

# THE RULE OF INTERNATIONAL LAW

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## I.

This Article will focus on how one should think about the rule of law in the international arena. Asking about the rule of law in the international arena is not just asking whether there *is* such a thing as international law, or what it is, or what we think of particular treaties (such as human rights covenants), or of the value of customary international law, or of the enforceability of international law in our own courts. The phrase “the rule of law” brings to mind a particular set of values and principles associated with the idea of legality.<sup>1</sup> These values and principles are the ancient focus of our allegiance as lawyers. The rule of law is one of the most important sources of the dignity and honor of the legal profession, and an awareness of the principles and values that it comprises ought to be part of all lawyers’ professional ethos, something that disciplines the spirit and attitude that lawyers bring to their work.

True, the rule of law is not the only value that lawyers serve. Lawyers must serve justice too, for justice is part of law’s promise.<sup>2</sup> And, of course, lawyers serve the interests of their clients and of society generally. But the rule of law constrains lawyers in their pursuit of these other goals: they pursue justice and the social good through the rule of law, not around it or in spite of it. This Article will talk particularly about the obligations the rule of law imposes upon lawyers as they act in various capacities.

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1. For good accounts of these values and principles, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–76 (1980); LON L. FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1969); JOHN RAWLS, *A THEORY OF JUSTICE* 236–39 (1971); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 212–19 (1979).

2. See Jeremy Waldron, *Does Law Promise Justice?*, 17 *GA. ST. U. L. REV.* 759, 759–60 (2001) (quoting PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 443–44 (1992)).

Is it clear what the rule of law demands of lawyers in the international arena? Many people think it demands less in the international arena—that it demands less of a national government in the international arena, for example, than in the domestic arena—not just because there is less international law but also because a different attitude toward the rule of law is appropriate in international affairs. This Article is skeptical about that suggestion, and I shall present a number of reasons for rejecting it.

## II.

To begin with, what does the rule of law require of lawyers in the municipal arena?<sup>3</sup> Usually one thinks of the rule of law as a requirement placed on governments: the government must exercise its power through the application of general rules; it must make those rules public; it must limit the discretion of its officials; it must not impose penalties on people without due process; and so on. But the rule of law applies to the individual, too. So, what does the rule of law require of the ordinary citizen? Well, it requires that she obey the laws that apply to her. She should be alert to changes in the law; she should arrange for her legal advisors to keep her informed of her legal obligations; she should refrain from taking the law into her own hands; and she should not act in any way that impedes, harms, or undermines the operation of the legal system. Every ordinary citizen has these obligations and can properly expect the assistance of her legal advisors.

As the ordinary citizen goes about her business, she may find that there are areas where the law imposes minimal demands on her or no demands at all, instead leaving her free to her own devices. This is not a matter of regret. Allegiance to the rule of law does not mean that the citizen must wish for more law—or less freedom—than there is. Neither does it require that she play any part in bringing fresh law into existence if she does not want it. She must obey the law where it does exist, but she has no particular obligation where it does not. It is not up to individual citizens or businessmen to do the lawmakers' job for them. For example, they have no duty to extend the scope of

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3. I use "municipal" as international lawyers use it: to refer to law within a particular country.

the law's constraint (in accordance with common sense, morality, the spirit of the law, social purposes, or anything else), if the sources of law do not disclose an unambiguous enactment to that effect.

We can take this point even further. According to most conceptions of the rule of law, individual citizens are entitled to laws that are neither murky nor uncertain but are instead publicly and clearly stated in a text that is not buried in doctrine. If the state impacts individuals by way of penalty, restriction, loss, or incapacity, then individuals are entitled to advance notice through clear promulgated laws.<sup>4</sup> To the extent that the law is unclear, individuals are entitled to the benefit of that uncertainty.<sup>5</sup> In the absence of a clearly stated constraint laid down in a promulgated legal text (like an enacted rule or a well-known precedent), there is a presumption in favor of individual freedom: everything is permitted if it is not clearly forbidden. It is not inappropriate for lawyers to help their clients navigate the legal system with this in mind—looking for ambiguities and loopholes, taking advantage of them where they exist, and not going out of one's way to defer to laws whose application to a client's case is ambiguous or unclear.

