When Governments Break the Law

The Rule of Law and the Prosecution of the Bush Administration

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Vindicating the Rule of Law

Prosecuting Free Riders on Human Rights

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On June 26, 2003, the United Nations celebrated "International Day in Support of Victims of Torture." To mark the day, President Bush issued a statement in which he said:

The United States is committed to the world-wide elimination of torture and we are leading this fight by example. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment. I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy.

The irony of these remarks is pointed in the face of subsequent revelations that high-ranking members of the Bush Administration, with the assistance of attorneys at the Office of Legal Counsel (OLC), developed and implemented a system of torture to assist in the interrogation of suspected terrorists. In the early days of the new administration, when the public knew nothing of the inner workings of the war on terror, official rhetoric could afford to be morally high-handed with only minimal embarrassment. Another typical example was Bush's January 22, 2005 call for a worldwide end to tyranny and oppression: "All who live in tyranny and hopelessness can know: the United States will not ignore your oppression, or excuse your oppressors. When you stand for your liberty, we will stand with you." The executive branch's public discourse was at this time a daring act of brinksmanship with the threat that its own disregard for human rights would be revealed.
After the full extent of the administration's commitment to torture had come to light, the motivation for continuing unabashedly to make such remarks became even more puzzling. To take a prosaic example from this period, on the eve of the Olympic Games in Beijing (August 2008) President Bush attacked China's record on human rights: "The United States believes the people of China deserve the fundamental liberty that is the natural right of all human beings. . . . So America stands in firm opposition to China's detention of political dissidents, human rights advocates, and religious activists." Did the president fail to notice that our record on human rights might actually appear to be worse than Beijings?

Among the many ironies of the Bush Administration's clandestine commitment to torture was its enthusiastic adoption of the interrogation practice known as "waterboarding." The OLC's August 1, 2002 memorandum, mostly written by John Yoo but signed by Jay Bybee (hereafter the "Bybee memorandum") argues that waterboarding is insufficiently painful for it to count as torture. But high on the list of ironic twists is the fact that Americans had themselves devised waterboarding as torture when the Japanese used it against American and British POWs during World War II. After the war, the International Military Tribunal went so far as to prosecute Japanese interrogators for its use, and the Americans followed suit, with the result that some defendants were put to death; others were awarded long prison sentences. Given, then, that there was a prior American interpretation of the term "torture" that included waterboarding among its ranks, it is especially disturbing that the Bybee memorandum resorts entirely to its own definition of torture, without so much as a nod in the direction of the only American precedent on point.

To date, no one in the former administration has been held responsible for the Bush Administration's torture policy. In connection with the release of several of the previously classified OLC memoranda, President Obama announced that there would be no prosecutions of investigators who relied on the memos in their decision to use so-called "enhanced interrogation techniques" (or EITs). Stating that "this is a time for reflection, not retribution," Obama went on to reveal the pragmatic foundations of his rejection of prosecution, saying that "nothing will be gained by spending our time and energy laying blame for the past." Although his remarks deliberately left open the possibility of criminal prosecution for more senior members of the Bush Administration, the likelihood of pursuing criminal sanctions against any member of the former administration is exceedingly low. Evidence for this lies not only in President Obama's clear anti-prosecutorial remarks, but also in a pair of reports recently released by the Justice Department.

The first report, issued by the Justice Department's Office of Professional Responsibility, concludes that "former Deputy AGG John Yoo committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice." The report came to the same conclusion about the conduct of James Bybee, except that Bybee was found to have acted "in reckless disregard" of his professional duties rather than with "intentional professional misconduct." Although little mention was made of criminal prosecution, such a recommendation would in any event have been beyond the scope of the OPR, which is charged only to comment on the professional ethics of the lawyers' conduct. Had the OPR report been allowed to stand, however, it might have lent credence to those who believed criminal prosecution an appropriate response. That report, however, was overridden by another memorandum released the same day, namely that written by Assistant Attorney General David Margolis. Margolis rejected the conclusions of the OPR and restricted himself to saying that Yoo and Bybee exercised "poor judgment." This sequence of events is regrettable. Among other things, it is regrettable that the only complete factual investigation into the role of the OLC attorneys was so summarily cast aside.

In addition, by overriding the OPR report, Margolis' report drove the final nails in the coffin of potential disciplinary proceedings for violations of professional ethics. And although there will be efforts to revive the question of criminal prosecution, the Margolis report has also for all practical purposes foreclosed the possibility that such prosecutions will ever take place.

Rather than focusing on the pragmatic preoccupations that have shaped the current administration's stance toward those responsible for the torture policy, this essay is motivated by deeper philosophical concerns relating to the status of the rule of law. In particular, the current project is prompted by the thought that the further the public reason of a government journeys from its actual administrative functioning, the greater the reach of executive power, and, as an associated phenomenon, the more enfeebled the rule of law. This is not an incidental feature of the relationship between public discourse and executive power, but a reflection of a fundamental aspect of the rule of law, namely that a necessary, though not sufficient, condition for a society to be governed by strong rule of law values is a simultaneous commitment in that society to the public nature of the rules and principles that structure its legal system. There are, in short, three elements that form an indissoluble triad in a society governed by law: first, the public reason of the regime along
with the values that reason expresses, second, the actual administrative functioning of the regime and the rules and principles by which such functioning is guided, and third, the robustness of the rule of law in the society governed by that regime. My concern is that when the first and second of these elements come apart, the third element, the rule of law, may be permanently and irrevocably impaired.

The dependence of the rule of law on the relative transparency of governmental reasoning, although intuitively plausible, is in fact rather difficult to fully explain. A complete account of the connection is beyond the scope of this essay, but such an account would ultimately have to do with the fundamentally public character of legal rules, combined with a clear understanding of the role that legal rules play in maintaining democratic processes. When a government publicly declares its fidelity to one set of rules while covertly following another, it is effectively rejecting the very idea of governance by rules. Where democratic governance is concerned, there is no such thing as private rule by law. The hypocrisy of the Bush Administration’s stance on human rights was an early sign of its diminished executive fidelity to the rule of law.

Consistent with the aims of the present volume, I shall not discuss the possible legal structure of a prosecution of those responsible for the torture policy in all its details, but will instead make the assumption, for purposes of argument, that at least a prima facie case of accomplice liability against certain individuals for encouraging CIA interrogators to commit torture exists. My primary focus instead will be on questions that might be raised beyond the level of the prima facie case, namely matters that concern both the wisdom and the ultimately legal solidity of the case for prosecution. For several reasons, I focus on former Department of Justice lawyers, rather than higher-ranking officials like Donald Rumsfeld, Richard Addington, or Dick Cheney, to whom the torture trial might lead. There are several reasons for this.

First, ordinary, if flawed, legal arguments played a pivotal role in advancing the interrogation policies of the administration: OLC lawyers did far more than simply rule on the legality of an existing program; they helped to craft that program by putting in place sweeping reinterpretations of familiar and well-theorized legal concepts—concepts such as executive power, torture, and defenses like necessity and self-defense. Second, it is an important, but largely unresolved, question whether government lawyers should be subject to prosecution for illegal practices their advice helps to establish or sustain. Addressing this question is a thorny, though crucial task, for the way we handle the current controversy will set a precedent for the treatment of government lawyers called on to give benediction to an administration’s illegal activities for years to come. Third, government lawyers who endorse and help to foster illegal policies of the executive branch play a singular role in damaging the rule of law, especially when such assistance depends on an illicit expansion of executive privilege: although disregarding legal norms will always damage the rule of law to some extent, the damage is of an entirely different order when illegal policies are wrapped in the mantle of legal legitimacy. If legal argumentation itself becomes distorted, the law will no longer provide a constraint against the erosion of legal values through the press of ideology. Prosecution is a particularly forceful way to seek to vindicate the rule of law in such cases. Correcting the excesses of specious legal analysis through the legal process itself reasserts the legitimacy of the internal logic of law. This effect is unlikely to be attained if the attempt to vindicate the rule of law focuses on the political process alone. Criminal prosecution would thus appear to be an indispensable tool of democratic governance, one that can be crucial for restoring society’s commitment to core democratic values.

