorneys to communicate not only their own views of the law but also countervailing considerations. This interpretation of Rule 2.1 is consistent with the text of Rule 2.1 and the ethical rules as a whole and encourages lawyers to provide their clients with a more complete understanding of their legal situations in order that clients are better situated to make decisions. I will then apply this interpretation of Rule 2.1 to the Torture Memos.

### A. *Rule 2.1's Honest Assessment*

Under Rule 2.1, an attorney is obligated to provide “straight forward advice expressing the lawyer’s honest assessment”<sup>233</sup> of the law. An “honest assessment” of the law should not be reduced to an attorney’s view of what the law is. An “honest assessment” involves an evaluation of what the law is.<sup>234</sup> Providing a client with one possible interpretation of the applicable law when that interpretation is greatly contested is not an assessment at all—even if the attorney communicates his or her own genuine view of how the law should be interpreted.

This interpretation of Rule 2.1 follows not only from the Rule’s commentary but also the language of the Rule itself, which permits an attorney “to 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.”<sup>235</sup> Implicit in this is that an attorney *will* refer to legal considerations that are relevant to a client’s situation.<sup>236</sup> The Rule commentary also notes that in some circumstances, advising the client only of “strictly legal considerations” is inadequate.

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<sup>232</sup> This does not mean that an individual would be immune from prosecution on account of his or her reliance on this legal advice. See *infra* note 314 at 250–51.

<sup>233</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1 (2011).

<sup>234</sup> The Oxford American dictionary defines “assessment” as the “evaluation and estimation of the nature, quality or ability of someone or something.” OXFORD AMERICAN DICTIONARY 96 (2010).

<sup>235</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1.

<sup>236</sup> See *also id.* R. 2.1 cmt. 2.

quate.<sup>237</sup> It would be somewhat anomalous if Rule 2.1 permitted attorneys to omit legal considerations “relevant to the client’s situation” such as that the attorney’s view of the law is highly contested, while not allowing attorneys to raise only legal considerations in some instances.

The Preamble to the Model Rules provides further support for the proposition that an attorney’s legal advice should seek to incorporate more than the attorney’s view of the law. The Preamble refers to an attorney’s duty *qua* advisor to “provide[] a client with an informed understanding of the client’s rights and obligations” and to “explain their practical implications.”<sup>238</sup> An honest assessment that only reflects the attorney’s view of the law provides a client neither with “an informed understanding” of the law nor conveys the practical implications that may follow if the lawyer’s view of the law is contested.

Of course, the ethical rules cannot tell attorneys every legal and non-legal consideration that is relevant to a client’s situation because many considerations will be specific to the particular legal problem and practice area at issue. Some considerations, however, are likely relevant regardless of the particular field of law. For example, if a statute of limitations for a cause of action is set to expire or has expired, this would be a consideration that would ordinarily be relevant to the client’s situation. Another relevant consideration that seems to follow from the language of Rule 2.1 is if there are widely-accepted views of the law that are different from those of the attorney. An “honest assessment” would consider these views. That a majority of attorneys would disagree with Yoo’s view that torture must produce pain that is equivalent to that caused by organ failure or death,<sup>239</sup> for example, was a consideration that Yoo should have identified in the Torture Memos. By failing to address this issue, Yoo did not attempt to give his superiors an “informed understanding”<sup>240</sup> of the meaning of “torture” under U.S. law.

The interpretation of Rule 2.1 offered here is also consistent with the Model Rules as a whole. Under Rule 1.2(a), the client sets the objectives of the representation while the attorney offers his or her honest assessment of whether those objectives can be achieved by identifying relevant legal and non-legal considerations pursuant to Rule 2.1. In seeking to apprise the client of all relevant legal and non-legal considerations, the attorney also fulfills his duty under Rule 1.4(b) to “[e]xplain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding a representation.”<sup>241</sup>

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<sup>237</sup> *Id.* R. 2.1 cmt. 3 (“A client may expressly or impliedly ask the lawyer for purely technical advice. . . . When such a request is made by a client inexperienced in legal matters, however, the lawyer’s responsibility as advisor may include indicating that more may be involved than legal considerations.”).

<sup>238</sup> *Id.* Pmbl.

<sup>239</sup> OPR REPORT, *supra* note 1, at 176 n. 133 (citing Bybee Memo, *supra* note 86).

<sup>240</sup> MODEL RULES OF PROF’L CONDUCT Pmbl.

<sup>241</sup> *See also In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000) (“By failing to advise his client of a ruling in the controlling jurisdiction that was adverse to the legal arguments contemplated for his

It is a consequence of the interpretation of Rule 2.1 that I have articulated here that an attorney may violate his or her duties under Rule 2.1 *even if his or her legal advice is ultimately proven correct*. If an attorney presents only his or her view of the law and does not explain that there is an equally plausible interpretation of the law, the attorney has failed to identify a potentially crucial legal consideration that is relevant to the client's situation. Indeed, the fact that the competing interpretation occurred to the lawyer suggests that it is relevant to the client's situation and should be shared with the client. In failing to convey the competing interpretation of the law to the client, the attorney has deprived the client of his or her honest assessment.

The client may not be prejudiced if the attorney's view of the law is ultimately proven correct. The attorney's violation of Rule 2.1 may also be unreported under these circumstances, and disciplinary authorities could consider the lack of prejudice to the client in determining whether a sanction or admonishment would be inappropriate. Nevertheless, a client who reads for the first time in a legal decision that his or her legal problem is a "close call" would seem to have a legitimate grievance with his or her attorney, notwithstanding the fact that the judgment ended up in his or her favor.

#### B. *Application to Yoo*

Yoo violated Rule 2.1 for failing to give his client an honest assessment of U.S. law with respect to torture by omitting legal considerations "that were clearly relevant to the client's situation."<sup>242</sup> Yoo knew that many of the legal positions in the Torture Memos were controversial. He was told as much by his OLC colleagues,<sup>243</sup> and yet produced memoranda totally "devoid of nuance" that "overstat[ed] the certainty of his legal conclusions and underexpose[ed] countervailing arguments."<sup>244</sup>

Yoo's ethical failing, in other words, was not that his views on issues ranging from what constitutes torture to the scope of executive power were wrong as a matter of legal doctrine. Rather, he failed to identify opposing views in the Torture Memos, even though those opposing views were widely accepted, whereas Yoo's views were, at best, plausible.<sup>245</sup>

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client's case . . . the respondent effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued and to make informed decisions regarding whether to go forward with it.").

<sup>242</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1.

<sup>243</sup> See, e.g., OPR REPORT, *supra* note 1, at 50–51 (noting that Yoo had been told Commander-in-Chief argument should be removed); *id.* at 253 (noting that junior attorney had told Yoo that discussion of common law defenses to torture was dubious in light of CAT's ratification history).