These actions are legitimate and entirely consistent with legality because (on most accounts) the whole point of the rule of law is to secure individual freedom by providing a predictable environment in which individuals can act freely, plan their affairs, and make their decisions.<sup>6</sup> To eliminate uncertainty in the interests of freedom and to furnish an environment conducive to the exercise of individual autonomy constitutes the *raison d'être* of the rule of law. So it is perfectly appropriate to approach legal matters in this arena with the freedom of the indi-

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4. See A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 110 (Liberty Classics 1982) (1885) (“[The rule of law] mean[s], in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”).

5. See, e.g., *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (describing the rule of lenity).

6. See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1960) (“The significance for the individual of the knowledge that certain rules will be universally applied is that . . . [h]e knows of man-made cause-and-effect relations which he can make use of for whatever purpose he wishes.”).

vidual in mind—freedom from any restrictions that are not promulgated clearly in advance.

### III.

What happens when attention is turned from the individual to the government? (For the moment, this is still in the municipal arena; international law is still left to one side.) Unlike the individual, the administration does not have an inherent interest in freedom of action in the municipal arena. It does not have an interest in being unconstrained by law, in the way that the individual does. Quite the contrary: it is important that the government should in all things act in accordance with law. In doing so it upholds the ideal that, when it comes to governance, this is a nation of laws, not men. So the presumption for the government goes in a direction exactly opposite to the presumption for the individual. Governmental freedom is not the *raison d'être* of the rule of law. The rule of law does not favor freedom or unregulated discretion for the government. Quite the opposite is true; the government is required to go out of its way to ensure that legality and the rule of law are honored in its administration of society.

For the citizen, absence of regulation represents an opportunity for individual freedom. But absence of regulation represents a very different case for the state. It means that official discretion is left unregulated; it means that power exists without a process to channel and discipline its exercise; it means that officials are in a position to impose penalties or losses upon individuals without clear legal guidelines. Such absence of regulation is not an opportunity for freedom, but is rather a defect, a danger, and a matter of regret for the rule of law. A government committed to legality should feel pressed to remedy this situation by facilitating and taking responsibility for the emergence of new law to fill the gap. This does not correspond to any equivalent obligation placed on an individual citizen faced with the silence of the laws regarding her own conduct. So, although from the citizens' perspective "the more law the better" is definitely not true, something like that *is* true for the government. When it comes to the regulation of government discretion, more law *is* better—or at least that is true from the perspective of the rule of law, even if

it has to be qualified from the perspective of other ideals that apply to the government.<sup>7</sup>

Accordingly, the responsibilities of a lawyer advising the government are different from the responsibilities of a lawyer advising the private citizen or the individual businessman. The lawyer's job in private practice is certainly not to counsel law-breaking, but the lawyer may legitimately look for loopholes or other ways to avoid the impact of regulation and restraint on the freedom of her client. In government service, however, the situation is different. There, the lawyer's job is to hold the government to its responsibility under the rule of law. Government lawyers should not look for the pockets of unregulated discretion or the loopholes often present in regulations. They should not be advising their political bosses that they are entitled to avoid the impact of legal constraint where it is ambiguous or unclear. Nor should government lawyers complain when their expectations of governmental freedom from constraint are frustrated—that is, when legal constraint turns up in an area where they believed that the government had a free hand.<sup>8</sup> Instead, government lawyers should proceed on the basis that the government is to act in accordance with law in *all* of its operations, bearing in mind at all times that this general sense of constraint is applied precisely to foster the sort of environment in which *individuals* can enjoy their liberty. The administration subjects itself to constraint by law so that citizens can enjoy freedom under law. The government's own freedom of action is not a value, or at least not an intrinsic value as it is for individual citizens. This is an important contrast of ethos and attitude.

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7. The rule of law is just one of the normative ideals that apply to government action. Others, such as efficiency or even security, may sometimes pull in a different direction. For some reflection on the limits of the rule of law as a political ideal, see FULLER, *supra* note 1, at 168–77; RAZ, *supra* note 1, at 226–29.

