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WHAT LAWYERS, WHAT EDGE?

*Michael E. Tigar**

I. INTRODUCTION

When Monroe Freedman called and said that the conference was to be titled “Lawyering at the Edge,” my response was like that of Professor Steven Gillers. I said, “the edge of what?” An edge implies a shape, an area, and theoretically on this surface, we are to localize lawyer behavior, and, again as Steven Gillers recognized, the rules cannot define the edge. They simply describe ways of seeing it. These ways of seeing or interpreting are influenced by the independence of the bar as an institution and the requirement of lawyer autonomy, as well as by the content of the rules themselves. Some of the rules, such as the ones that require zeal on behalf of clients when we are engaged in advocacy, operate under social and historical circumstances that make it inevitable that the edge will be difficult to define.

This Article argues that the edge must be defined socially, historically, and functionally. That is, nobody—not even the New York Post—would contend today that Nelson Mandela’s conviction of terrorism-related offenses should disqualify him from speaking about the obligations of lawyers. There is a consensus that Mandela, despite his conviction for armed activity and his concession that the African

* Research Professor of Law, Washington College of Law; Visiting Professor of Law, Duke Law School. I note that the New York Bar has said that because Lynne Stewart has been disbarred, there can be no CLE credit for her portion of the program. I hope that at the next such conference here you will invite my second favorite lawyer who was convicted of alleged terrorist offenses, Lynne of course being my first. That second lawyer would be Nelson Mandela, and if you doubt me you can read of his Rivonia trial. I mention this because the thrust of my remarks is that we need a sense of historical perspective, now as ever, in dealing with the subject of lawyers’ roles. There is more on this general point in my new book, *Thinking About Terrorism*, and I refer you to that. See generally MICHAEL E. TIGAR, THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY (2007) (a historical exploration of governmental responses to terrorism).

National Congress did engage in terrorism,¹ has some valuable things to say about oppression and the struggle against it, and even about the role of lawyers in that struggle.

Perhaps the reader will wonder, “isn’t Tigar the one who successfully argued in *Gentile v. State Bar of Nevada*² that ABA Model Rule 3.6 was unconstitutional? And among his arguments, did he not say that rules that govern lawyer speech and that are the basis for proposed disciplinary action must be narrow and precise?” The answers are “yes.” I would point out that in the context of advocacy, this tension is inevitable. The First Amendment, as well as any reasonable view of an advocate’s duty, requires breathing space for the exercise of rights. But when the state or its agents want to impose sanctions, the requirements of precision and narrowness are designed to allow the speaker the maximum possible autonomy of decision about the form and content of expressive behavior.

In this Article I will discuss two dualities. The first is the duality of defense and prosecution. The second is that of advice and advocacy. We recognize historically as a part of the tradition of our profession that the advocates whose work we celebrate were those who are remembered for confronting powerful judges and confronting currents of opinion in the societies in which they lived. They did so decisively, at the edge. Sometimes they were threatened with punishment because their conduct was seen as beyond the edge.

II. DEFENSE AND PROSECUTION

Andrew Hamilton came to the defense of John Peter Zenger in New York in 1735 after two lawyers, Alexander and Smith, had been struck from the rolls of the bar for making a motion to recuse the judge.³ In the Dean of St. Asaph case, Erskine confronted Justice Buller, in whose chambers he had been a pupil at some earlier time.⁴ Threatened with contempt, he said, “I know my duty as well as your Lordship knows

1. *Mandela Admits ANC Violated Rights, Too*, MILWAUKEE J. SENTINEL, Nov. 2, 1998, at 6; see also Vera Haller, ‘Atrocious Things Were Done on All Sides’, WASH. POST, Oct. 30, 1998, at A32.

2. 501 U.S. 1030 (1991).

3. I have discussed this, and other early libel cases in Michael E. Tigar, *Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101, 121 (1986).

4. Michael E. Tigar, Address, *Litigators’ Ethics*, 67 TENN. L. REV. 409, 411 (2000).

yours. I shall not alter my conduct.”⁵ Clarence Darrow was repeatedly at the edge of the law.

And then there’s that delightful episode of John Philpot Curran, the famous Irish barrister of the nineteenth century, confronting some terrible English judge.⁶ One must remember that at that time, almost all the judges were English, or had so far abased themselves that they might as well have been. The judge, so the story goes, said, “Mr. Curran, if you persist in that, sir, I shall be compelled to commit you for contempt.”⁷ Curran rocked back on his heels and replied, “Ah, then your lordship and I will both have the satisfaction of knowing it won’t be the worst thing your lordship has ever committed.”⁸

Monroe Freedman has written about Lord Brougham, who justified his own conduct in the defense of Queen Caroline.⁹ The Queen was put to trial in the House of Lords, on a bill of pains and penalties, for adultery. Some said Brougham’s vigorous defense, and the manner of it, might endanger the British monarchy.¹⁰

In sum, we recognize the historic role of defenders, advocating for those who are targeted by those in power, and working in a posture of resistance, and we recognize that they have this obligation to behave in a certain way.