The idea of using criminal prosecution as a response to prior governmental misconduct has always been controversial, both in the domestic context and in the transitional justice literature. Those who disfavor prosecution in the domestic context do so for the most part not because they think the torture policy morally and legally valid, but because they see prosecution as both doomed to failure and unwise from the standpoint of our political and military objectives. Rather than seeking to balance the pragmatic, philosophical, and political considerations that might factor into any actual decision about prosecution, however, my aim in this essay will be to point out the theoretical merits of what one might call the “prosecution model” for vindicating the rule of law, a task made especially important by the upper hand gained by practical and political objections to prosecution under the Obama Administration. In limiting my inquiry in this way, I am asking whether we ought, in the first instance, to regard the prosecution of government lawyers for giving illegal advice as a defensible and potentially effective way to redeem the rule of law in the face of severe injuries it may have sustained.

Part II explores, inter alia, the requirement that lawmaking is fundamentally public, meaning that the reasoning that stands behind the allocation of
rights and duties under the law should be available to all. After articulating the basic argument in favor of a societal "publicity condition" with respect to legal rules, I take such a condition for granted as a necessary feature of a society organized with adequate respect for the rule of law. I then suggest that the gap between the publicly announced commitment to democracy and human rights, on the one hand, and the actual policies used to govern, on the other, is objectionable, among other things, because it constitutes a form of free riding.\footnote{44}

Part III applies the above framework to the acts of the OLC lawyers. It suggests that the creation of the gap between publicly articulated rules and private reasoning is a clear violation of the publicity condition, particularly in its call for the significant expansion of executive powers argued for in the Bybee memorandum. It is this aspect of the private reasoning of OLC attorneys that poses the most serious threat to the rule of law, and the part that most stands in need of public correction. In the first half of Part III, I apply this argument to establish the case for liability not only for authorized instances of torture, but for anticipated unauthorized uses of torture during interrogation as well. I thus suggest that it is not unreasonable to hold the OLC lawyers responsible for both the interrogation techniques they actually endorsed, but also for the escalation of a culture of violence that foreseeably grew out of such authorization. In the remainder of Part III, I explore a possible rebuttal of the argument that the call for expanded executive authority establishes a violation of the rule of law, namely that lawyers from the OLC may be exonerated for distorting the law in defense of torture by the fact that they held a good faith belief that they were rendering valid legal opinions. Since the impermissibility of torture is something that every one can be expected to know without the benefit of instruction or additional notice, I argue that good faith reasoning should not provide a defense.

Part IV turns to another avenue of defense for the OLC lawyers, namely one that denies the culpability of the interrogators, with respect to whom the lawyers would be accomplices. There are several theories under which the principals might claim a defense: they can be thought of as having a legal justification for their use of torture, an excuse for having done so, or an immunity to prosecution. This Part argues that defenses and immunities for the principals ought not to apply, and it criticizes the Bybee memorandum's efforts to establish such a defense.

Part V concludes with some further remarks about the relation between free riding and vindicating the rule of law.

II

On August 1, 2002, the Office of Legal Counsel issued a crucial memorandum seeking to defend "enhanced interrogation techniques," or "EITs," methods whose use had already begun in "black sites" in Iraq and elsewhere. There were twelve such methods, only eleven of which have been declassified. The known methods are the "attention grasp," "walling," "facial hold," "facial or impact slap," "cramped confinement," "insects," "wall standing," "stress positions," "sleep deprivation," "use of diapers" (and concomitant denials of access to toilet facilities), and "waterboarding."\footnote{45} The central argument of the Bybee memorandum was that for an act to qualify as "torture" under the federal torture statute (18 U.S.C. § 2340–2340A), it must constitute an "extreme act," one that inflicts pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Alternatively, it must inflict mental pain resulting in "significant psychological harm of significant duration, e.g., lasting for months or even years."\footnote{46} The Bybee memorandum went on to conclude that the techniques generally employed in connection with the interrogation of detainees would not meet this standard, though it made no attempt actually to identify the subjective quality of the pain of "organ failure," "impairment of bodily function," or "death." Furthermore, there was also no attempt made to respond to the historical irony of this conclusion, and little argument was offered to justify the narrow definition of the term "torture" in the federal statute. Nor was any attempt made to establish what the degree of pain or psychological pressure was for a person undergoing the most severe of the known EITs, namely, waterboarding.

The debate about the narrow definition of torture in the Bybee memorandum has raged on since the memo first saw the light of day. This point has drawn more fire in the popular press than any other part of the memorandum. While garnering less attention, however, there are other parts of the memorandum that are of still greater concern, such as the view of executive authority the memorandum defends. Finally, there is a strange and poorly argued discussion of a possible necessity defense or self-defense claim for the interrogators who used the government-endorsed techniques. Whatever the concerns about the specific positions taken, however, the aspect of the memorandum that has drawn the greatest ire from legal professionals has been the lack of fidelity to established sources of law. With regard to the quality of its legal scholarship, the Bybee memorandum has been nearly universally condemned by the American legal profession as
reflecting inaccurate and unprofessional argumentation and research. The condemnation comes not only from partisan sources. Yoo’s former colleague at the OLC, for example, Jack Goldsmith, ultimately repudiated the memos Yoo authored, calling the work “flawed in so many important respects,” “too simplistic and potentially erroneous,” and “mak[ing] overly broad and unnecessary claims about possible defenses to various federal crimes . . . without considering, as we must, the specific circumstances of particular cases.”

Of greatest interest for our purposes is the analysis the memorandum offers of the proper place of executive authority in a constitutional system. Yoo’s arguments for expanded executive powers is a long-standing feature of his constitutional law scholarship, both before and after he worked at the Office of Legal Counsel. His central claim is that the commander-in-chief power in times of war is virtually unlimited, and that the president must have the power to decide on the scope of his own authority. Indeed, the Bybee memorandum portrays the president’s powers during times of war as so extensive that even a federal statute that contravened executive prerogative in this context would have to be considered unconstitutional.

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign . . . . Any effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional.

The conception of unlimited sovereignty makes a frontal assault on two mainstays of Anglo-American constitutional jurisprudence: first, the Enlightenment idea that the sovereign is himself a creature of the laws, and second, the foundational idea that executive power must be balanced against or constrained by other branches of government. Ironically, the Bybee memorandum’s conception of executive privilege is so strong that it effectively makes the attempt to narrow the definition of “torture” in the first part of the memo otiose, for as the above quotation suggests, even if the authorized interrogation techniques do contravene the statute, that would only indicate that the statute is unconstitutional if construed as limiting the wartime powers of an executive branch convinced of the wisdom of using such techniques! Yoo has recently defended his own commitment to this interpretation of executive authority in several interviews. In an interview with an investigator from the Office of Professional Responsibility (OPR), for example, he was asked whether the president’s wartime powers could include ordering an entire village of civilians to be exterminated. Yoo’s response was that such an order “would fall within the commander-in-chief’s power over tactical decisions.”