<sup>244</sup> Margolis Memo, *supra* note 6, at 68.

<sup>245</sup> See also Wendel, *supra* note 36, at 1229 ("[T]he defenders of [Yoo and Bybee] argue, in effect, that the position taken in the memos, particularly with respect to executive power, is so cutting edge that it has wrongly been thought crazy rather than innovative. The trouble with this

This is a point that Yoo's defenders often overlook, even as they acknowledge the importance of attorneys considering a full range of views. For example, in his testimony before a Senate sub-committee investigating the Torture Memos, Professor Paulsen claimed that Yoo's views of executive power and definition of torture "[fell] within the range of legitimate legal analysis and the range of reasonable disagreement common to legal advice of important statutory and constitutional issues."<sup>246</sup> However, in the same testimony, Professor Paulsen stated that Model Rule 2.1 requires attorneys to "provide objective legal analysis that assists a client in understanding the legal options available," and government attorneys should provide "vigorous legal advice reflecting the full range of views."<sup>247</sup> But Professor Paulsen did not claim, and indeed cannot claim, that the Torture Memos considered "the full range of views,"<sup>248</sup> even though under Professor Paulsen's own analysis this is what the Memos should have done. Professor Paulsen's defense of Yoo is based entirely on the notion that the plausibility of Yoo's views means that he cannot be subject to professional discipline.<sup>249</sup>

Professor Steele has characterized Yoo's failure to identify counterarguments to his good faith legal advice as a violation of Rule 1.1 and not Rule 2.1.<sup>250</sup> Although it is certainly possible to see Yoo's work as having violated Rule 1.1, such an analysis may underestimate the extent to which the two rules are related. Rule 2.1, like many of the profession's ethical rules, appears to assume a basic level of competence. A truly incompetent attorney will not be able to discern which legal and non-legal factors "may be relevant to a client's situation" under Rule 2.1 just as an incompetent attorney may not be able to determine pursuant to Rule 3.1 when "there is a basis in law and fact" for asserting a particular argument.

If an attorney is incompetent, his or her assessment will likely be worthless to the client regardless of whether or not the assessment is "honest." However, assuming that an attorney is competent and can discern the relevant legal considerations, he or she should communicate those considerations to the client

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defense is that nowhere in the memos do the authors flag the argument as a challenge to received wisdom.").

<sup>246</sup> Paulsen, *supra* note 16, at 5 (emphasis omitted).

<sup>247</sup> *Id.* at 7–8.

<sup>248</sup> By way of example, two courts have treated "waterboarding" and the "water cure" as torture, although both cases pre-dated the anti-Torture statute. See OPR REPORT, *supra* note 1, at 235. Neither case was addressed by Yoo even though he condoned the use of waterboarding in the Bybee CIA Memo. *Id.* at 234–36.

<sup>249</sup> See Paulsen, *supra* note 16, at 6.

<sup>250</sup> See John Steele, DOJ OPR to Investigate Warrantless Surveillance, LEGAL ETHICS FORUM (Nov. 13, 2007), <http://www.legalethicsforum.com/blog/2007/11/doj-opr-to-inve.html>. Margolis also advances this position without exploring it in detail. See Margolis Memo, *supra* note 6, at 23.



pursuant to Rule 2.1.<sup>251</sup> In this regard, it is noteworthy that Rule 2.1 refers to an attorney's duty to "render candid advice." If the attorney fails to render such advice, he or she does not provide the client with his or her honest assessment. In other words, a competent and incompetent attorney both violate the ethical rules when they fail to set out the relevant legal considerations for their clients, although the ethical rules they violate may be different. In neither case, however, should the attorney be immune from professional discipline simply because he or she happened to believe the legal advice he or she offered.

The circumstances under which Yoo wrote the Torture Memos, as well as his sterling credentials, would tend to suggest that this was not a case of "empty head, pure heart."<sup>252</sup> Nevertheless, certain arguments may have been so poorly reasoned that they could constitute a violation of Rule 1.1 as well. For example, although Yoo had a limited background in criminal law, he "looked at the cases [on specific intent] quickly,"<sup>253</sup> culminating in the dubious advice that an individual must have an express purpose to violate U.S. anti-torture law to commit torture.<sup>254</sup>

## VII. RULE 2.1 AND INDETERMINACY

Thus far, I have suggested that Rule 2.1 can be interpreted to require an attorney to address competing views of the law with his or her clients in order to provide an "honest assessment" of the law. This interpretation of Rule 2.1 protects a lawyer's freedom to offer novel and controversial views of the law but, unlike the Margolis Memo's interpretation, does not protect one-sided legal advice that potentially undermines client autonomy and incentivizes clients to seek out lawyers with idiosyncratic legal views to sanction acts of dubious legality.

In this section, I will argue that an additional reason that this article's interpretation of Rule 2.1 should be adopted is because it allows for the ethical criticism of attorneys *qua* advisors and yet is not predicated on the notion that the U.S. anti-torture law, or any other body of law, has determinate content.

### A. *The Indeterminacy Thesis*

Since at least the 1920s and 1930s, legal scholars known as "legal realists" have argued "that it is almost always possible to derive multiple and often inconsistent" answers to legal problems.<sup>255</sup> Realists viewed the law as indeter-

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<sup>251</sup> Cf. *Matthews*, 2005 WL 3542561, at \*5 (failure to cite to adverse authority may establish violation of duty of candor under Model Rule 3(a)(3)).

<sup>252</sup> See Luban, *supra* note 9, at 2.

<sup>253</sup> See OPR REPORT, *supra* note 1, at 166.

<sup>254</sup> See *id.* at 171.

<sup>255</sup> See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 474 (1990) (citations omitted). Professor Tamanaha has recently argued that what is now known as "legal

minate because legal interpretation can draw on a multiplicity of legal sources, many legal terms are vague and/or ambiguous, and even when attorneys are able to find a clear legal rule, “[n]o rule can determine the scope of its own application.”<sup>256</sup> The indeterminacy thesis also holds a central place in the Critical Legal Studies (“CLS”) movement, whose adherents have argued that the law is indeterminate not only in its application but at its very core.<sup>257</sup>

Professor Tushnet has stated the indeterminacy thesis thusly:

Across an analytically interesting range of “cases” or legal events, legal propositions are indeterminate. This is *not* a claim about the degree of controversy over the right outcome, or about the difficulty of discerning that outcome. The indeterminacy thesis asserts that no matter how hard one tries, or how skilled one is as a lawyer, legal propositions in the relevant range are indeterminate.<sup>258</sup>

The indeterminacy thesis in some variants is a metaphysical claim based, for example, on semantic skepticism that contests the possibility of legal knowledge.<sup>259</sup> Such accounts of indeterminacy are “Archimedean” to the extent they purport to criticize legal interpretation from outside the practice of law.<sup>260</sup> Although some scholars have undoubtedly viewed the indeterminacy thesis in this light,<sup>261</sup> the indeterminacy thesis is perhaps better understood as a critique

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realism” actually was a relatively common view in the alleged heyday of formalism. *See generally* BRIAN TAMANAHA, *BEYOND THE FORMALIST REALIST DIVIDE* 4–5 (2010).