On the other side of the aisle, we recognize equally that prosecutors have heightened obligations to their adversaries, the court, and the community. They have a heightened responsibility to seek a fair and just result.¹¹ Why is this so? It could be a special instance of a general rule. The state has a great deal more power to inflict harm than any private individual or group of individuals, and the state is inherently, inevitably a recidivist, a repeat offender. Out of this realization come the Supreme Court’s remarks in *Berger v. United States*¹² and the Sixth Circuit’s

5. 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 331 n.3 (London, Macmillan 1883).

6. Tigar, *supra* note 4, at 411-12.

7. *Id.*

8. *Id.* at 412. The story was told to me by an Irish lawyer and I used it in a play about Irish and Irish-American lawyers, *The Warrior Bards* (1989) (co-authored with Kevin McCarthy).

9. Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213 (2006).

10. *Id.* at 1215-17; see also William H. Simon et al., *Thinking Like a Lawyer—About Ethics*, 38 DUQ. L. REV. 1017, 1020 (2000).

11. See, e.g., Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 298-300 (2003).

12. 295 U.S. 78, 84-89 (1935).

eloquent discussion in the *Demjanjuk* case.¹³ More recently, we have seen the case of Durham County district attorney Mike Nifong and the Duke lacrosse matter.¹⁴ Nifong was disbarred for lack of candor and for media comments that created a serious risk to trial fairness.¹⁵

A few years ago I was asked by the AFL-CIO to go down and help represent the Charleston Five, dock workers charged with using their heads to make offensive contact with police batons, in a demonstration that they had a permit to have, down on the Charleston docks against a non-union operator. When the longshoreman showed up down by the docks, they confronted six hundred riot police who were ready to break up their march and beat them up. The local sheriff refused to prosecute the longshoreman, except perhaps for a misdemeanor or two. South Carolina's Attorney General Charlie Condon then announced that South Carolina needed to make an example out of these "violent" union members. The reason for the riot police and their tactics became clear. This was a plan at the highest level of state government to attack the union's power and influence in the busy Charleston port. Condon convened a special grand jury and headed a team of special prosecutors. Five dockworkers were indicted for felony riot, which is a vague and broad common law offense in South Carolina.¹⁶

When I first got into the case, I read transcripts of the Attorney General's press conferences. I then wrote a motion to disqualify him from proceeding further in the case on the grounds that he had already violated ethical rules by making media statements that he knew or should have known had a substantial likelihood of prejudicing a judicial proceeding. This conclusion was based on the rules of professional responsibility that had been rewritten in the wake of *Gentile v. State Bar of Nevada*.¹⁷

Having filed that motion and others directed at First Amendment and criminal procedure issues in the case, I went to Charleston for a pretrial hearing. The Charleston lawyers working on the case and I went to the state court building on the outskirts of Charleston. The presiding

13. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353-54 (6th Cir. 1993).

14. See, e.g., David Barstow & Duff Wilson, *Prosecutor in Duke Sexual Assault Case Faces Ethics Complaint from State Bar*, N.Y. TIMES, Dec. 29, 2006, at A22; Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

15. Duff Wilson, *Prosecutor in Duke Case Is Suspended*, N.Y. TIMES, June 20, 2007, at A13.

16. See SUZAN EREM & E. PAUL DURRENBERGER, *ON THE GLOBAL WATERFRONT: THE FIGHT TO FREE THE CHARLESTON 5* (2007); see also S.C. CODE ANN. § 16-5-130 (2003).

17. 501 U.S. 1030, 1048, 1053, 1057-58 (1991).

judge called us into his chambers and showed us that morning's edition of the local paper. The Attorney General had held a press conference the evening before, announcing he was withdrawing from the case.

That was a good event for us because the judge, regardless of what he felt about it before, made clear that to withdraw an appearance in his court you generally filed a motion to withdraw, rather than holding a press conference. However, construing the press statement as a motion, it was granted, and the Attorney General would no longer be welcome to practice there.