The appeal to the unlimited nature of the commander-in-chief powers is the intellectual heart of the OLC memos. It is also the doctrinal commitment that poses the deepest threat to the rule of law. The argument from executive privilege creates an exception to the rule of law so great that, as Yoo effectively explains, no statute or other source of law could constrain executive authority on this theory. And the constitutional argument for these expanded privileges that lurks in the background makes the “vesting” powers of the executive branch so significant that ordinary constitutional constraints, such as the bill of rights, do not provide much limitation either.

A mystery lies in the fact that though clandestine, these arguments were written as though for public consumption, and at least one of their authors, John Yoo, has been willing to endorse their logic publicly in books and in public interviews. Yet the formal legal analysis in which the administration appears to have invested so much was intended to be classified, and it was, on the whole, an object of shame, not pride. Thus although they are the kinds of arguments one would normally prepare to convince a disbelieving judge or jury, the documents were actually intended to be buried forever in internal, classified memoranda, documents designed to remain as secret as the conduct they were meant to justify. What, then, could the possible benefit be of developing elaborate legal arguments, whose only purpose is to provide a legal justification to a close circle of presidential advisors who presumably never themselves felt the need to establish a justification for the relevant EITs in the first place? Since the use of legal argumentation appears to be as nakedly political as the commitment to the torture policy, it is not clear what the Bush Administration saw itself as gaining by wrapping its illegal policies in legal trappings.

A number of political philosophers over time have articulated objections to private lawmaking, the best known of these being the point expressed by John Rawls’ famous “publicity condition.” As Rawls first articulates this condition in A Theory of Justice, it is a requirement that the basic institutions of a democratic society function according to a set of public rules. Moreover, the public availability of such rules is a requirement that Rawls builds into the definition of an institution in a “well-ordered society.” He writes:
In saying that an institution, and therefore the basic structure of society, is a public system of rules, I mean then that everyone engaged in it knows what he would know if these rules and his participation in the activity they define were the result of an agreement. A person taking part in an institution knows what the rules demand of him and of the others. He also knows that the others know this and that they know that he knows this, and so on. . . . The principles of justice are to apply to social arrangements understood to be public in this sense.  

In other words, Rawls' two principles of justice, which parties in an "original position" of choice would select to govern their society, apply strictly to institutions that are organized according to rules that are public in the foregoing sense.

As Rawls describes it, there are two aspects to such publicity. First, it must be the case that each individual affected by the relevant institution has the knowledge that he would have "if the rules and his participation in the activity they define were the result of an agreement." Second, such knowledge has a regressive aspect: each person participating in an institution knows the rules of that institution and his and others' obligations under the rules, and he knows that others know the rules, and that they know that he knows this, and so on. The second aspect of the publicity condition is the legal analogue to the game theoretic assumption known as the "common knowledge of rationality."  

There is a countervailing strain of thought about publicity in political theory, however, and this is the rather darker, Machiavellian idea that the efficacy of government depends on the maintenance of a certain respectful distance between those with the right to rule and those over whom they rule. A number of political and legal philosophers, starting as early as Plato's famous description of government and its relation to the general public in the Republic, have endorsed a separation between public governmental reason and the operative principles of political rule. Just such a separation appears to have been at work in the elaborate attempt to justify, in private terms, what could never have been accepted as a piece of legitimate legal analysis if held up to the light of public scrutiny.

Interestingly, none of the philosophers who maintain that rules of government should be clandestine has suggested that observing a separation between the rules governing institutions and the public knowledge of such rules would enhance a society's commitment to the rule of law. Instead, their idea is the utilitarian thought that administrative control and efficiency are increased if the public can be kept in the dark about the policies their government is actually pursuing. For these purposes, the rule of law proves an inconvenience. The more one is able to leave the public in a state of ignorance with respect to one's actual policies, the less interference one can expect, and hence the more effectively government is able to implement its real priorities. But the rule of law requires more than administrative efficiency; it requires a deep societal commitment to a shared set of ideals and principles. These function not as figureheads on governments organized around wholly disassociated premises, but as a normative basis for a shared standard, both within and outside a given society. The rule of law, for this reason, should function as an impendiment to the widening of the gap between public reason and private administrative function.

From a contractarian point of view, violation of the publicity condition in democratic governance presents a grave breach of the rational foundations of cooperative arrangements. This is so in two respects. First, domestically, the extensive use of clandestine executive governance forecloses the possibility of public debate over the conditions of political rule, and impedes individual citizens from engaging in an assessment of whether their grant of authority to a sovereign entity satisfies the original conditions that made such grant rational. Secrecy thus deprives citizens of an opportunity to evaluate the rationality of their own deference to authority, and hence to the continuing rationality of their adherence to the terms of the contract. The existence and form of government must be continuously justified to individual subjects in terms of advantages to their own welfare, the contractarian asserts. But a government conducting its business in secret fails to provide the necessary justification, because the lack of information makes it impossible for the citizen to assess where this interest lies. It therefore takes advantage of the political fidelity of citizens, without having had to prove that it is worthy of such fidelity. The rational response on the part of the citizen can only be to reject the authority that governs in this way.

Second, internationally the gap between public rhetoric and private law-making produces immense distrust in the broader world community, especially when the humanitarian commitments to which lip service is paid serve as a disguise for extensive violations of basic human rights. Insofar as any nation professes adherence to universal humanitarian norms and thereby enhances its credibility in international arrangements, it acquires an illegitimate advantage over other nations by the making of false promises. Once those promises have been shown to be false, the violating nation establishes itself as a free rider relative to other nations. The rational response on the part of the international community can only be expulsion from the community of nations.
This is a point that Thomas Hobbes recognized over four centuries ago:

[H]e which declares it reason to deceive those that help him can in reason expect no other means of safety than what can be had from his own single power. He, therefore, that breaketh his covenant, and consequently declareth that he thinks he may with reason do so, cannot be received into any society that unite themselves for peace and defence but by the error of them that receive him.¹⁸

For a rational contractarian like Hobbes, the foregoing represents the most essential reason to take domestic action against free riders: rendering false legal arguments is like engaging in political rule with a "Ring of Gyges." It creates power for the ruler that cannot be questioned or confronted. Given that the foundation of political authority is a social contract for the mutual benefit of all members of society, anyone who intentionally free rides on the trust of social cooperators does so at his peril. If discovered, he is to be sharply rejected from the community, and this means rejected from the basic terms of social cooperation.

A nation that treats other nations with which it has entered into agreements of mutual benefit as though they were mere tools for its own domestic aims thus violates the terms of cooperation in the community of nations. If the United States manifests disregard for the basic agreements regarding international human rights to which it had formerly pledged its allegiance, then other nations having exercised self-restraint have been disadvantaged by their own cooperation. In order to avoid a total collapse into a general state of war, the cooperating nations must expel the free rider. And with regard to the latter, they have no choice but to reject the agreement and all other possible terms of cooperation.