8. Compare, however, the misplaced concern of Justice Scalia, in his dissent in *Rasul v. Bush*, about whether or not the administration's expectations of freedom are entitled to respect:

Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.

542 U.S. 466, 497–98 (2004).

## IV.

Moving now to the international sphere, imagine a lawyer in the State Department, the Defense Department, the White House, or the Justice Department's Office of Legal Counsel advising the administration on its responsibilities under international law. Which model from municipal law is appropriate for analyzing what the rule of law requires of that lawyer in the international domain?

It is tempting to say that the individual model is appropriate. It is true that the lawyer is acting for a government, but in the international realm governments are just like individuals: in Hobbes' language, "commonwealths once instituted take on the personal qualities of men."<sup>9</sup> As individual humans are the subjects of domestic law, nation-states are the individual subjects of international law. And so—the argument goes—the administration and its lawyers would deserve the benefit of the same attitude toward the rule of law in the international realm as individuals and their lawyers have in relation to the law of the land. The administration should respect any law that is clearly applicable—the clear text of any treaty it has entered into, for example—but only to the extent that it is manifestly and unambiguously on point. On this theory, any lack of clarity would be resolved in favor of liberty—in favor, that is, of the freedom of action of the individual sovereign state. The state would be entitled to treat international legal restraints in a rigorously textual spirit; the restraints would have force where they clearly apply, but there would be no requirement to stretch or extend their meaning to constrain governmental freedom of action in areas that are unclear.<sup>10</sup>

Following this approach, a national government would not be required to go out of its way to establish international law. It need not wish for more laws (though it may), nor would it be required to strive to bring what jurists sometimes call "soft law" into clearer focus so that it could play a larger part in

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9. THOMAS HOBBS, ON THE CITIZEN 156 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1647).

10. For an argument that this is the approach of Bush administration lawyers to the Geneva Conventions, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1691–95 (2005).

regulating or constraining sovereign states.<sup>11</sup> In the municipal sphere, the individual citizen is entitled to regard the absence of law or the lack of clarity of law as an opportunity for the exercise of freedom, and so—pursuing this analogy further—an individual government would be entitled to regard the absence, gaps, or ambiguity of international law as an opportunity for the exercise of its sovereign freedom.

This way of looking at international law is a mistake and the analogy on which it is based is misconceived. In fact, the state is quite unlike an individual; certainly it is quite unlike an individual when it comes to the value of its freedom of action. Considered in both its municipal aspect *and* in its international aspect, a state's sovereignty is an artificial construct, not something whose value is to be assumed as a first principle of normative analysis. In its municipal aspect, the state is a particular tissue of legal organization: it is the upshot of organizing certain rules of public life in a particular way.<sup>12</sup> Its sovereignty is something made, not assumed, and it is made for the benefit of those whose interests it protects. In its international aspect, the sovereignty and sovereign freedom of the individual state is equally an artifact of international law. What its sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international order.<sup>13</sup>

This is not to say that the sovereign state is not entitled to respect as the basic unit of international law. But respect comes in many shapes and sizes. The respect that the state is entitled to is already bound up with its status as a law-constituted and law-governed entity. It is not to be regarded in the light of an anarchic individual, dragged kicking and screaming under the umbrella of law for the first time by some sort of international social contract. Immanuel Kant made this point long ago, in a

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11. On the concept of "soft law," see Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

12. For this way of regarding the state, see HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY § 48, at 99–106 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934).

13. See H.L.A. HART, THE CONCEPT OF LAW 223 (2d ed. 1994) ("[I]f in fact we find that there exists among states a given form of international authority, the sovereignty of states is to that extent limited, and it has just that extent which the rules allow. Hence we can only know which states are sovereign, and what the extent of their sovereignty is, when we know what the rules are . . .").

way that was actually intended to blunt the censoriousness of certain enthusiasts for international law:

[T]he obligation which men in a lawless condition have under the natural law, and which requires them to abandon the state of nature, does not quite apply to states under the law of nations, for as states they already have an internal juridical constitution and have thus outgrown compulsion from others to submit to a more extended lawful constitution according to their ideas of right.<sup>14</sup>

If a government has reason to resist the application of international law to itself—international law, as such, or any particular treaty or custom—it does so not as an individual defending her freedom, but as a law-imbued entity that already constrains its conduct with rules of its own. Accordingly, any argument made for resisting the application of international law should be based on legality rather than the repudiation of legality.