In the State prosecution of Terry Nichols, the trial court disqualified Oklahoma County District Attorney Robert H. Macy from the case based on his prejudicially inflammatory media statements.¹⁸

These instances simply illustrate the distinction between prosecution and defense obligations that is expressed, for example, in Model Rules 3.6 and 3.8, and in many cases.¹⁹ Acknowledging this distinction does not involve one in culpable moral relativism. Monroe Freedman took up this difficult topic early in his career and has pursued it diligently ever since.²⁰ In the early days, his candid and thoughtful comments evoked a great deal of controversy, and he courted significant risk to his professional reputation as a legal scholar and advocate. In the historical perspective of counsel coming to the defense of the despised, the discriminated, and the oppressed, we see and can understand that alleged defense excess will often, if not usually, be understandable, forgivable, and often, in retrospect, necessary.

After all, what's the problem here? In the system that calls itself criminal justice, more than ninety percent of the cases are resolved by guilty pleas.²¹ Is there some pandemic of excessive zeal out there? Is there truly some social evil that needs to be identified and gone after? We live in a country where incarceration rates are five to seven times that of comparable countries, and where there is systematic racial

18. Jo Thomas, *Oklahoma Prosecutor to Seek Death for Bombing*, N.Y. TIMES, Sept. 6, 2001, at A14.

19. MODEL RULES OF PROF'L CONDUCT R. 3.6 & 3.8 (2007); *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935).

20. *See* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (2d ed. 2004).

21. *See, e.g.*, U.S. Dep't of State, Criminal Trials, http://usinfo.state.gov/dhr/democracy/u.s._legal_system/criminal_trials.html (last visited Feb. 10, 2008).

discrimination in the administration of criminal law.²² It is obvious that one could not possibly prosecute all the allegedly punishable behavior that goes on in society. Discretion is inevitable, and in its exercise we do not see excessive defense counsel zeal as a problem in the system. Quite the opposite, defense counsel are too often simply clerks on a conveyor belt that runs from the ghetto and the barrio to the prison.

Now I will say a word, in this context, about Lynne Stewart. She was charged—and I represented her—with a conspiracy to aid a conspiracy.²³ The gravamen of the charges against her related to two press statements that neither caused nor even advocated violence. It was alleged that the conspiracy that she conspired to assist would take place in another country and might have involved the killing or kidnapping of people.²⁴ Judge Koeltl refused to make the government identify which country that might be²⁵ although, of course, if the violence were to take place in the West Bank, that would be a failure of proof, because the West Bank is not a country. The judge refused to make the government identify even by grouping or by some general description, the victims who might be harmed.²⁶ In sum, if you put together the distance of Lynne's speech conduct from any alleged harm, and the vagueness and breadth of the allegations, there was and remains, we thought, a considerable First Amendment problem. Judge Koeltl rejected our arguments, finding many of them non-justiciable.²⁷

With Ellen Yaroshefsky's help, a defense was prepared based on Lynne's sense of professional responsibility to a client who needed her help. There was immense media controversy generated by Lynne's appearance at this conference.²⁸ Let me balance that with what Judge Koeltl said of her at sentencing, rejecting the government's position. Lynn Stewart "provid[ed] a criminal defense to the poor, the

22. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 186-89 (2007); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 411 (2006); Michael Tigar, *Essay, Lawyers, Jails, and the Law's Fake Bargains*, MONTHLY REV., July/Aug. 2001, at 29 (arguing that the American justice system is dominated by racial disparity).

23. *United States v. Sattar*, 272 F. Supp. 2d 348, 352, 379 (S.D.N.Y. 2003).

24. *Id.* at 373-74.

25. *Id.* at 375.

26. *Id.* at 374-75.

27. *Id.* at 363-64.

28. See, e.g., Paul Vitello, *Hofstra Polite as Lawyer Guilty in Terror Case Talks on Ethics*, N.Y. TIMES, Oct. 17, 2007, at B3 (describing the controversy surrounding Lynne Stewart's speech at the Hofstra University School of Law).

disadvantaged and unpopular over three decades.”²⁹ “[I]t is no exaggeration to say that Ms. Stewart performed a public service not only to her clients but to the nation. . . . [She performed her duties with] enormous skill and dedication”³⁰

So often in our legal history, the accusation that an advocate might be endangering the established order of things is more a comment on the unsavory character of that order than upon a supposed fault of the advocate. Lord Brougham was warned that his advocacy could undermine the monarchy.³¹

I will never agree that Lynne Stewart stepped over the edge. If one believes otherwise, I invite them to think about this issue of discretion, to think about this concept of perspective. I just came back from Ireland, so you are going to hear from William Butler Yeats. If you disagree, I wish you to imagine as one would of those Yeats chronicled, “what if excess of love Bewildered them.”³² We would still “write . . . [their names] out in a verse.”³³

This concludes the discussion of the first duality, between prosecution and defense. Now we turn to the issue of advice versus advocacy.