<sup>256</sup> *Id.* at 478–81.

<sup>257</sup> *See* Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 115 (1984) (“This indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds, that are fundamentally contradictory. We are . . . constantly torn between our need for others and our fear of them, and law is one of the cultural devices we invent . . .”).

<sup>258</sup> Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 *QUINNIPIAC L. REV.* 339, 341 (1996).

<sup>259</sup> *See generally* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 *U. PA. L. REV.* 549, 568–69 (1994) (“The core of semantic skepticism is the claim that there are no facts that constitute or determine a sentence’s meaning, so that language is indeterminate at the most basic level . . . [T]here is no point to claiming that a legal rule can be satisfied by some actions but not others since the meaning of the rule is always ‘up for grabs.’”); *see also* MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 13 (1987) (noting that many Critics seems to hold that linguistic indeterminacy is central to their work).

<sup>260</sup> *See* Ronald Dworkin, *Objectivity and Truth: You Better Believe It*, *PHIL. & PUB. AFF.*, Spring 1996, at 87, 88.

<sup>261</sup> Professor Kelman appears to associate this position with Critical Legal Studies. “The Critics certainly do *not* believe that the world around us can be perceived in some untainted, unmediated, direct, and ‘accurate’ form . . . We treat the external world as if it determines our ideas, ascribing false concreteness to the categories we have in fact invented.” KELMAN, *supra* note 259, at 269–70.

of the way law works in practice.<sup>262</sup> In other words, contrary to the perception of laymen that the content of the law is largely definite and that the role of legal actors is to differentiate “balls and strikes,”<sup>263</sup> most, if not all, legal rules can be interpreted in a variety of ways, and the plausibility of a particular interpretation of the law will depend entirely on the professional judgment of lawyers.<sup>264</sup>

Most lawyers accept that the law is at least to some extent indeterminate in the second sense of the term. Professors Coleman and Leiter have claimed, for example, that “[o]nly ordinary citizens, some jurisprudes, and first-year law students have a working conception of law as determinate.”<sup>265</sup> As noted, Margolis relies on both the indeterminacy of the ethical rules as well as U.S. anti-torture law to justify his decision to not refer Yoo and Bybee for sanction.

### B. *Indeterminacy and the Challenge to Legal Ethics*

The indeterminacy thesis has a destabilizing effect on legal ethics. After all, “[i]f one cannot say objectively that the client is *not* legally entitled to do Y, and Y is a socially harmful thing to do, then the lawyer may assist her client doing Y to cause a significant amount of harm, and there is no legal standpoint from which we can criticize the lawyer . . . .”<sup>266</sup> To put this in terms of the Torture Memo controversy, how can it be legitimate to criticize Yoo when “different lawyers answering previously undecided legal questions often will produce different answers”?<sup>267</sup> Readers may recall the torrid debate within the legal academy as to whether Crits should teach in law schools, with the former Dean of Duke Law School memorably arguing that the Crits’ emphasis on indeterminacy and the lack of set principles could lead students to become so cynical about the law and its content that they would naturally resort to corruption.<sup>268</sup>

Professor Hatfield has recently revived this criticism in the context of the Torture Memo controversy. He writes:

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<sup>262</sup> See Tushnet, *supra* note 258, at 342 (describing the indeterminacy thesis as an argument in “informal political theory”).

<sup>263</sup> The umpire analogy was used to great effect by the Current Chief Justice of the Supreme Court during his confirmation hearings. See Jack Shafer, *How the Court Imitates the World Series: John Roberts’ Winning Baseball Analogy*, SLATE (Sept. 13, 2005, 6:44 PM), <http://www.slate.com/id/2126241>. But see KELMAN, *supra* note 259, at 286 (describing the determinate view of the law as an “anesthetic” to “block the omnipresence of the contradictory”).

<sup>264</sup> Tushnet, *supra* note 258, at 343.

<sup>265</sup> Coleman & Leiter, *supra* note 259, at 579 n.54.

<sup>266</sup> Wendel, *supra* note 36, at 1201–02. Margolis may not accept this formulation as he would allow for criticism where an attorney does not actually believe the advice he or she is offering the client. However, as a practical matter, it will prove exceedingly difficult for disciplinary authorities to affirmatively prove that a lawyer does not believe advice that he or she offered to a client.

<sup>267</sup> Margolis Memo, *supra* note 6, at 31.

<sup>268</sup> See generally Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984); see also Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 1 (1986) (arguing that Critical Legal Studies scholars “endanger the proudest and noblest ambitions of the law”).

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* . . . . 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.<sup>269</sup>

Professor Hatfield is likely correct that a law student who believes that the law is largely indeterminate will be skeptical about the law's ability to definitively settle legal questions. However, he or she would not be compelled to accept the idea that "there is no difference between what is legal and what is arguably legal," let alone that "it is the lawyer's job to make sure." Moreover, whatever the merits of eschewing the teaching of indeterminacy thesis in law school, law students may be dissuaded of the "secular religion"<sup>270</sup> of indeterminacy once they are confronted with the realities of practice.<sup>271</sup>

More importantly, Crits generally do not claim that the indeterminacy thesis makes all legal outcomes arbitrary.<sup>272</sup> Nor do they believe that an individ-

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<sup>269</sup> Hatfield, *supra* note 72, at 523–24.

<sup>270</sup> Carrington, *supra* note 268, at 227.

<sup>271</sup> The Supreme Court's highly controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000), for example, brought a great deal of attention to the politicized nature of the judiciary. See Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113, 113 (2001) ("*Bush v. Gore* seems to have let critical legal studies arise like Lazarus from the grave.").