Domestically, then, the argument that establishes a governing regime as a free rider is that found in the exaggerated claims about the supremacy of executive power over democratic processes. Internationally, the argument lies in the suggestion of the supremacy of domestic over international law and the disregard for international agreements that would restrict that superiority. The Bybee memorandum makes both types of arguments, and suggests on the one hand that the counterweight to domestic executive authority—the rules of democratic governance, on the one hand, and the rules and customs of international comity, on the other—are normatively powerless and should be disregarded. But such reasoning is manifestly false: free riding on agreements regarding the democratic foundations of government, as well as those pertaining to universal human rights, is damaging in the extreme to the rule of law. Large-scale agreement can survive if there is only a small number of people who fail to conform, as long as their nonparticipation is either sufficiently covert, or else sufficiently isolated from the behavior of others that it will fail to generalize. Under such conditions, the defection will not significantly weaken the agreement. But as the above quotation from Hobbes suggests, where defection is known to exist, no matter how minor, the overt rejection of fidelity to the social contract provides the basis for excluding the free rider from the terms of cooperation.

A question arises whether all defections must be punished. Would such a rule not be overly demanding, not to mention unrealistic? Sometimes, arguably, it is less destabilizing to ignore a small defection than to punish everyone to the full degree authorized by law. And might that not turn out to be the case where government actors are concerned, in particular government lawyers who were merely being careless in the legal advice they offered?

There is, I think, a real answer to this question, one that is implicit in many passages in Hobbes, and that seems to be foundational to Kantian ethics as well. The problem with tolerating free riders, Hobbes notes, is that it suggests that we embrace their behavior, and it signals to others that we would be committed to the same from them.¹⁹ For this reason, Hobbes suggests, it must be an integral part of the original terms of the agreement that free riding on its benefits cannot be tolerated. The absurdity of entering into an agreement for mutual benefit and failing to stick to that agreement, Hobbes would say, is tantamount to declaring at the outset that although we mutually pledge our cooperation toward one another, there will be no requirement that anyone actually adhere to the conditions of the agreement. Such reasoning would be internally contradictory, and cannot be either rationally or politically maintained.

### III

Let us suppose that at least one of the techniques endorsed in the Bybee memorandum, most likely waterboarding, constitutes torture under 18 U.S.C. §§ 2340–2340A. And let us also suppose that that the appeals to expanded executive authority to override the authority of the federal statute are not legally well-founded. What would be the case for prosecuting the lawyers from the OLC for torture under the statute? The most straightforward way to make the legal case is that the lawyers are accomplices to the federal crime of torture, where the principals are the interrogators who
violence can easily spread from the officially approved methods to harsher, informally sanctioned methods. Arguably, in authorizing torture on a more restricted scale knowing it would have a tendency to increase, OLC lawyers may also be ripe for prosecution for foreseeable or foreseeable uses of torture that were not specifically authorized in OLC memoranda. Similar to the expansion of liability to co-conspirators under a foreseeability theory, the extension of OLC responsibility for torture seems a natural line to take in light of the known, or easily knowable consequences of placing the bodily integrity of prisoners in the hands of individual interrogators. To confer such a broad grant of physical and psychological power on CIA agents and other clandestine interrogators, who have little to no accountability to publicly articulated rules, is to take a grave risk that there will be abuse.

The opposite process is also possible, and can also be anticipated under certain circumstances. If the social contract makes clear the fate of free riders, and parties to the agreement are consistent in their responses to such individuals, the degree of compliance with the agreement will increase, since more people will be willing to self-constrain in order to reap the benefits of cooperation. They will do so with ever-increasing confidence that they will in fact achieve those benefits if they incur the cost of the agreement. The point is clear in both the domestic and the international context: in any instance in which large numbers of individuals must regulate an agreement without the help of a central enforcement agency. And in both the domestic and international context, there is a serious difficulty with enforcement; in the domestic context, the lack of enforcement stems from the fact that the central enforcer has turned against democratic principles, and in the international context, there simply is no enforcer, and the result is more or less the same.

If, for example, nearly all citizens voluntarily pay their income tax, there is a tendency for the norm of paying taxes to strengthen, and the number of taxpayers has a tendency to increase. Similarly, if there is sufficiently high compliance with ticket requirements on public transportation in countries where an honor system is in place, the degree of compliance with the ticket rules will tend to strengthen further, until it is nearly universal. Presumably individuals in such a society benefit most if everyone observes the tax and transportation requirements, even if the cost of such rules requires them to sacrifice some well-being as compared with the world in which they free ride on the compliance of others. But assuming this latter option is ruled out by the terms of the agreement (and by a rationality condition, such as common knowledge that would make such cheating readily discoverable), we have reason to treat free riding on the efforts of others as infeasible, and so to
regard our highest good as realized in the context of cooperation. Against this background, it will turn out that if most people voluntarily pay for their subway tickets in an honor code system, that will tend to increase the number of people who voluntarily pay taxes. Conversely, if there is sufficient public flouting of tax obligations and ticket requirements, the degree of compliance with such rules will tend to spiral downward, until there is very little social compliance with the rule.

Arguably, a similar "tipping" phenomenon was at work in Iraq, and was particularly on display in the abuses that occurred at Abu Ghraib. Since the rates of compliance with international human rights norms were intentionally reduced by official sanction of enhanced interrogation, the general level of compliance with such norms began to spiral downward, until there was widespread rejection of humanitarian norms on all sides. The result was significantly decreased rates of compliance with basic human rights norms, which in turn made compliance risky, and drove the rates of cooperation further down. Of course the objects of this treatment will respond in kind, since although they do not personally and specifically have a contract with their captors that commits them to extending and receiving humane treatment, any implicit agreements regarding civilized exchange are quickly shed, and captor and captive will further descend into that Hobbesian state of war. There are, then, significant dangers of noncompliance with fundamental norms and principles of governance, and significant benefits to be had from cooperation with such norms. Indeed, in some cases compliance can safely be extended to those who have failed to comply, and the possibility of upward improvement can be increased even by unilateral action.

Since the federal torture statute (18 U.S.C. § 2340–2340A) is primarily a codification of an international instrument—the United Nations Convention against Torture (CAT)—we encounter both the domestic and the international examples of intentional free riding in one and the same conduct, namely, lack of compliance with the legal norms governing the use of torture. In the international context, it makes sense for us to return to first principles and ask whether treaties such as CAT would be regarded by the nations who sign and ratify it as sufficiently attractive to garner their own agreement were they to know at the time of signing that at least one of the major signatories to the Convention would free ride on the other members of the Convention and refuse to adhere to its terms when inconvenient to do so. In other words, if we assume that nation-states are roughly rational, self-interested entities with "nonaltruistic preferences," would they agree to contract with other nations if they knew that those states secretly dis-

avowed the treaties they signed? The answer, of course, is no. Contracting with other nations on matters with important domestic implications makes sense only on the condition that the other party can be assumed to be collaborative. And if it is rational to free ride, because the chances of detection, are sufficiently low, then adherence to international agreements cannot be anticipated and relied upon without a system of sanctions for violators in place.

The same might be said of prosecution under federal law. In democratic governments, we can think of the force of law as stemming from the fact that good law reflects that set of agreements that rational agents with largely self-interested preferences would adopt in order to further their own welfare. Such agreements are not rational merely because they consist in mutual forbearance from the infliction of evil on one another, but because they allow mistrustful agents to capture the gains of cooperation with others. In effect, if free riders on agreements of mutual advantage are not disciplined, the rational basis for entering into such contracts in the first place would be undermined.