III. ADVICE VERSUS ADVOCACY

Some years ago I represented a partner in a New York law firm. There was an investigation by the Resolution Trust Company (“RTC”) about the way in which he had represented deponents in an RTC examination. The RTC took the position that he was too aggressive in defending the depositions and that he ought to have made his clients be more forthcoming. In those investigations, many lawyers got into trouble. I managed to steer my client out of difficulty, by insisting that there was a difference in lawyer duties between litigation, that is advocacy, situations, and advising. In that particular context, a lawyer

29. Transcript of Record at 115-16, *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003) (No. 395).

30. *Id.*; see also SteveLendmanBlog, <http://sjlendman.blogspot.com/2006/10/lynne-stewarts-crime-of-courage-honor.html> (Oct. 18, 2006, 8:02 EST).

31. See, e.g., Monroe H. Freedman, *Idea, Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1320 (2006).

32. W.B. Yeats, *Easter 1916*, in *SELECTED POEMS AND TWO PLAYS OF WILLIAM BUTLER YEATS* 85, 87 (M.L. Rosenthal ed., 1962).

33. *Id.*

who helps the client put out a statement that will affect a securities market is different from the lawyer acting in an adversary proceeding.

A year or so ago, I was asked to be an expert witness in a California proceeding, against a lawyer being sued by the trustee for a defunct corporation that had been founded and operated by that lawyer's client as a vehicle to defraud investors. I found the lawyer's conduct wanting. Here's what happened. The lawyer, call him S, got a call to go down and represent a man, call him L, who was in the federal lock up in the Los Angeles federal court building. L was under indictment for a substantial mail fraud scheme in New York involving bilking people by selling phony viatical settlements. The FBI had arrested L at his home in Palm Springs, California. S went to the lock-up, and said, "I'll represent you." So far, that is a privileged discussion. S said, "I need one and one-half million dollars right now—one million for my retainer, and \$500,000 to pay the bail bond premium on the five million dollar bond." The conversation is still privileged. L says, "Fine, call Wells Fargo Bank, and get the money out of my accounts there." S calls Wells Fargo and the bank officer says, "Sorry, Mr. S, but there's a freeze order in affect. This guy's accounts are frozen."

L says, "No problem. Call back and tell Wells Fargo that you need to get into my safe deposit box." S calls the bank again, and the banker says that the freeze order covers the safe deposit box.

L now says to S, "Tell you what: I've got six million dollars in my house in Palm Springs. I won it playing the slot machines in Las Vegas." I must pause here as everyone reading my remarks realizes that nobody has ever won six million dollars playing the slot machines. It is nearly a statistical impossibility. But S tells L that somebody needs to go get this money out of the house. L nominates his associates for the task. They are in the courtroom along with L's private pilot. These two associates go to Palm Springs. S remains in Los Angeles, but does speak to L's landlady by telephone to request that she let the associates in the house. S tells the landlady that the associates need to get some legal papers and to feed the cat.

Unsurprisingly, most of the money goes missing, and only the retainer and bail bond money make it back to Los Angeles. There is clear professional responsibility law that says that a lawyer steps outside the advocate role into misconduct by moving evidence, even when the lawyer learns where the evidence is located in a privileged

conversation.³⁴ And a lawyer who helps a client hide money that the lawyer knows probably belongs to someone else has committed misconduct and perhaps violated the law as well.³⁵

For present purposes, the S case is one instance of a lawyer acquiring an obligation to a person or to people other than the client. The lawyer is aware that the client's conduct may harm third parties, and by helping the client commit that harm, the lawyer steps over the edge.³⁶ This would be so even if the conversations with the client remain subject to an obligation of confidentiality.

These two examples do not, of course, exhaust the range of situations that raise this issue of lawyer as advisor. The lawyer as advisor is different from the advocate in two fundamental ways. First, the advocate operates in an open forum, making arguments to a tribunal. The opposing advocate will respond, also out in the open. This process, when it operates fairly, may be seen as self-correcting. Of course when the so-called adversary process is distorted by summary procedures, decider bias, ineffective counsel, unlawfully-obtained evidence, and other forms of misconduct, there is a real risk of unfairness. That risk is accounted for by rules that forbid these sorts of distortions.

An advisor operates in secret and in a one-sided manner. The advisor in effect gives permission to the client to act in a certain way. If the client is powerful, the permitted action may do considerable harm.