For example, one can imagine a state indicating that it prefers to be bound by the human rights constraints contained in its own constitution rather than by those contained in an international instrument (and qualifying its ratification of the latter accordingly); there is nothing incompatible with the rule of law in that.<sup>15</sup> But that is quite different from a state associating its sovereignty with the desire to be free from legal restraint altogether. As Kant noted in his essay on perpetual peace, there is something odd about the state treating its majesty as a sover-

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14. IMMANUEL KANT, *PERPETUAL PEACE* 18 (Lewis White Beck ed. & trans., Bobbs-Merrill Co. 1957) (1795).

15. This might apply, for example, to some of the qualifications on the United States' ratification of the Convention Against Torture:

I. The Senate's advice and consent is subject to the following reservations:

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(2) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th amendments to the Constitution of the United States.

S. EXEC. DOC. NO. 101-30, at 29 (1990). It might even apply to the United States government's refusal to be bound by the International Criminal Court, if such refusal is based on a good faith affirmation that legality is better served by the extensive legal procedures it has for regulating and disciplining the conduct of its own military in theaters outside the United States.

eign republic—something which, to the citizens of that state, is bound up with the very idea of legality and constitutionalism—as a license to demand freedom from international constraint, or as a platform from which it gives only the most grudging bow to the rule of law when it looks outwards rather than inwards.<sup>16</sup> In the international realm, the state remains a creature of law, a tissue of legality that is imbued with the idea of law and governed in the way that states are supposed to be governed, so far as the rule of law is concerned.

This challenges some of the conventional ways of thinking about international law. It is often said that states are the subjects of international law,<sup>17</sup> which seems to imply—by the aforementioned, rejected analogy—that states are just like individuals in the municipal arena. But it must be understood that the state is not *just* a subject of international law; it is additionally both a *source* and an *official* of international law. International law regulates a small community of a few hundred members, compared to the millions that domestic law regulates. And it is horizontal law, rather than vertical law, that depends largely on treaties between states or the emergence of customs among states for the generation of new norms. Therefore, regulating a sovereign state in international law is more like regulating a law-maker in municipal law than like regulating a private individual.<sup>18</sup> It is true that in the municipal arena individuals may also be sources of law—through contract, for example. The difference is that in the municipal arena there are substantial sources of law that are not dependent on individuals in this way, whereas in the international arena the sources of law not dependent on the individual members are few. States may be subjects of international law, but they are also much more like legislators than most legal subjects, and they both have and should embody special duties of respect for legality commensurate with that status.

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16. See KANT, *supra* note 14, at 16.

17. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58 (6th ed. 2003); LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 241 (3d ed. 1993).

18. Cf. Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396, 1410 (1965) (“If states are the ‘subjects’ of international law, they are so, not as private persons are the ‘subjects’ of municipal legal systems, but as government bodies are the ‘subjects’ of constitutional arrangements.”).

States are not just makers of the international order; they are also its officials. International law has few executive resources of its own. It depends on its individual subjects—sovereign nation-states—for the enforcement of its provisions and the integrity of its rule. Governments are the officials or officers of the international legal system.<sup>19</sup> Advising a government in the realm of international law, then, is much more like advising an executive official in the municipal arena than like advising a private individual or business. As stated earlier, advising such a client cannot be based on the model of finding loopholes or trying to minimize the extent to which law constrains a client's freedom of action.