<sup>272</sup> See Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 1030 ("Even as to CLS's argument that all cases that judges actually decide are indeterminate, critical legal scholars are careful to point out that this claim stops short of alleging that judging is arbitrary . . . ."); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 25–26 (1984) ("[T]he legal theories advanced to justify our rules and institutions are indeterminate. The same theories could be used to justify very different sorts of institutions and very different rules. This does not mean, however, that outcomes in our legal system are completely unpredictable or that the choices made by judges are arbitrary in the sense that they are unconsidered . . . ."); see also Coleman & Leiter, *supra* note 259, at 577–78, 589 (suggesting that indeterminacy need not lead to the conclusion that all legal outcomes are equally warranted). Where Coleman and Leiter differ from Crits is that they do not believe that for a legal outcome to be legitimate that it must have been caused by a unique set of legal reasons. See generally Segall at 594. But see Tushnet, *supra* note 258, at 340 (arguing that Professors Leiter and Coleman underestimate the extent to which laymen obey the law because they view it as having determinate content).

ual attorney's interpretation of the law—no matter how idiosyncratic—is just as good as any other.<sup>273</sup> Rather, Crits, as with many of their interlocutors, understand that legal interpretation does not and cannot occur in a vacuum,<sup>274</sup> and Crits accept that there is a great deal of regularity among lawyers in terms of the interpretation of legal rules.<sup>275</sup> Indeed, professional “lawyers are socialized to find some legal propositions unquestionable and others frivolous.”<sup>276</sup>

For these reasons, while the indeterminacy thesis makes ethical criticism more complex, it does not preclude the possibility of such criticism. One possible basis for ethically criticizing Yoo that would be entirely consistent with the indeterminacy thesis is to argue that although lawyers can and do reasonably disagree about many legal questions, Yoo's arguments in the Torture Memos are simply not what Crits would describe as “professionally respectable to assert.”<sup>277</sup>

I understand Professor Lederman to be making a variation of this argument when he equates the question of whether waterboarding is torture to the question of whether the rule “no vehicles in the park” prohibits a souped-up Corvette from driving through the park.<sup>278</sup> In Professor Lederman's view, although there may be close cases where it is unclear whether a particular act constitutes torture, waterboarding is definitely torture, and if a lawyer's interpretive principles suggest that it is not, it may be necessary to abandon these interpretive principles.<sup>279</sup>

<sup>273</sup> See, e.g., Singer, *supra* note 272, at 59 (“We are not destined to live in a world in which we must choose between believing in some ultimate permanent foundation for law and morality (rationalism) or believing that all views are as good as all others . . .”).

<sup>274</sup> Compare *id.* at 35 (“If people within a relevant community agree to a certain proposition, then the proposition satisfies criteria or arguments that they accept. All objectivity means is agreement among people . . .”) with Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982) (“[T]he objective quality of interpretation is bounded, limited, or relative. It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules.”).

<sup>275</sup> See Gordon, *supra* note 257, at 125.

<sup>276</sup> Tushnet, *supra* note 258, at 349. This socialization is highly troubling to some scholars. See Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982); KELMAN, *supra* note 259, at 14 (stating that Paul Brest describes, in effect, the interpretive community of legal scholars as “a bunch of stuffy old privileged white males, whose opinions would scarcely be worth tossing onto a trash heap.”); see also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987) (“[The CLS] movement is attractive to minority scholars, because its central descriptive message—that legal ideals are manipulateable and that law serves to legitimate existing misdistributions of wealth and power—rings true for anyone who has experienced life in non-white America.”).

<sup>277</sup> See Tushnet, *supra* note 258, at 343.

<sup>278</sup> See Marty Lederman, *Sorry, Ben, But Judge Mukasey Can (and Should) Answer the Question*, BALKINIZATION (Oct. 29, 2007, 3:01 PM), <http://balkin.blogspot.com/2007/10/sorry-ben-but-judge-mukasey-should.html>.

<sup>279</sup> See *id.*; see also DAVID LUBAN, LEGAL ETHICS & HUMAN DIGNITY 192–200 (2009) (arguing that Yoo's arguments in the Torture Memos were not mainstream and should be thought of as frivolous).

In a similar vein, Professor Wendel has suggested that professionalism requires attorneys to subject their legal positions to the evaluation of the relevant interpretive communities and the standards they recognize for evaluating the correctness of legal positions.<sup>280</sup> Under this view, Yoo could be subject to sanction because the vast majority of practitioners in the fields of criminal law, constitutional law, and international law would not believe that his conclusions are supported by the arguments he put forward in the Torture Memos.<sup>281</sup>

Although these approaches may allow for the criticism of some legal positions, it will often be problematic to measure the reasonableness of legal advice based on the intuition of lawyers or a “relevant interpretive community,” as the controversy over the Torture Memos indicates. Rightly or wrongly, some lawyers simply do not see the question of whether waterboarding is torture as equivalent to whether one can drive a souped-up Corvette through a park. Similarly, Professor Wendel’s claim that the legal advice should be assessed by the practices of the “relevant interpretive community” does not cure this problem because there is no consensus as to what constitutes the “relevant interpretive community” and what its specific practices are.<sup>282</sup> Professor Wendel seems to concede these points<sup>283</sup> but nevertheless argues that having to justify one’s legal positions to an interpretive community will serve to constrain “undue aggressiveness.”<sup>284</sup> However, this underestimates the degree to which lawyers can use conventional legal arguments to justify extreme legal positions. For example, although the U.S. anti-torture statute does not mention any affirmative defenses to prosecution, Yoo’s argument that there is a necessity defense to torture could be justified by the familiar and uncontroversial proposition that “Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law.”<sup>285</sup>

Legal ethicists should also be careful in assigning normative value to any prevailing view of the law.<sup>286</sup> One of the chief insights of CLS is that the state of the law is entirely contingent, and that the “[t]he rule-system could [] have generated a different set of stabilization conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch

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<sup>280</sup> See Wendel, *supra* note 36, at 1213–16.

<sup>281</sup> See Wendel, *supra* note 9; see also LUBAN, *supra* note 279, at 193 (“Legal plausibility is a matter for case by case judgment by the interpretive community . . .”).

<sup>282</sup> Even if there were a consensus as to the “relevant interpretive community,” Critics have argued that this would still be an illegitimate basis to assess the reasonableness of a legal position. See *supra* note 253 and accompanying text.

<sup>283</sup> See, e.g., Wendel, *supra* note 36, at 1215.

<sup>284</sup> *Id.* at 1223–24.

<sup>285</sup> See Margolis Memo, *supra* note 6, at 57 (quoting *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980)).

<sup>286</sup> Professor Luban has argued, for example, that “the legal mainstream defines the concept of plausibility.” LUBAN, *supra* note 279, at 194.

to those opposing conventions at any time.”<sup>287</sup> If the Crits are correct about this, it is even possible for a frivolous legal position to become non-frivolous when “some socially significant group finds it useful to raise legal claims that theretofore seemed frivolous.”<sup>288</sup> All that is required to change the law is for lawyers to identify a “background rule” that, once put into play, can provide the basis for an entirely different legal rule.<sup>289</sup>

The debate over the legality of torture is a vivid illustration of this phenomenon. Prior to September 11th, the notion that the President could ignore federal law with respect to torture would have been a fringe, if not outright frivolous, position.<sup>290</sup> It is clearly no longer perceived as such. The Margolis Memo describes the position only as “aggressive” and “subject to considerable dispute.”<sup>291</sup> Respected academics such as Professors Posner and Vermeule have defended the Torture Memo’s vision of executive power by claiming that “[a]n older generation of legal academics developed something like a consensus in favor of enhanced congressional power over foreign affairs . . . . That conventional view has been challenged in recent years by a dynamic generation of young scholars who emphasize constitutional text, structure, rather than precedent . . . .”<sup>292</sup> By relying on “constitutional text and structure,” Yoo and others have arguably put the Torture Memos’ position that the President can ignore laws that interfere with his war powers in play, notwithstanding that a previous generation would have viewed such an argument as foreclosed by *Youngstown Sheet & Tube Company v. Sawyer*.<sup>293</sup>