The advisor's role can first be seen, as Professor Gillers has suggested, in the context of tort law.³⁷ Professor Rabin has written about what he terms "enabling torts."³⁸ The classic one is the *Tarasoff* case, in which a mental health professional fails to warn a potential victim that the client may go out and hurt somebody.³⁹ We have that law school

34. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007).

35. *Id.*

36. See generally *People v. Pic'l*, 646 P.2d 847 (Cal. 1982) (reversing the lower courts decision that there was no reasonable cause to charge an attorney for bribing a prospective witness); *People v. Meredith*, 631 P.2d 46 (Cal. 1981) (discussing a lawyer's professional obligation in handling evidence); see State Bar of California Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1988-101, available at http://calbar.ca.gov/calbar/html_unclassified/ca88-101.html ("An attorney who holds funds on behalf of a non-client third party is a fiduciary as to that party and is governed by the California Rules of Professional Conduct, even when not acting as an attorney per se in the transaction.").

37. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 247 (1985).

38. The discussion of enabling torts and the examples are drawn from Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 436 (1999).

39. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

favorite of the indulgent aunt who buys her drunken and dissolute nephew a car, and then he predictably drives recklessly and causes harm. There are the dram shop cases, involving liability for bartenders who serve intoxicated customers.⁴⁰ The enabling tort theory has been applied to handgun manufacturers as well. In these situations, the enabler's liability is limited by proximate cause, that is, by the foreseeability of harm and the justice of holding him or her liable.⁴¹ Some have suggested that the action of the "enabled" wrongdoer may be an independent or supervening cause of harm, thus exonerating the enabler. I find it difficult to accept this sort of reasoning, as the wrongdoer most often has impaired judgment to the extent that his or her alleged "autonomy" is factitious.

The rules of professional responsibility also provide guidance on the lawyer's obligation to third parties. In Pennsylvania, for example, the comments to Rule 4.3 say that responsibility to a client requires a lawyer to subordinate the interest of others to those of the client, but that this does not imply that a lawyer should disregard the rights of third persons.⁴² The ABA Model Rules suggest that if a client wants to use advice to commit a wrong, the advocate should withdraw from the representation.⁴³ Note that withdrawal in the advice setting is usually a very different matter from withdrawal in the heat of a trial. Trial withdrawal may prejudice the client's right to a defense, for it is impractical to bring a new lawyer on-board. Withdrawal from an advising relationship does not raise that issue.

Another point: It is implicit in the crime-fraud exception to the evidentiary lawyer-client privilege that there are instances in which a person is not entitled to seek the advice of a lawyer in that person's capacity as a lawyer, and the lawyer is not entitled to give advice.⁴⁴ I recognize that this exception is a rule of evidence and not of professional

40. See, e.g., *Cimino v. Milford Keg, Inc.*, 431 N.E.2d 920, 922 (Mass. 1982); *Campbell v. Carpenter*, 566 P.2d 893, 894, 897 (Or. 1977).

41. Rabin, *supra* note 38, at 441-42, 446-47.

42. PA. RULES OF PROF'L CONDUCT, R. 4.3 cmt. 2 (2005), available at <http://www.padisiplinaryboard.org/documents/Pa%20RPC.pdf>.

43. MODEL RULES OF PROF'L CONDUCT, R. 1.16 cmt. 2 ("A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.")

44. See *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983* (Marc Rich & Co. A.G.), 731 F.2d 1032, 1038 (2d Cir. 1984) (explaining the well-established principle of evidence that attorney-client privilege is not applicable to communications with counsel which were used to commit fraud or unlawful conduct, regardless of the knowledge of the attorneys).

responsibility, but there has always been a relationship between those two sorts of rules, based as they are upon some of the same policy goals.

For these reasons among others, there is today a sense that lawyers who advise the powerful, and particularly lawyers for the state, have a special responsibility. This responsibility is grounded in rules of professional responsibility that are the creature of state law provisions governing the licensing and regulation of the legal profession. This is an important point, and not only because this Article will soon turn to discussing federal government lawyers. The people that exercise state power that are referred to are those in the federal government. Recall that a few years ago, Attorney General Richard Thornburgh had the idea that federal government lawyers could contact and interview represented persons even though the disciplinary rules of the jurisdictions in which they were admitted forbade that conduct.⁴⁵ Thornburgh argued that his directives as Attorney General could override state disciplinary rules. The courts that confronted the issue disagreed.⁴⁶ This area of regulating the legal profession is one in which the *Erie* doctrine applies with particular force.⁴⁷ Federal law may provide additional duties for those whose practice involves federal concerns, but the baseline rules are those prescribed by the state.