It is worth laboring the point that states are not themselves human individuals. In the last resort, states are not the bearers of ultimate value. They exist for the sake of human individuals. To use Kant's terminology, they are not ends in themselves, but means for the nurture, protection, and freedom of those who *are* ends in themselves.<sup>20</sup> This is acknowledged in the philosophy of municipal law, when it is said that the state exists for the sake of its citizens, not the other way around. The same is true in the international arena, where states are recognized by international law as trustees for the people committed to their care.<sup>21</sup> As trustees, they are supposed to operate lawfully and in a way that is mindful that the peaceful and ordered world that is sought in international law—a world in which violence is restrained or mitigated, a world in which travel, trade, and cooperation are possible—is something sought not for the sake of national sovereigns themselves, but for the sake of the millions of men, women, communities, and businesses who are committed to their care. These millions are the ones who are likely to suffer if the international order is disrupted; they are the ones whose prosperity is secure when the international order is secure. Their well-being, not the well-being of sovereign nation-

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19. This is analogous to a lawyer who works not just as a counselor for his client, but also as an officer of the law, or an officer of the court. See James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 *BUFF. L. REV.* 349 (2000) (providing a useful discussion of this idea); Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 *VAND. L. REV.* 39 (1989).

20. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 36–37 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) (“[T]he human being and in general every rational being *exists* as an end in itself. . .”).

21. See generally BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 201–51 (1999).

states, is the ultimate end of international law.<sup>22</sup> Nowhere is this clearer than in the role of international law in articulating a set of common standards for the protection of human rights.<sup>23</sup> A pedant might see this as a departure from the intergovernmental character of international law. In reality, though, this is the consummation of the concept that the government is a trustee for its people's interests: ultimately, international law is oriented to the well-being of human individuals, rather than the freedom of states.

The analogy that this Article argues against—that states are just like individuals in the municipal arena—is sometimes bolstered by the amount of international law that seems to arise out of treaties, and alternatively, by the idea that treaties are analogous to contracts between businesses or individuals. Again, the claim is that people are bound only and at most by their explicit undertakings; they are not—some people say—bound to extend the spirit of those undertakings into any gray areas where they do not clearly apply. But once again, this analogy must be handled with great care. It makes the most sense in regard to bilateral treaties that regulate particular aspects of trade or border relations, for example. In other areas, however, treaty-making is much more like voluntarily participating in legislation than like striking a commercial bargain. This is certainly true of multilateral treaties. This sort of treaty-making has a jurisgenerative aspect. The responsibility of those who enter into a multilateral human rights convention—the Convention Against Torture, for example—is like that of a legislature that passes a law constraining its own freedom of action,<sup>24</sup> such as when Congress passed the Religious Freedom Restoration Act.<sup>25</sup>

Essentially, the rule of law in the international realm constrains the administration not in the way that domestic law constrains an individual, but in the way that domestic law con-

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22. When it is said in traditional international law doctrine that the individual is only an object of international law and not a subject, one might read "object" in the sense of the goal of international law.

23. See William T. D'Zurilla, *Individual Responsibility for Torture Under International Law*, 56 TUL. L. REV. 186 (1981) (discussing various theories to think about the role of international law in relation to the individual).

24. Cf. Chayes, *supra* note 18, at 1410.

25. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (restricting the government's ability to burden a person's exercise of religion). For an example of this statute's application, see *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 126 S.Ct. 1211 (2006).

strains a lawmaker. Governments are bound in the international arena, as in any arena, to show themselves devoted to the principle of legality in all of their dealings. They are not to think in terms of a sphere of executive discretion where they can act unconstrained and lawlessly.

This understanding affects how lawyers should think of themselves when they advise the government on matters of international law, such as when they work in the Justice Department or the White House. These lawyers should remember that they are acting for and advising an entity that is not just limited by law but governed by law in its very essence—a nation of laws, not men, in *all* its operations. Their advice should be given with the integrity of the international legal order in mind. Legal advice given in this spirit should not be grudging about legality, treating the rule of law in the international arena as an inconvenience or an envelope to be pushed. Legal advice should certainly not be given in a spirit of studied recklessness or deliberately cultivated obtuseness about the nature and extent of the obligations of international law. Instead, legal advice should be given in a spirit that embraces the importance of the international legal order and the obligatory character of its provisions.