If Crits are correct that what was once a frivolous position can become non-frivolous or, depending on the power of the social and political group advocating for it,<sup>294</sup> the dominant view, then any attempt to ground an ethical appraisal of an attorney’s interpretation of the law on the perceived reasonableness of the interpretation will likely fail. An allegedly “unreasonable” legal position may simply be one that has not yet been widely accepted, and presumably the ethical rules should not be used to enforce stasis in legal dogma. This is precisely Professors Posner and Vermeule’s defense of Yoo—he should not be viewed

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<sup>287</sup> Gordon, *supra* note 257, at 125; see Singer, *supra* note 272, at 25–26.

<sup>288</sup> Tushnet, *supra* note 258, at 345.

<sup>289</sup> *Id.* at 346.

<sup>290</sup> See David Luban, *Torture and the Professions*, 26 CRIM. JUST. ETHICS 2, 2 (2007). (describing the existence of a torture debate as inconceivable prior to September 11th).

<sup>291</sup> Margolis Memo, *supra* note 6, at 45.

<sup>292</sup> Posner & Vermeule, *supra* note 2.

<sup>293</sup> 343 U.S. 579 (1952). The decision is, of course, most notable for Justice Jackson’s concurrence setting out three categories of Presidential power. See generally *id.* at 635–38 (Jackson, J concurring).

<sup>294</sup> See, e.g., Tushnet, *supra* note 258, at 345.

as an outlier but rather as part of a “dynamic generation of young scholars who emphasize constitutional text, structure, rather than precedent.”<sup>295</sup>

Because CLS has generally been associated with the far left of the political spectrum and scorned by the right,<sup>296</sup> it is ironic that in the context of the Torture Memo controversy “it’s the left that wants to claim that the law can have moderately determinate content apart from the efforts of interpreters, and it’s the right arguing that we can’t really say a lawyer is distorting or twisting the law.”<sup>297</sup> Of course, many of the critics of Yoo’s work—including attorneys at the OLC who ultimately withdrew the Torture Memos—can hardly be described as leftists. Nevertheless, if one accepts that the proposition that Yoo’s arguments in the Torture Memo are acceptable to some scholars, then criticisms that Yoo distorted the law can be viewed as little more than an attempt to reassert a previous generation’s orthodoxy.

### C. *Clients, Indeterminacy, and Yoo*

The indeterminacy thesis casts doubt on the possibility of the law dictating any one particular outcome, as well as the capability of lawyers to definitively differentiate reasonable interpretations of the law from unreasonable ones. But the indeterminacy thesis does not change the fact that clients need lawyers to interpret the law. By focusing on what lawyers owe to their clients, it becomes evident why attorneys should convey not only their own views of the law but differing views as well pursuant to Rule 2.1 and why we may legitimately criticize attorneys like Yoo who fail to advise their clients in this manner.

Although lawyers arguably serve many functions, among the most fundamental is to help clients structure their lives in accordance with the law. In a famous address, Justice Holmes claimed that this was the central function of the legal profession:

[I]n societies like ours the command of the public force is intrusted to judges in certain cases, and the whole power of the state will be put forward, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk against what is so

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<sup>295</sup> See Posner & Vermeule, *supra* note 2. Professor Posner and Vermeule likely overstate the degree to which Yoo’s views on executive power are uncontroversial. For example, Steven Bradbury, who served as the acting head of the OLC in the second term of the Bush administration, told OPR that the Commander-in-Chief argument in the Bybee Memo was “not a mainstream view” and that “somebody should have exercised some adult leadership in that respect.” OPR REPORT, *supra* note 1, at 199.

<sup>296</sup> See Tushnet, *supra* note 258, at 351–52.

<sup>297</sup> See Wendel, *supra* note 9.



much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.<sup>298</sup>

Holmes's remarks are particularly germane when considering the function of lawyers *qua* advisors. Whether a lawyer is assisting a client with a business transaction or advising whether certain conduct is criminal, the client needs to be able to determine how to act in accordance with the law.

As Professors Coleman and Leiter have suggested, it does not matter from the perspective of the client whether the law is determinate or indeterminate—the client will still need to know what the law seems to require of him or her.<sup>299</sup> Indeterminate law is a problem only if a client cannot know what the law is and thus cannot adapt his or her behavior accordingly.<sup>300</sup> This is fundamentally not a concern about indeterminacy but about predictability, and “the very point of the realist tradition is that rationally indeterminate outcomes can nevertheless be reliably predictable.”<sup>301</sup> Indeed, under Holmes's view, the law is simply “systematized prediction,”<sup>302</sup> and Critics also generally acknowledge that the law can be highly predictable.<sup>303</sup>

Holmes's view of the function of lawyers is certainly not uncontroversial. One can argue that lawyers should do more than merely counsel clients as to how to steer clear of possible criminal and civil violations.<sup>304</sup> Critics would certainly contest Holmes's notion that a lawyer can carry out his or her predictive role by differentiating morality from law and concentrating principally on reports, treatises, and statutes.<sup>305</sup> Indeed, if the indeterminacy thesis is true, it is likely that a lawyer will have to take into account a wide variety of political and socioeconomic considerations to predict whether a particular act will be perceived as unlawful.<sup>306</sup>

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<sup>298</sup> Oliver Wendell Holmes, Address Delivered to the Suffolk Bar Association Dinner (Feb. 5, 1885), *reprinted in* THE PATH OF THE LAW AND ITS INFLUENCE 333 (Steven J. Burton, ed., 2000).

<sup>299</sup> See Coleman & Leiter, *supra* note 259, at 582.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Holmes, *supra* note 298, at 334.

<sup>303</sup> See, e.g., Singer, *supra* note 272, at 21–22; Tushnet, *supra* note 258, at 350 (“[T]he indeterminacy thesis is compatible with the discovery of a high degree of predictability about legal propositions.”).

<sup>304</sup> See David Luban, *The Bad Man and Good Lawyer*, 72 N.Y.U. L. REV. 1547, 1581 (arguing that the lawyer's moral convictions have a role to play in legal advice), *reprinted in* THE PATH OF LAW AND ITS INFLUENCE, *supra* note 298, at 44; Gordon, *supra* note 53, at 30 (arguing that lawyers should guide clients away from acting in a way that is contrary to the purpose of the law).

<sup>305</sup> Holmes, *supra* note 298, at 333.