Against that background, let us see what advice some federal government lawyers have been giving, in secret and designedly not subject to any correction by publicity or independent review. So let us look at the evidence, and let's look at what some of these lawyers did. And here, of course, we are indebted to Josh Dratel and Karen Greenberg for their book *The Torture Papers*,⁴⁸ in which they collect

45. See Memorandum from Dick Thornburgh, Att'y Gen., to All Justice Dep't Litigators (June 8, 1989), in Administrative Office of the U.S. Courts, Office of Defender Servs., *Not Pervasive, or a Pleonasm?: Prosecutorial Misconduct*, 29, 32-33, app. A, available at http://www.fd.org/pdf_lib/Prosecutorial_Misconduct5.pdf.

46. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993) (“[T]he Sixth Amendment guarantee would be rendered fustian if one if its ‘critical components,’ a lawyer-client ‘relationship characterized by trust and confidence,’ could be circumvented by the prosecutor under the guise of pursuing the criminal investigation.”) (citing *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990)).

47. See *Erie R. Co. v. Tompkins*, 304 U.S. 817, 822-23 (1938) (establishing the principle, now known as the Erie Doctrine, that federal courts hearing diversity claims, which do not arise under the United States Constitution or under acts of Congress, are required to apply state law, including state statutory law and common law).

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

and comment upon the most important documents that were available at the time they wrote.

Here is one example. On January 9, 2002, John Yoo, who is now a professor at Boalt Hall and is a member of the Pennsylvania Bar, said that people thought to be part of the Al Qaeda terrorist organization should not receive the benefit of the laws of war.⁴⁹ He said that the protections provided in the Geneva Conventions do not apply to members of the Taliban militia. He said that Afghanistan is a “failed State,” and that prisoners taken there were not entitled to the protections of the Geneva Conventions.⁵⁰ The “failed state” argument he made could logically be applied to any number of repressive and inefficient regimes, a fact that underscores the breadth of his contentions.

The Geneva Conventions and the Hague Conventions state fundamental principles governing the rights of civilians and combatants. These treaties were arrived at after bitter experience and long social struggle. That is, the world community and its people paid a great deal to achieve these treaties. To see their fundamental importance, I recall the case of Nazi Field Marshal Wilhelm Keitel. At his Nuremberg trial, there was evidence that he had repeatedly issued orders that captured partisans were not to be treated in accordance with the Geneva Conventions.⁵¹ He also ordered summary execution of Jews and Communists.⁵² These orders, some in his own handwriting and some issued despite objections from other senior officers, were a dominant influence in the tribunal’s decision that he should be executed by hanging.⁵³ Thus, there is powerful evidence that counseling disobedience to the Geneva Conventions is a serious matter.

Mr. Yoo, in his memorandum, goes on to claim that that the President, as Commander in Chief, has the power to suspend United States compliance with the Conventions.⁵⁴ This assertion rests on two astounding falsehoods. The first of these is historical and factual. Without doubt, the events of September 11, 2001, were crimes. Between 3000 and 4000 people were killed. This is very far from proof that this

49. Memorandum from John Yoo, Deputy Assistant Att’y Gen. & Robert J. Delabunty, Special Counsel, to William J. Haynes II, General Counsel, Dep’t of Defense (Jan. 9, 2002), in *THE TORTURE PAPERS*, *supra* note 48, at 38, 48 [hereinafter John Yoo Memo].

50. *Id.* at 53-59.

51. 2 OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 536 (1946).

52. *Id.* at 537-38.

53. *Id.* at 533-46.

54. John Yoo Memo, *supra* note 49, at 64-66.

event transformed the world in a way that permitted suspension of treaty obligations that have been in place for decades, during troubled times far more dire. Deaths of this order of magnitude are the consequence of road accidents, alcohol consumption, cigarette smoking and even—according to plaintiffs’ lawyers—taking FDA-approved prescription drugs such as Vioxx.⁵⁵ Yet none of these events would qualify as a national emergency that confers extra-constitutional powers on the President.

Mr. Yoo’s second argument deals with the President’s constitutional position. In assessing the argument, we recall again that Yoo was giving secret advice. His words were designed to be, and were, acted upon. His was not an assertion during some open adversary proceeding. His assertions hark back to the Supreme Court’s 1936 decision in *Curtiss-Wright*.⁵⁶ I have dealt with that issue at some length in my book, *Thinking About Terrorism: The Threat to Civil Liberties in Times of National Emergency*.⁵⁷ I rest my case on that analysis.