The OLC lawyers recommended to the president that members of al-Qaida and the Taliban be treated as so-called "enemy combatants," rather than domestic criminals, and hence as falling outside the scope of possible collaborative agreements. This was often defended with a quasi-contractarian argument. As Yoo has repeatedly suggested, Al-Qaida doesn't follow the Geneva Conventions, so why should we? This argument comes close to making a sensible contractarian argument, but in the end it misses its mark. The obligation to follow international human rights norms is not owed primarily to the individuals such norms were meant to protect. The obligation is owed instead to our fellow citizens, with whom we have pledged to maintain a government of limited powers, and other nation-states with whom agreements regarding basic human rights have been made. All other individuals or states are mere third-party beneficiaries of such agreements. But when an agreement is violated and an individual's rights ignored, the relevant contractual duty that has been breached is one that is owed to all other individuals, or nations, and not uniquely to the one whose violation of the agreement was anticipated. In that sense, the public rhetoric that the United States is committed to human rights does not, and should not, save it from incurring the wrath of those other nation-states who are willing to abide by such commitments in deed as well as in word."

Assuming that the conduct of those engaging in enhanced interrogation techniques did indeed violate both international law and federal statutes,
and that the OLC lawyers who sanctified such techniques can fairly be thought of as accomplices to that conduct, one would think prosecuting those involved—both at the higher and lower levels—would be a natural way to proceed. In the trials at Nuremberg, both types of actors were prosecuted. But in this case, there are some compelling arguments on the other side. With regard to those who acted on military or CIA orders, it is hard to deny the normative force of their claim to exoneration based on the fact that they were merely implementing a policy decided on by others. And with respect to the government lawyers, they were merely functioning in the way that lawyers usually do, namely, giving their opinions as to the legality of a government initiative. Surely they cannot be prosecuted for that, one might suppose. Are they not hired for this very purpose, namely, to articulate the background law to the best of their abilities and to present their true opinions of the legal imperatives under the circumstances? Moreover, there is little precedent for prosecuting lawyers who were acting in a purely advisory role. This is entirely different, it is said, from prosecuting an actual accessory, since the lawyers supposedly do not themselves wish to encourage the conduct on whose legality they are advising, and are not seeking to encourage it. At worst, the conduct appears to be a violation of a rule of professional ethics, such as Model Rule 1.2(d), which forbids a lawyer from assisting a client in conduct known to be criminal or fraudulent.

The two obstacles to prosecution—the “just following orders” defense and the defense of the supposedly neutral, disengaged lawyer, merely stating his honest opinion—together present a significant threat to the rule of law, given that their combined effect is to exonerate anyone involved in either creating or implementing the torture policies. There are two reasons why that combination of immunities is particularly deleterious to the rule of law: first, it abandons a crucial opportunity to repudiate the incursions into the rule of law by condemning conduct that was previously endorsed and accepted. President Obama had the idea of just such a public repudiation when he declared in his inaugural address that “the United States does not torture.” This statement suggested to many that President Obama was prepared to reject the Bush-era policies as forcefully as possible, but the backing away from prosecution for torture has belied their hopes.

Second, failure to prosecute damages the rule of law by constituting an implicit endorsement of the conduct of the previous administration, however illegal or wrongful it may have been. What it condones is admittedly complicated, for turning one’s back on wrongdoing need not always constitute an endorsement of the wrongful conduct. What the failure to prosecute signifies is an acceptance of the expanded conception of executive power the Bybee memorandum advances. If I am correct, the strongest reason to prosecute the Office of Legal Counsel lawyers who wrote and signed the “torture memos” is to publicly repudiate the conception of executive privilege on which their conclusions in part depended. This aim, combined with the need to affirm, through deeds, the United States’ commitment to human rights at more than a merely rhetorical level, provide two powerful reasons to prosecute Justice Department attorneys for aiding and abetting torture through memos that endorse it.

The next question is whether a good faith belief on the part of the lawyers, if indeed that claim can be maintained, should constitute a defense to the suggestion that they can be prosecuted as accomplices to torture. To allow the good faith defense amounts to the suggestion that the lawyers cannot be accessories to torture unless they actually believed that what they were advocating was in fact torture. This argument, however, is highly questionable.

First, why should accessory liability for torture in this case require that lawyers endorsing the torture policies have believed that the advice they were giving was false? It has never been a requirement, after all, that a criminal defendant believe he was guilty of a crime in order to be guilty of that crime. Roughly speaking, he need only believe that he has engaged in the relevant conduct, not that he know its legal status. This is the familiar point in criminal law that ignorance of the law is no excuse. So arguably, if the lawyers gave grossly false advice about the legal status of the torture policies, they might still be prosecuted as accessories to torture (or, alternatively, as conspirators), even if they did in fact make an honest mistake about the proper interpretation of federal and international law. The requirement that a lawyer be aware of the illegal nature of his client’s conduct is an appropriate requirement for the relevant professional ethics prohibition on assisting a client with a course of action known to be illegal. But it makes little sense for ordinary accessory liability.

Second, is a point of fact: if the lawyers from the OLC really did believe their own legal rhetoric: if, as Yoo maintains, the torture policy was both legal and wisely adopted, why did the Bush Administration go to such lengths to keep its interrogation policies secret? That is, given that they had constructed an extensive network of legal arguments to support the legality of the policy, and that this network purported to justify the policy in overt, publicly consumable form, why not just declare the policy publicly, along
with the elaborate legal construction designed to support the policy from a legal standpoint? Why not just come clean and draw out the implications publicly from the position that was taken to justify the relevant methods of interrogation, namely, that members of al-Qaeda and the Taliban are “unlawful enemy combatants,” rather than either prisoners of war or criminal suspects, and as such are not in fact entitled to the respect for human rights for which the president expressed such admiration in his 2003 speech at the United Nations? Although the appeal to the concept of an “unlawful combatant” was made public, the true implications of that label remained hidden for many years, namely, that as such, the administration believed that individuals so designated had acted in a way that forfeited even the most basic human rights. And insofar as they fall outside the ambit of civilized society, and hence outside the domain of rules such as those governing prisoners of war under the Geneva Conventions, they fall outside the bounds of all moral restraint. Thus, the puzzle is once again the combination of public rhetoric with private content: why did the Bush administration pour great effort into providing a legal justification for a policy it never intended to present publicly? Or, to turn the question once again the other way around, given that it thought it had a valid legal justification for the policy, why did it not reveal the nature of the policy and the legal justifications for it alongside?

A likely answer is that the OLC lawyers actually knew that the legal arguments they were making to support those techniques had little legal foundation. Indeed, this will probably be clear to anyone who bothered to read the August 1st memorandum, and would have been clear to members of the inner cabinet who presumably commandeered the memo, without caring much about the legal reasoning it contained. In other words, this was a way of distracting attention from the fact that the administration’s own lawyers, by 2002, taken the official, but secret, position that neither domestic nor international law can hold sway over domestic executive authority, and that therefore in times of war, there are no legitimate restrictions on the power of the Commander-in-Chief. The administration was walking a very fine line: it needed the sweeping arguments of domestic executive supremacy in order to convince itself that it possessed adequate grounds for ignoring the various sources of law and political authority that rejected its approach to the war on terror, at the same time that it sought to insulate the use of its own arguments from public scrutiny. For this latter purpose, the more strongly the United States could appear to respect international human rights, the more isolated its secret but powerful arguments for rejecting those rights in particular contexts could be made to seem. The Bush Administration thus ironically sought to bolster its own policies rejecting human rights law by appearing to accept them in other, less controversial contexts, such as in the example of the Beijing Olympic Games.