<sup>306</sup> See Coleman & Leiter, *supra* note 259, at 586 (suggesting that lawyers can predict outcomes by exercising an “informal folk theory”); see also KELMAN, *supra* note 259, at 7 (“CLS theorists have devoted a great deal of their efforts to demonstrating that law and society are inseparable or interpenetrating.”).

If one accepts that the law is to a large extent indeterminate and also that it is part of a lawyer's function to assist his or her clients to act in accordance with the law, then an attorney cannot fulfill his or her duty *qua* advisor by offering only his or her own view of what the law is. Instead, consistent with the reading of Rule 2.1 offered in Part V, lawyers should convey not only their own views of the law but also countervailing considerations because the law does not dictate any one outcome, and an individual lawyer's view of what the law is will, in many instances, be inadequate for the client.<sup>307</sup>

Of course, an attorney who honestly believes that the law allows his or her client to perform a certain act does not need to list every reason why his or her advice might turn out to be "wrong." There are many legal questions that lawyers consider uncontroversial, and part of being socialized as an attorney is to understand what those are.<sup>308</sup> Under such circumstances, the countervailing considerations, such as they are, would likely not be relevant to the client's situation. The attorney could list these considerations, or note that the law might change, but failing to do so will generally not deprive the client of an "honest assessment" of the law under Rule 2.1. When an attorney fails to identify countervailing views of the law, however, he or she assumes the risk that his or her own view of the law is contestable.

Applying this reasoning to the Torture Memo controversy, if U.S. anti-torture law is unclear, this would make Yoo's conduct more ethically questionable, not less. Yoo has acknowledged that the issues he was addressing in the Torture Memos were novel and complex,<sup>309</sup> yet he consistently "overstat[ed] the certainty of [his] conclusions and underexpose[d] countervailing arguments."<sup>310</sup> Yoo's ethical failing was not that he expressed views that many lawyers consider to be wrong but that he failed to convey to the administration the various ways that U.S. anti-torture law could be interpreted so that the administration could meaningfully assess its interrogation policies.

Attorneys can identify legal views contrary to their own because in the course of their careers they are exposed to legal actors with views often radically different than their own.<sup>311</sup> Presumably if Yoo knew his legal advice would eventually be tested before a judge with a rigid commitment to precedent as

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<sup>307</sup> See Coleman & Leiter, *supra* note 259, at 581 (noting that the ideal lawyer for the legal realist is one "who is in the best position to counsel his clients about what to expect from litigation").

<sup>308</sup> See Tushnet, *supra* note 258, at 343.

<sup>309</sup> JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* vii (2005) ("The legal issues raised by the war on terrorism are novel, complex, and unprecedented. They range from the use of force, to targeting, to the detention and interrogation of enemy combatants who do not fight on behalf of a nation.").

<sup>310</sup> Margolis Memo, *supra* note 6, at 64.

<sup>311</sup> See also Tushnet, *supra* note 258, at 349 ("[T]he sociological aspects of the indeterminacy thesis demonstrate that a high degree of predictability, with respect to some or even many legal propositions, is compatible with the indeterminacy thesis.").

opposed to constitutional structure, he would not have advised his superiors quite in the same way. The same would be true if he knew that his legal positions would eventually be tested before a judge with strong civil libertarian leanings. The logical posture of an attorney who takes the indeterminacy thesis seriously is to communicate the multiplicity of possible outcomes.

One possible explanation for Yoo's failure to advise the Bush administration as to competing views of the scope and content of U.S. anti-torture law is that he wished to facilitate the perpetration of techniques that many would regard as torture. A more charitable view could be that Yoo's academic expertise led him to be overconfident about his legal views and the degree to which they were uncontroversial. Whatever the case, attorneys who create the impression of legal certainty out of uncertainty can legitimately be subject to sanction for violating their duties *qua* advisors.

### VIII. POSSIBLE OBJECTIONS

Thus far, I have suggested that lawyers should identify not only their own views of the law but also countervailing considerations. Such an obligation can be inferred from Rule 2.1 and the recognition that the law is to a large extent indeterminate but that clients nevertheless must act in accordance with the law.

This interpretation of Rule 2.1 may be controversial in so far as it could be constitutionally problematic to allow disciplinary authorities to impose sanctions against attorneys for their good faith legal advice. Separately, some may argue that lawyers should be able to provide one-sided legal advice when their clients request such legal advice and that the type of lawyering that follows from this article's interpretation of Rule 2.1 is not particularly desirable.

#### A. *Penalizing Good Faith Legal Advice*

Many defenders of John Yoo have argued that ethically sanctioning him for his legal advice would dissuade attorneys from giving legal advice on controversial issues.<sup>312</sup> As noted in Part IV.B., this concern is likely overstated because much of the criticism of Yoo is related to the one-sidedness of his legal advice. Professor Ku has argued, however, that attempting to prosecute attorneys for their good faith legal advice is not only poor public policy but may violate the First Amendment.<sup>313</sup>

Professor Ku's argument is based largely on *Vinluan v. Doyle*,<sup>314</sup> a recent decision from the New York Supreme Court, Appellate Division. In this case, an attorney was charged with conspiracy along with his clients, ten nurses who had resigned en masse from a nursing home, after the attorney had advised

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<sup>312</sup> See, e.g., Goldsmith, *supra* note 16; Ku, *supra* note 219, at 456.

<sup>313</sup> See *id.* at 456–57.

<sup>314</sup> 60 A.D.3d 237 (N.Y. App. Div. 2009).

that the resignations were legally permissible.<sup>315</sup> The court held that an attorney's good faith legal advice to his clients does not lose the protection of the First Amendment if that advice is later determined to be incorrect.<sup>316</sup> Although Professor Ku's article focuses on criminal prosecution, his argument that attorneys cannot be punished for their good faith legal advice can be extended to sanctioning or admonishing attorneys in disciplinary proceedings.

Professor Ku's constitutional argument is somewhat undermined by the fact that First Amendment protection applies only to objectively reasonable legal advice, as he recognizes.<sup>317</sup> Were it otherwise, lawyers could only be liable for malpractice when they provide advice in bad faith, which is not the applicable standard.<sup>318</sup> In *Vinluan*, the attorney's legal advice that his clients should resign en masse was held to be "objectively reasonable" and moreover the resignations were in fact held not to be a crime.<sup>319</sup> Professor Ku claims that Yoo's legal positions, as expressed in the Torture Memos, were similarly reasonable but he considers Yoo's various arguments in isolation, without assessing whether it was reasonable to make all of the arguments within the same memo and without considering any countervailing points of view. In contrast, this article contends based on Rule 2.1 and consistent with this case law<sup>320</sup> that one-sided legal advice should not be viewed as "objectively reasonable" when there are strong countervailing legal arguments. If this argument is correct, the First Amendment would not be implicated when attorneys are sanctioned for allegedly good faith legal advice or prosecuted for such legal advice.<sup>321</sup>

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<sup>315</sup> *Id.* at 239.