Let us continue. In a later memo, Jay Bybee, John Yoo, and Alberto Gonzales gave us that famous assertion that Geneva Conventions are “quaint.”⁵⁸ They also wrote a definition of torture that is unrecognizable to anybody who studies the consistent development of law in this realm. Torture is forbidden by a peremptory norm of international law that has been repeatedly construed by tribunals and jurists’ opinions and in state practice.⁵⁹ Despite this impressive body of authority, these men sought to ensure that the interrogation techniques being used by, and at the instigation of, Americans could not be the subject of punishment. They wrote that for conduct to amount to torture, there must be organ failure

55. Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238, 1240 (2004) (estimating that in 2000, 435,000 people died from tobacco, 85,000 died from alcohol consumption, and 43,000 died as a result of motor vehicle accidents); Memorandum from David J. Graham, MD, MPH, Assoc. Dir. for Science, Office of Drug Safety, to Paul Seligman, MD, MPH, Acting Dir., Office of Drug Safety, Risk of Acute Myocardial Infarction and Sudden Cardiac Death in Patient Treated with COX-2 Selective and Non-Selective NSAIDs (Sept. 30, 2004), available at www.csdp.org/research/1238.pdf (estimating that from 1999 to 2003 the number of cases with Vioxx-related risk of coronary heart disease were in excess of 27,785).

56. *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936).

57. TIGAR, *supra* note *, at 165-70.

58. Memorandum from Alberto R. Gonzales to the President of the United States, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), in *THE TORTURE PAPERS*, *supra* note 48, at 118, 119.

59. See generally *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) (finding that the actions of the Croatia Defence Council in “interrogating” witnesses, including stripping them nude, raping them, or forcing them to watch others being raped, amounted to torture, even if at least some of the perpetrators were only observers).

or similar kinds of harm.⁶⁰ They wrote in this vein so that those accused of torture might claim that they lacked the mental state required to convict because they accepted this “advice,” or in a civil case that they acted in good faith.⁶¹ The moral bankruptcy and hypocrisy of manufacturing defenses in this manner reminds one of the “don’t pay your income tax” fraudsters who hold seminars around the country.

During a recent trip to Ireland, I spoke to young solicitors about issues of international human rights. I told them that the Irish experience informs us. Recall that the United Kingdom regularly tortured IRA suspects, leading to an important decision of the European Court of Human Rights (ECHR).⁶² The ECHR focused on the non-derogable nature of the torture norm, rejecting claims that national security justified such conduct.⁶³

Then I saw the latest round of revelations, the Bradbury-Gonzales memoranda that the *New York Times* reported on October 4, 2007.⁶⁴ I am aware that there is discussion about these issues among political candidates and even law professors. I repeat what I said on this subject last year at the University of Texas. “I am prejudiced against torture. I am also prejudiced against the posturing and tergiversation that has lately gone on about torture. The media, even including respectable academic publications, use phrases like ‘the debate about torture’ without a hint of irony.”⁶⁵

60. Memorandum to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra* note 48, at 172, 176.

61. *Id.* at 175.

62. *See Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 1 (1978).

63. *Id.* at 58.

64. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

65. Michael E. Tigar, Research Professor of Law, Washington College of Law, Universal Rights and Wrongs: *Roper v. Simmons*, Torture and Judge Posner, Address at the Dedication of the Capital Defense Center at the University of Texas (Apr. 2006).

In February 2008, Attorney General Mukasey said that the Department of Justice could not prosecute waterboarding as torture because at the time the practice was engaged in, the Department of Justice had said it was legal. “That would mean that the same department that authorized the program would now consider prosecuting somebody who followed that advice,” the *Washington Post* reported him saying. *Justice Department “Cannot” Probe Waterboarding*, *Mukasey Says*, WASH. POST, Feb. 8, 2008, at A4. This remark shows the iniquity of the memoranda I have been discussing. Mukasey’s position is also contrary to accepted principles of criminal law. A person may know that conduct is unlawful even though government officials have said it is permissible. This was the Nuremberg issue. *See, e.g.*, Model Penal Code § 2.10 (military orders defense not available to one who knew conduct was unlawful). An official interpretation on which a

I have heard people pose hypotheticals about torture. What if you knew that somebody had planted a bomb, and torture might make them reveal where it was? These days, when we think about “somebody,” we usually picture a somebody who is a somewhat different color and a rather different religion than ourselves. My answer is, first, is our “knowing” on the same level as knowing that Saddam Hussein had weapons of mass destruction? Second, let us assume that sometimes the norm against torture will be violated, and after the fact somebody might want to say that the torturing is excused or justified.