What is the evidence for the suggestion of bad faith, and how can we make such an assertion based on so little actual knowledge of mental state? First and foremost, there is the quality of the arguments themselves: many of the legal claims offered in support of these techniques were transparently lacking in legal credentials. Arguments pertaining to the interpretation of the relevant federal statutes contain little to none of the usual citations to legislative intent, inference regarding intent drawn from a careful interpretation of the statutes themselves, evidence regarding the contemporaneous understanding of the language of the statutes when they were drafted, and so on. Instead, what we find is short phrases and isolated terms analyzed without benefit of context or common understandings, no evidence whatsoever that might bear on legislative intent, and specious arguments of a quasi-textualist nature designed to bolster highly ideologically driven interpretations of the relevant sources of law. This point was made repeatedly, and in careful detail, in the OPR memorandum.

By advancing legal arguments of any sort, whether true or false, precise or careless, well supported or utterly invented, the president’s legal advisors were able to appear as though they were arguing for the legitimacy of certain methods of interrogation in good faith. And insofar as the legal advisors appeared to be arguing in good faith, those in the administration who had designed the relevant interrogation methods and fervently believed them to be of crucial utility in the war against terror could also seek cover by relying on those opinions. In this way we had legitimation through division of labor; those who design and implement intelligence policies are not themselves directly responsible for knowing the legal status of their conduct; they are permitted to design such policies on the basis of utilitarian considerations alone. And those who pronounced on the legality of these policies neither directly drafted them nor sought to encourage them. The true authors of the policy are not responsible, because they cannot be held to making correct judgments about the legality of their conduct, and those whose job it is to pass on the legality of the policy are also not responsible, because they are merely rendering an honestly held opinion, a stance whose supposed passivity guarantees its own immunity.
IV

I have thus far made a case for prosecuting former lawyers from the OLC for violations of federal law based on the suggestion that vindication of the rule of law requires the explicit and visible rejection of free riders on democratic principles. This argument, however, has something in the nature of a consequentialist flavor to it, given that it takes into account the effects of prosecution as an argument that counts in favor of it. Any such argument in the case of criminal prosecution will be dangerous, in that it lacks the individualized component that retributivist intuitions seem to require. In this regard, it will be crucial to consider several further defenses that the lawyers might have based on the individual responsibility of the principals to whom their liability would be attached as accessories in an actual prosecution. And it is these factors that most focus our attention on the question of individual justice and responsibility.

First, might the lawyers from the Office of Legal Counsel share a possible justification defense of the principals for advising others in the administration about the legality of manifestly illegal conduct? This is indeed an argument the Bybee memorandum itself makes with regard to individual interrogators applying Justice Department guidelines. The suggestion is that individual interrogators might be able to claim a necessity defense to the charge of torture, once all other arguments have failed. The defense would be based on a kind of collective or societal self-defense claim: just as an individual whose life is at risk may sometimes engage in illegal actions in order to prevent or preempt harm to himself, so society might engage in such acts when the threat to itself is sufficiently grave and sufficiently imminent. The idea that former Bush officials believed that U.S. interrogation practices were illegal but nevertheless justified, is one that is only now slowly making its way into Republican defenses of the Bush Administration's policies.

The major obstacle to claiming a necessity defense in this context, however, is that necessity cannot strictly speaking be demonstrated because the pressure to torture one particular individual is never as severe as the legal philosophers who pose the truly wrenching torture hypotheticals would purport to suggest. The use of torture at Abu Ghraib did not fit the "ticking time bomb" scenario, not least because the vast majority of detainees had little to no information to offer. The more likely claim in this domain would be self-defense, and the 2002 memo indeed makes an argument in this direction as well. But it is weak and unconvincing: self-defense was never meant to apply to society's welfare. It applies to individual actors who once again find themselves in a situation in which they must act immediately if they are to avert a threat to their lives or bodily integrity. And it is once again safe to say that in the vast majority of cases of enhanced interrogation, no such immediate need will manifest itself.

Lawyers in the Bush Administration, however, were so convinced that the survival of the country depended on the acquisition of information about terror plans in the making, and that such plans could not be gleaned from ordinary methods of interrogation, that they believed that they had a justification for doing what the law does not allow, and this belief was presumably replicated on the level of individual interrogators. Should we not allow that if they were indeed acting in good faith in a second sense, namely they believed their use of torture was justified and would be legally excused, that they might benefit from a defense like mistake? Even if they incorrectly assessed the applicability of the concept of justification to their case, then, should not the honest, but mistaken, assessment of the need to use defensive force result in some sort of excuse (that is, mistakes justification), as long as they were reasonable in believing in the need for justification? Notice that this is not the kind of mistake of law defense we discussed above, which I denied should have significant import as a defense for Bush interrogators and lawyers. Rather, it is mistake about the availability of a justification defense, which is different from the lack of knowledge of illegality. Normally, however, we do not allow criminal defendants to convert what should be a justification defense into a kind of excuse. For if a justification applies to a prima facie offense, it would override the culpability that attaches to a defendant's fulfillment of a prohibitory norm. But the same cannot be said when a defendant makes a mistake about a justification. In that case, there can be no override; there can only be a denial of the mens rea conditions that could serve to establish culpability in the first place. Since, as I argued above, knowledge of the illegality of the conduct promoted is not necessary to be guilty of a crime, there is no mens rea requirement that attaches to the illegality condition, and hence no way to generate a "mistake" defense regarding the belief that one's conduct was justified.

If the concept of justification really does play the role I have suggested it does in the thinking of principals and accessories about the use of torture, we can now make sense of why President Bush had the sangfroid to make the statement he did about America's adherence to the Convention on Torture in June 2003. It is not really that he and lawyers at the Office of Legal
Counsel believed that waterboarding was not torture; they knew full well it was. Rather, they saw the months and years following September 11, 2001 as a protracted condition of siege, one in which ordinary legal rules could be justifiably dispensed with on grounds of either justification (self-defense) or for social welfare (necessity). This explains a great deal about the mind-set of Yoo and Bybee in fashioning these policies. The lawyers of the OLC presumably thought they were engaged in developing highly necessary concessions to emergency planning. One must not be afraid to get one’s hands dirty when survival itself depends on it.

Finally, we should consider a third type of mistake of law defense, and this is when there has been inadequate notice. Although they were aware of a risk that the enhanced interrogation techniques might turn out to be illegal, they were not on notice that such lapses could actually result in prosecution. That is, because human rights abuses of this sort are sufficiently widespread, and the prosecution of those who merely offer legal advice to sanction this conduct sufficiently rare, they had every reason to suppose that the world would look the other way when suspected terrorists were tortured in the name of national security. This argument, however, once again seems to me to fall in light of the post–World War II prosecutions we ourselves conducted against Japanese soldiers who used the waterboarding technique on captured enemies. The same might be said more generally of the most significant of the novelties of the Bush Administration’s approach to detainees, namely, the decision to treat them as “unlawful combatants.” Since this decision itself had little precedent and was highly tendentious, legally speaking, the OLC lawyers should have been aware of a risk that they might have made a legal mistake in making use of this category, given that it stripped individuals of rights they might traditionally have had.