<sup>316</sup> Ku, *supra* note 219, at 456 (citing *Vinluan*, 60 A.D.3d at 250–51).

<sup>317</sup> *See id.* at 457.

<sup>318</sup> Legal malpractice claims generally only require evidence that (1) the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the client, and (3) that, but for the attorney's negligence, the plaintiff would have been successful in the underlying action. *See, e.g., Simmons v. Edelstein*, 32 A.D.3d 464, 466 (N.Y. App. Div. 2006).

<sup>319</sup> *Vinluan*, 60 A.D.3d at 250–51.

<sup>320</sup> *See Cousin v. District of Columbia*, 142 F.R.D. 574, 577 (D.D.C. 1992). In *Cousin*, the defendant's attorneys had argued that attorney fees could not be sought by plaintiffs on account of the Eleventh Amendment. *Id.* at 575. The attorneys had failed to cite to two Supreme Court cases that seemed to contradict this argument. *Id.* at 576. The district court wrote that "it was defendant's responsibility to cite and, if possible, distinguish these cases. Defendant's failure to do so is unreasonable." *Id.* at 577. Moreover, the court considered and rejected the argument that for purposes of Federal Rules of Civil Procedure, Rule 11, it was necessary to show that the attorneys acted with bad faith. *Id.* *See also In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000) (finding that the attorney should have apprised client that his arguments were contrary to precedent in controlling jurisdiction).

<sup>321</sup> Professor Ku also argues that Yoo did not have the requisite *mens rea* to commit a criminal violation because of his good faith belief in his legal advice. *See Ku, supra* note 219, at 454 ("[A]s long as the [OLC] attorneys believed such advice was correct, they could not have the intent necessary to violate the torture statute."). However, an individual's good faith belief that his or her

## B. Client Autonomy and “CYA” Memos

Another possible concern is that clients should be able to solicit legal advice that does not fully consider countervailing arguments. Professor Freedman has argued:

[T]he way in which lawyers recognize, honor, and enhance the rule of law in our society is by serving individual clients. That is, in a free society, lawyers enhance the rule of law by enhancing the autonomy of each individual. We do this by counseling our clients about their lawful choices and by helping them to achieve the lawful goals that *they* choose in accordance with *their* interests as they perceive them to be.<sup>322</sup>

If a client is interested only in whether the attorney ultimately views certain conduct as legal, and the lawyer believes it is legal, it arguably violates client autonomy for the attorney to be forced to explain the reasons why his or her client’s conduct might nevertheless be illegal.

It is not unusual for clients to request advice that sets out something less than an attorney’s full appraisal of the law. Professor Freedman has written on the propriety of so-called Cover Your Ass (“CYA”) letters, which set out only the attorney’s best view of the law and do not set out contrary legal positions so that the client may show good faith in the event of future prosecution.<sup>323</sup>

Whether CYA letters are consistent with the ethical rules is certainly subject to dispute. Professor Luban has argued, “[w]hat makes CYA opinion[s] unethical by professional standards is that lawyers advising clients don’t have an adversary and are not supposed to be advocates. Their duty . . . is to provide clients with ‘independent’ and ‘candid’ advice about what the law requires, not advice spun to say whatever the client wants.”<sup>324</sup>

The ethical rules themselves do not appear to contemplate clients requesting and receiving one-sided legal advice. The commentary to Rule 2.1 in-

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actions are not criminal does not negate *mens rea*—it instead raises an affirmative defense based on alleged mistake of law. See MODEL PENAL CODE § 2.04 (1962); Ohlin, *supra* note 4, at 209 (“[I]f the principal is engaging in torture, it does not matter for his *mens rea* that he thinks torture is lawful, because knowing that his actions violate the law is not an element of the offense. Similarly, it does not matter for the accomplice that he, too, thinks torture is lawful—all that matters is that he intends to assist the principal. This standard criminal law analysis is often neglected when the case of lawyers is considered.”).

<sup>322</sup> Freedman, *supra* note 52, at 471.

<sup>323</sup> See Monroe Freedman, *The Propriety of CYA Letters*, LEGAL ETHICS FORUM (Mar. 22, 2010), <http://www.legalethicsforum.com/blog/2010/03/the-propriety-of-cya-letters.html>.

<sup>324</sup> David Luban, *Torture and the Professions*, 26 CRIM. JUST. ETHICS 2, 60 (2007). Professor Luban seems to equate the Torture Memos with CYA Memos. See LUBAN, HUMAN DIGNITY, *supra* note 279 at 164 (“[T]he torture memoranda raise . . . [the question] whether lawyers may spin their legal advice because they know spun advice is what their clients want.”).

dicates that clients “may ask for purely technical advice,”<sup>325</sup> and that an attorney may “put advice in as acceptable a form as honesty permits.”<sup>326</sup> However, it is difficult to discern how “technical advice” can be equated with one-sided legal advice. Similarly, the lawyer’s ability to “put advice in as acceptable a form as honesty permits” seems limited to the situation where it is necessary to “sustain the client’s morale.”<sup>327</sup> The rule does not seem to contemplate that an attorney can avoid identifying relevant legal considerations but rather suggests only that the attorney should be careful in the manner in which he or she raises these legal considerations.

I am nevertheless inclined to think that it may be permissible for attorneys to provide one-sided legal advice if requested to do so because clients and attorneys are permitted to limit the scope of representation pursuant to Model Rule 1.2(c) and have “substantial latitude to limit the representation.”<sup>328</sup> A client may not have sufficient time or money to receive a full exposition on a complicated legal issue. Under these circumstances, it would not be problematic for a client to only receive the lawyer’s view of what the law is, as long as the client understands the significance of his or her decision to limit the representation in this way—namely that he or she will not be receiving a full assessment of the legal issue and may in fact only be receiving the attorney’s personal view that may not be in accordance with the views of a majority of lawyers in that jurisdiction. Professor Freedman himself seems to only accept the propriety of CYA letters when the attorney cautions the client separately that the view advanced in the CYA letter may turn out to be wrong and that reliance on a CYA letter may not confer immunity.<sup>329</sup>

The interpretation of Rule 2.1 urged in this article is not necessarily in conflict with the notion that clients should be able to request something less than a lawyer’s full assessment of the law, as in the case of a CYA letter. Indeed, the controversial nature of CYA letters, and the circumstances under which they can be issued, suggests the degree to which attorneys customarily endeavor to consider all sides of a legal issue.

### C. *Is Identifying Countervailing Considerations Good Lawyering?*

I have argued that a lawyer’s duty to consider and communicate competing views of the law follows from Rule 2.1 and recognition of the law as indeterminate. Although few legal scholars would argue that the law is not at all

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<sup>325</sup> MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 3 (2011).