Change the hypothetical slightly. Talk about murder instead of torture. The criminal law has rules about excuse and justification. It is administered with discretion. The trier of fact sometimes makes unauthorized exceptions. Punishment may be mitigated under certain circumstances. Yet all of these considerations could not possibly lead us to say that the norm against murder should not exist or not be enforced. The hypotheticals conjured by apologists for torture tell us absolutely nothing of value.⁶⁶

The harm done by these memoranda is as measurable as that done by the indulgent aunt who bought her drunken nephew a car, or the dram shop bartender, or the mental health professionals who failed to warn.

How, then, might we measure and redress the wrong done? These lawyers were not at some vague and indefinable edge. So what should one do? Following Professor Rabin’s analysis, tort liability is certainly possible. There is litigation out there on such a theory. However, suing federal officials is expensive and difficult for reasons unrelated to the merits. The government claims various kinds of immunity, including those contained in such statutes as the Military Commissions Act.⁶⁷ It invokes the political question doctrine.⁶⁸ It retreats behind a claim of secrecy and executive privilege. My students and I have faced these issues in suing Henry Kissinger and others for torture and complicity in assassinations.⁶⁹ I encourage lawyers for torture victims to include these aiders, abettors, and inciters in their pleadings.

defendant relies negates the intent element only if reliance is reasonable. WAYNE R. LAFAVE, *CRIMINAL LAW* § 5.6(e)(3), at 298-99 (4th ed. 2003).

66. See *supra* note 65 and accompanying text.

67. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2006 (to be codified at 28 U.S.C. § 2241(e)).

68. *Baker v. Carr*, 369 U.S. 186, 217-18 (1962).

69. *González-Vera v. Kissinger*, 449 F.3d 1260, 1261 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190, 192 (D.C. Cir. 2005).

I understand that someone might argue that these lawyers have the right to their opinion, and that the First Amendment is somehow implicated here. I reject that idea. The classic line between political speech and using words to provoke violent criminal conduct is sometimes difficult to draw.⁷⁰ However, advice given in secret that directly counsels unlawful violence seems clearly to fall outside any arguable protection.

Of course, one might consider criminal prosecution of these lawyers along with the actual torturers. The likelihood of that happening is remote. I have discussed this issue in more detail in *Thinking About Terrorism*.⁷¹ Once a nation comes to terms with disgraceful past events, it is usually a fairly long trajectory from denial to impunity to prosecution.⁷² When thinking about these issues, consider the case of Patrick Fitzgerald. So long as he was prosecuting Sheik Abdel Rahman and Lynne Stewart, he was the hero of the Bush-Ashcroft-Gonzales administration. As soon as he prosecuted Scooter Libby, he overnight became a “rogue prosecutor.”⁷³

Another example: How many years, how many decades did it take for France to confront the reality of what so many Frenchmen have done either by their silent complicity or the active participation in the Nazi horrors. When I first began lecturing on this in France, I was mildly or not so mildly derided for having done so. Finally, after the former Gaullist minister Maurice Papon was prosecuted in 1997 for sending trainloads of Jews and others to the concentration camps,⁷⁴ many people began to take notice. After my 1998 lecture at the law school in Aix-en-Provence, the criminal law professor stood to acknowledge that indeed, “France was a collaborator.” But that, of course, was more than fifty years after Papon’s conduct.

No, indeed, lawyer misconduct is lawyers’ responsibility. These people are members of our profession. They have dishonored our most basic principles. We have the right, and indeed the duty, to have this conduct examined by disciplinary authorities in the jurisdictions where these lawyers are admitted to practice. We have the example of Mike Nifong in Durham, North Carolina, against whom a concerned citizen

70. On the difficulty, see generally *United States v. Montour*, 944 F.2d 1019 (2d Cir. 1991); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

71. TIGAR, *supra* note *, at 77.

72. *Id.* at 69-74, 77.

73. Wesley Pruden, *When a Pardon Balances Accounts*, WASH. TIMES, Mar. 9, 2007, at A4.

74. TIGAR, *supra* note *, at 71-73.

brought the proceedings that led to his disbarment.⁷⁵ The bar has the duty to make a lawyer accountable for his or her conduct. All the issues of good faith can be argued, but the lawyer cannot retreat behind a wall of secrecy and silence.

IV. CONCLUSION

If we are to redeem the reputation of our profession, our task is a double one. Of course we must stand up in defense of those lawyers who are at the edge in the sense of taking up the cause of the despised, disposed, and discriminated. In doing so, we recognize that the edge of advocacy must always be seen in a tolerant and understanding way. But we must also insist that lawyers who advise the powerful have a responsibility not to enable their clients to violate the rights of others.

75. Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar, July 2007), available at <http://www.ncbar.com/discipline/printorder.asp?id=505>.