What I have been implicitly suggesting in this and the preceding section is that the key to the legal cover for both lawyers from the Office of Legal Counsel and for individuals acting to implement their opinions can be located in the idea that each individual acts pursuant to a specific and delimited role: a presidential legal advisor has an obligation to give advice on the legality of executive conduct to the very best of his ability, taking into account the available sources and experts who can correctly inform him of the legal status of such conduct. From a moral point of view, then, making a mistake about the governing law is not necessarily criticizable, as long as one’s errors are made in the absence of any legal knowledge to the contrary, and based on a thorough review of all the legal sources that might have a bearing on the matter. The utility of the appeal to human rights and other democratic values is that such rhetoric, offered at the same time that such values are being systematically ignored, provides an apparent basis for exonerating the individuals who were implementing the administration’s most cherished, illegal policies of the time. If the administration as a whole could be understood to prize the very values its policies are intent on ignoring, a presumption might be raised that lawyers interpreting international and domestic legal constraints will do so in a way that respects them. At the very least, the administration can be presumed to be acting on the basis of a set of honestly held views about the legal permissibility of the policies it sought to defend. And since the misperception that government lawyers may be punishable for bad faith interpretations of law but not for good faith ones appears to be an abiding view, it is not hard to see why the rhetoric appealing to human rights and rejecting the use of torture would be appealing.

V

The United States benefits significantly from being viewed by other nations as a leader in human rights: it makes it easier to secure the cooperation of those nations, and also gives us a secure position from which to insist on the humane treatment of our own POWs when captured by enemy forces. Other nations benefit similarly from the commitment to human rights in a variety of ways, and so, we might say, there are mutual gains to be had from the coordinated restraint of personal maximizing on the part of nation-states in favor of adherence to international norms of human rights. Unfortunately, as President Bush was also aware, it is not the actual adherence to such norms that provides access to the benefits of international cooperation, but the appearance of adhering to such norms. If the United States is, indeed, free riding on the commitment to international agreements regarding human rights, by paying lip service to its dictates while ignoring its contents, what response should the international community have? Should it expel the United States from human rights agreements, on the ground that it does not contribute to the mutual benefit for which others sacrifice? As we saw above, such an argument was raised by John Yoo in his defense of treating the Taliban and al-Qaida members as unlawful combatants instead of as prisoners of war, which would have afforded them POW status under the Geneva Conventions. He argued that this categorization was morally permissible on the grounds that they themselves do not follow the Geneva Conventions. As Yoo correctly points out, they deliber-
ately target civilian populations, use civilian populations for cover, do not accord prisoner of war status to their own hostages, and so on. In contractarian terms, you might say that given that the Taliban and al-Qaeda have exempted themselves from the human rights conventions in their treatment of others, the United States have no reason to afford them any of the benefits of self-restraint in war when they have clearly manifested their ill-intentions towards us.

But we have also seen that this argument is weak in several respects. First, contravention of the federal torture statute does not hang on whether the victims of torture are protected by the Geneva Conventions. Second, expulsion from the terms of the social contract does not entail that anything goes, morally speaking. As we saw above, our primary duty to respect the terms of the humanitarian social contract is owed to those who violate the contract, and to those who adhere to it. And it is reasonable to suppose that the terms of the contract include conditions regarding treatment of those who are not members of the contract. Assuming the contract is one established for purposes of mutual advantage, then, animals, the insane, the severely disabled, and children would not be among its members. But the conditions of the contract provide for their care and establish rights on their behalf, and the respect of those rights is a basic condition of the contract established with others. Thus, in some cases nonmembers of the contract may be the beneficiaries of our duties to one another under the social contract. We therefore have duties to respect the most basic humanitarian rights of members of al-Qaeda and the Taliban, which entails that any use of force against them must be justified in ways that do not contravene the basic terms of social cooperation.

Although we have not entered into the details of a possible theory of prosecution, the most compelling way to spell out the theory of liability for torture for the OLC lawyers is via the doctrine of accomplice liability. Liability here can be established by a rather straightforward legal analysis: the OLC lawyers possess the mens rea for accomplice liability to torture—namely, purposely assisting in the commission of torture—and also the actus reus—soliciting or encouraging the commission of such offenses. And we saw that with regard to this argument, it is not clear why it would make a difference to their positions whether they knew or did not know that the legal advice they were giving was in all likelihood false, since mistake of law does not traditionally constitute a defense. Alternatively, one could proceed via conspiracy analysis: the OLC lawyers conspired with one another and with others in the administration to violate the federal torture law, as well as basic treaties of international law. Proceeding by way of conspiracy law, as we have seen, would give us a basis for finding liability for acts of torture not authorized by the OLC memos, on the grounds that such ultra vires acts could be reasonably foreseen from the authorization of illegal acts of torture as part of official policy.

I have argued that legally speaking, it does not matter whether the lawyers were acting in good faith when they counseled the legal permissibility of certain forms of torture. We must distinguish legal from moral analysis, however. Where moral evaluation of the lawyers' conduct is concerned, their position would surely be worsened by the revelation that their attempts at legal argumentation were disingenuous. There are at least several reasons for this. First, it is a grave breach of professional ethics for a lawyer to render legal opinions merely for the sake of achieving a certain political result, and especially so if he does not actually believe in the correctness of the legal opinions he is presenting. Rendering advice on the basis of a hoped-for result, without regard to the underlying sources of law, is a matter of grave moral and professional misconduct. It also constitutes a serious violation of the publicity condition, since it presupposes the legitimacy of a "private" basis for lawmaking, namely the instrumental features of legal reasoning as related to some pragmatic end. And thus if an agent's moral status matters to the advisability of prosecuting him, and if failing to prosecute immoral agents contributes to a disregard for the rule of law, the fact that the OLC lawyers probably intentionally ignored contravening sources of legal and moral authority against their positions would contribute significantly to the case for resorting to prosecution.

Finally, by making false legal arguments with the aim of justifying the denial of basic human rights, the OLC lawyers have shown themselves to be intentional free riders on both domestic and international agreements of mutual benefit that enhance personal security and welfare. The domestic agreements are those that establish the proper role of lawyers and the forms of reasoning that are socially available to them. And the international agreements are those establishing the foundations of human rights law, and that assign legal reasoning about domestic priorities a subordinate place in their relation to the welfare of the whole.

In light of these arguments, let us return briefly to President Bush's heartfelt statement condemning torture and pledging to prosecute its practitioners. We might now be in a position to understand why the president would have been keen to make such a statement, despite the fact that he was fully aware that the United States was making extensive use of tech-
niques that had previously been prosecuted as torture, and that provided a strong basis for thinking it violated the terms of the Convention. Since the executive branch of the United States was clandestinely turning its back on its own normative commitments to the domestic democratic order, as well as to other nations, it was crucial to the administration to be able to vindicate its own status and to reject its image as a free rider on moral and legal constraint. For the extreme disadvantages of free riding on democratic principles like the separation of powers and limited government would not make themselves felt if the free riding could be conducted in the absence of public awareness. Once we are understood to be free riders—whether free riders on internal democratic processes or free riders on international adherence to human rights conventions—we impair our own ability to reap the benefits of cooperation if we do not discipline the agents who endorsed and advocated the free riding in the first place. This, finally, is the reason why Obama’s firm stance that no one would be prosecuted for following the advice of lawyers who advocated torture is so problematic, and why the Justice Department’s more recent backpedaling on the condemnation of the OLC lawyers for professional misconduct leaves our persuasiveness with regard to domestic and international arguments in favor of self-constraint impaired.