<sup>326</sup> *Id.* R. 2.1 cmt. 1.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* R. 1.2(c) cmt. 7.

<sup>329</sup> See Freedman, *supra* note 323; see also LUBAN, *supra* note 279, at 201 (“[S]ome courts in some contexts will accept a defense of good faith reliance on the advice of counsel . . . . But when the client tells the lawyer what advice he wants, the good faith vanishes, and under the criminal law of accomplice liability, both lawyer and client should go down.”).

indeterminate, it is certainly possible to believe that the domain of indeterminacy is small and that in the vast majority of cases attorneys can determine the "correct" answer to a particular legal problem. If this is true, then the type of lawyering urged in this article can be seen as needlessly wishy-washy and anti-theoretical to client interests.

Whether or not a Hercules can determine the correct answer in a given case,<sup>330</sup> the average lawyer who is called upon to interpret the law for his or her client cannot be assured in many cases that his or her interpretation will be the correct one. Clients do not need to seek legal representation to know whether it is generally legally permissible to run a stoplight or to bludgeon strangers to death. The fact that a client needs to rely on a lawyer presupposes that the law is to some extent unclear. Sophisticated clients such as the U.S. government in particular would not be expected to seek a legal opinion on a relatively settled legal question.

It is also a matter of historical fact that interpretations of the law that were once considered unassailable have since been controverted. At one time the First Amendment was held not to protect the advocacy of Communism,<sup>331</sup> and the Fourteenth Amendment was held not to prevent segregation in public facilities.<sup>332</sup> If fundamental points of law such as these can eventually be controverted, on what basis can a lawyer definitively claim to know that his or her interpretation of the law is the correct one and that there is no need to consider countervailing views? At best, a lawyer's interpretation of the law will reflect the consensus view in a given jurisdiction, and under these circumstances, he or she will not be subject to ethical criticism for failing to communicate outlier views to the client. When an attorney conveys only his or her view of the law to the client, however, he or she assumes the risk that his or her legal advice could be controverted by other actors including the disciplinary authorities.

This article's interpretation of Rule 2.1 also does not require that attorneys be "neutral" as to the various competing visions of the law. Lawyers can and should express their views as to the strength of various interpretations of the law, and as Professor Gordon suggests, a lawyer's framing of a client's various options will inevitably influence how the client is likely to proceed.<sup>333</sup> This is not problematic as long as the attorney advises his or her client of competing

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<sup>330</sup> Professor Dworkin has postulated that an ideal judge named Hercules may be able to find the right answer for every contestable legal proposition. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975). As Professor Tushnet notes, this is a claim about whether legal propositions are true or false in the ontological sense, and Professor Dworkin does not claim that ordinary legal actors will be able to find a clear answer for every legal proposition. Tushnet, *supra* note 258, at 342.

<sup>331</sup> *Whitney v. California*, 274 U.S. 357, 366 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1960).

<sup>332</sup> *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>333</sup> Gordon, *supra* note 53, at 30.

views to his or her own view of the law. The client's ultimate decision will naturally be a product of a "dialectical interaction"<sup>334</sup> with the attorney, but attorneys open themselves up to ethical criticism when they distort this interaction by apprising their clients only of their own views of the law. This is precisely what occurred with the Torture Memos. Yoo advocated for his own narrow view of U.S. anti-torture law while greatly understating contrary views.

## IX. CONCLUSION

Prior to the release of the Margolis Memo, I would not have thought that there was any doubt that lawyers are ethically required to inform their clients of competing views of the law, particularly where the attorney's view is highly contested and controversial. What Margolis describes as a "best practice,"<sup>335</sup> this article considers a fundamental obligation of an attorney *qua* advisor that is contemplated by Rule 2.1.

Attorneys generally do communicate countervailing views of the law to their clients.<sup>336</sup> They do so for a variety of reasons, including self-interested reasons such as to protect themselves from malpractice suits if their legal advice is ultimately proven incorrect. But some attorneys—particularly those who calculate that their legal positions will not be tested—do not and Rule 2.1 has rarely been enforced in the absence of other ethical violations.

The underenforcement of Rule 2.1 is unfortunate because attorneys have economic and personal incentives to offer tendentious legal advice to their clients, and without the fear of sanction, attorneys may feel that there are no constraints on the legal advice they give. How disciplinary authorities can begin to more effectively monitor whether attorneys are providing independent and candid advice to their clients is beyond the scope of this article. However, attorneys should not be wary of criticizing the legal advice of other attorneys out of a misguided sense that indeterminacy somehow eliminates the possibility of ethical criticism. Indeterminacy does not compel one-sided legal advice that does not consider countervailing arguments. On the contrary, a lawyer who heeds indeterminacy will endeavor to give a full and rich account of the law because he or she will realize that on many legal issues there is a diversity of viewpoints and that his or her own view is not privileged over the views of other legal actors.

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<sup>334</sup> *Id.* at 73.

<sup>335</sup> *See, e.g.* Margolis Memo, *supra* note 6, at 45.

<sup>336</sup> Although this article disagrees with many of the Margolis Memo's conclusions, the Margolis Memo considers a variety of interpretations of the ethical rules and does not merely put forward interpretations of U.S. anti-torture law that tend to support Margolis's view that Yoo did not commit misconduct. Consequently, Margolis fully complied with his obligations under this article's reading of Rule 2.1 and his work suggests, perhaps, the degree to which lawyers customarily address a wide range of views on controversial legal issues, whether they view this as an obligation imposed by the professional responsibility rules or a best practice.



The Bush administration lawyers who followed Yoo described his work as “insane,” a “slovenly mistake,” and a “one-sided effort to eliminate any hurdles posed by anti-torture law.”<sup>337</sup> The only possible way to condone such legal advice is to hold, as Margolis does, that the only measure of legal advice can be an attorney’s subjective belief as to the merits of the legal advice. This radically subjectivist position does not follow from the text of Rule 2.1 or the indeterminacy thesis properly understood. Instead, Margolis’s interpretation of Rule 2.1 is reflective of a legal culture that above all else seeks to protect its own.<sup>338</sup>

To change this culture, the solution is not to pretend that the law always produces clear answers. Rather, attorneys must recognize that the profession’s ethical rules provide some guidance as to both the form and substance of legal advice and that it is against the interests of clients and the legal profession itself to protect legal advice that trivializes the legal and moral dilemmas facing clients.

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<sup>337</sup> OPR REPORT, *supra* note 1, at 160.

<sup>338</sup> See Balkin, *supra* note 10; see also Scott Horton, *The Margolis Memo*, HARPERS (Feb. 24, 2010), <http://www.harpers.org/archive/2010/02/hbc-90006597> (arguing that the Margolis Memo is a product of “craven clientalism”).