I have argued that violations of the rule of law that stem from the distortion of fundamental legal concepts ought to be vindicated through the legal process itself, as this is the most effective way to publicize, and thus to deter, shameless government free riders. The argument for this appeal to public vindication is contractarian; because the commitment to the rule of law in a democracy depends on the perceived mutual advantages of living under the curtailment of legal rules, the public repudiation of illegal conduct through legal processes is crucial for vindicating the rule of law. Contractarian political theory thus gives us a basis for using legal proceedings to reject the legitimacy of domestic and international free riding on the self-imposed constraints of others. The argument for bringing to justice those who have contributed most to the infringement of the rule of law through their attempt to replace public reason with clandestine executive rule would then be that we do most to strengthen the rule of law when we use law itself to assert its own supremacy, because it is through law that rational self-constraint asserts itself. Law thus constrains not only the society it purports to govern, but its own operation as a protector of governance by law. Such self-restraint is rational, because it is voluntarily chosen by members of society who can perceive it as contributing to their mutual benefit.

NOTES

2. Second Inaugural Address. Periodic obeisances to the notion of freedom were also a regular part of Bush’s argument for invading Iraq, since the war on Iraq was routinely justified on humanitarian grounds after the death of Saddam Hussein had weapons of mass destruction been revealed as false.
4. Some scholars have attempted to distinguish the waterboarding conducted by the Japanese during the war from the waterboarding carried out by American soldiers and the CIA in the war on terror with regard to the label torture, claiming that the Japanese use of this technique was much more brutal than our own. See Remarks by Michael Lewis, Federalist Society Debate (with Claire Finkelman), University of Pennsylvania Law School, November 15, 2009.
6. Eric Holder appeared in his confirmation hearings for Attorney General: “If you look at the history of . . . [waterboarding] used by the Khmer Rouge, used in the inquisition, used by the Japanese and prosecuted by us as war crimes, we prosecuted our own soldiers in Vietnam, I agree with you, Mr. Chairman, waterboarding is torture.” Eric Holder, testifying before the U.S. Senate Committee on the Judiciary, January 15, 2009.
7. “In releasing these memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution.” Statement by President Obama on Release of OLC Memos, April 16, 2009.
9. Ibid.
11. Ibid.
12. Although not pragmatic, my focus is also not the usual philosopher’s hypothetical about whether it would ever be permissible to torture one person to save an entire city from the ravages of a ticking time bomb—an example about which reasonable minds can surely differ. See Michael Moore, “Torture and the Balance of Evils," in Placing Blame: A General Theory of Criminal Law (Oxford: Oxford University Press, 1989).
14. It is for this reason that I reject the suggestion of two of the authors in this volume, Steve Vladeck and Paul Horwitz, to the effect that prosecution is often unnecessary and
generally dispreferred as a way of vindicating the rule of law. Both authors suggest that intervention by the political process is preferable to prosecution as a way of vindicating the rule of law, hence that prosecution should be considered only as a last resort. If my suggestion is correct, prosecution should be a first, rather than a last, resort.


15. It is with personal sadness and regret that I pose this question to the OLC lawyers, insofar as one of them, John Yoo, was both a law school classmate of mine, and for several years a close colleague and friend at the University of California, at Berkeley. There we occupied adjacent offices and spent much time sharing views about the experience of being junior faculty members at a new institution. It is difficult to imagine the affable, pleasant, and engaging colleague that John was in the role in the Bush Administration he subsequently came to occupy.

16. A good example of this last point might be the relations of the United States to the work of an organization like the Red Cross. Insofar as we rhetorically support Red Cross efforts to supply needy populations with food, clothing, and medicine, we are relieved of the responsibility to do so ourselves, especially when the condition of such populations is in part a product of our own conduct. Furthermore, when our governmental administration verbally endorses the aims of such organizations and aligns itself sufficiently vocally with the rescue efforts such NGOs make, the international perception of Western, democratic aid tends to rub off substantially on the United States, and we receive implicit credit for work done by others. One example would be the contrast between the retrospective perceived large U.S. government response to the tsunami in the Indian Ocean in 2004 and the actual response of the Bush Administration. Initially, the Bush Administration only committed $15 million in aid, which over the next several months grew to $550 million, following criticism. Alan Cowell, "Asia’s Deadly Waves: Bush and Other Leaders Quick to Offer Condolences and Aid," *New York Times*, December 27, 2004, World section, http://query.nytimes.com/gnt/fullpage.htm?res=9C02E5DAF33F934A157510C2A9629C0B8&sec=opes&pagewanted=all, BBC News, "Bush Aims to Boost U.S. Tsunami Aid," BBC News, Americas section, http://news.bbc.co.uk/2/hi/americas/4054171.stm. By the end of 2004, however, American NGOs and American citizens donated nearly $1.9 billion.


19. In addition, the August 1, 2003 memo required that the infliction of mental pain or suffering could amount to torture under § 2340 only if it resulted from “one of the predicate acts listed in the statute,” which included cruelties of inhumane death or threats of infliction of the kind of pain that would amount to physical torture. Bybee memo, 1.


24. Ibid., 55-56.

25. Ibid.


29. For other common examples of tipping phenomena, see Malcolm Gladwell, *The Tipping Point* (New York: Little, Brown, 2000).


31. See Christopher Kutz, "Gaveling Spillover," *Criminal Law and Philosophy* (2007): 289-305. The accomplice liability analysis is somewhat complicated, but one can articulate it in a straightforward way: the attorneys encouraged and solicited torture by writing the memos they did. And that means that they have the mens rea for the offense (intentional encouragement of violation of the prohibition on torture), they have a relevant actus reus, namely, the overt act consistent with the mens rea of encouragement, and they have no particular defense. *Model Penal Code*, § 2.06.

32. Nevertheless, there are some well-known instances of individuals being prosecuted for their advisory role. For example, Joachim von Ribbenbrop, the Foreign Policy Advisor to Hitler, wrote a memorandum justifying instances of Nazi aggression and was later prosecuted for war crimes. Ellis Ciammasso, "A Legal Advisor’s Responsibility to the International Community: When Is Legal Advice a War Crime?" *Valparaiso University Law Review* 41 (2004): 1146.

33. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law. *Model Rule 1.2(d).*

34. President-elect Barack Obama, remarks in press conference announcing his Intelligence Team, on January 9, 2009. He went on to indicate that the United States would abide by the Geneva Conventions.

35. To be more precise, in the usual case he had to know he was engaged in the relevant conduct, or be aware of a risk that he was engaged in that conduct. In occasional cases, he
can be convicted merely because he should have been aware that he was running a risk of engaging in the relevant conduct. That is, he must either have been aware of his conduct, have been reckless with respect to engaging in it, and occasionally have been negligent with respect to that conduct (or result, to be strictly correct). But knowledge of the illegality of that conduct is virtually never required.

39. There are two important exceptions to this principle: first, mistake of law is an excuse when the relevant prohibitory norm makes the lack of knowledge of the law itself an element of the offense, to which mens rea then applies. Even where the mens rea for the crime is intent, rather than knowledge, this is usually not the case. Second, knowledge of the illegality of one's conduct must be demonstrated when it is fair to assume that the defendant did not have adequate notice of the illegality of his conduct, as can often be the case with so-called "regulatory" offenses. See Model Penal Code, § 2.04.


41. See interview with General Janet Karpinsley, former military commander of the Abu Ghraib prison, in the film Ghosts of Abu Ghraib, who estimates that over 90 percent of those rounded up for purposes of divulging information had no information to offer, and that most were arrested indiscriminately.

42. Some support for this thought lies in the creation of the Japanese detention camps during World War II. See Stephen L. Vladeck, "Justice Jackson, the Memory of Internment, and the Rule of Law after the Bush Administration," in this volume.