## V.

Although this Article may appear abstract and jurisprudential, the issues involved are not abstract. The ethics of lawyering in relation to international law and human rights constraints is a live concern in the United States. Think of the advice that lawyers in the Office of Legal Counsel gave concerning the applicability of Common Article Three of the Geneva Conventions to al Qaeda and Taliban detainees in the war against terrorism.<sup>26</sup> Further, think of the advice lawyers in the same office gave concerning the legality of torture and of cruel, inhuman and degrading treatment in the course of interrogation.<sup>27</sup> Although there is law to govern these matters, lawyers

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26. See Memorandum from John Yoo, Deputy Asst. Att’y Gen. & Robert J. Delabunty [sic], Special Counsel, U.S. Dep’t of Justice, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

27. See Memorandum from Office of the Asst. Att’y Gen. to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C.

in the Office of Legal Counsel and elsewhere advised the Bush administration in a way that treated that law as though it were an inconvenience to be ignored, an order to be muddied, or a framework to be broken. They failed to defend the integrity of these laws as an order in which America can take its rightful place as a nation, among other nations, under law and subject to the principles of legality.

This sort of lawyering entails grave breaches of professional ethics, amounting in some cases to complicity in war crimes.<sup>28</sup> Those who have done this—including some members of the Federalist Society—are going to have to live now with the personal and reputational consequences as well as the damage they have done to the honor and reputation of their country in relation to the rule of law.

Consider an illustration: In December 2005, Robert Keohane, an international affairs theorist at Princeton's Woodrow Wilson School, wrote a letter to the *Financial Times*, protesting something written in an opinion piece concerning Jack Goldsmith, formerly of the Office of Legal Counsel and now a professor at Harvard Law School. The piece that Keohane objected to suggested that Goldsmith might be subject to criminal prosecution for the legal advice he gave the United States government concerning extraordinary renditions.<sup>29</sup> Professor Keohane disagreed. He maintained that Goldsmith acted more honorably and that "when he became assistant attorney-general, [Goldsmith] withdrew one of the Yoo memos well before it became public, and that he resigned as a result of disputes with vice-president Dick Cheney's top legal adviser, David Addington."<sup>30</sup> What is striking about this exchange is not so much the merits of the particular issue concerning the actions of Professor Gold-

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§§ 2340–2340A (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB*, *supra* note 26, at 172.

28. See, e.g., Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 694 (2004) ("It is worth recalling that Ribbentrop was convicted at Nuremberg for having issued memoranda justifying the Nazi preemptive strikes . . .").

29. See Philippe Sands, Comment, *America Cannot Circumvent the Law on Torture*, FIN. TIMES (London), Dec. 9, 2005, at 19 ("Goldsmith . . . perversely advised the administration that the convention [which clearly prohibits 'forcible transfers'] allowed transfers out of Iraq 'for a brief period but not indefinite period, to facilitate interrogation.' That is wrong.").

30. Robert O. Keohane, Letter to the Editor, *Wrong Target Chosen over Torture Memos*, FIN. TIMES (London), Dec. 14, 2005, at 14 (Asia Edition), available at <http://www.ft.com/cms/s/f696e76e-6c47-11da-bb53-0000779e2340.html>.

smith.<sup>31</sup> Rather, it is striking that it was necessary to undertake and debate these differences between senior law professors formerly in the public service concerning possible liability for war crimes prosecutions in connection with their lawyering. How did this happen? How did our profession end up in a situation in which bright lawyers and law professors are described by their peers as war criminals, complicit in war crimes, or in conspiracy to violate the laws of armed conflict, and where their colleagues must rebut these characterizations? How did it happen that we had to begin drawing distinctions of this kind among our friends? The answer has to do with attitude, environment, and culture; it has to do with the attitudes we cultivate and reinforce among ourselves, the culture in which we immerse ourselves, and the way we insulate ourselves from the wider world in which our actions and attitudes might be challenged.

This has implications for law students who may take up these sorts of legal positions in the future. Budding lawyers ought to reflect upon their relation to the rule of law—this ancient ideal that is the focus of the profession’s allegiance, the key to its honor, and the foundation of the dignity of the work that lawyers do. Young lawyers ought to think very carefully about the attitudes that they cultivate among themselves—in the Federalist Society and elsewhere—so far as law, the rule of law, and the international order are concerned. An organization of like-minded people can be a wonderful thing, but it can also sometimes blind its members to their broader responsibilities and, by a process similar to groupthink, can lead them to treat with contempt or derision practices, virtues, institutions, and constraints that are in fact—when seen from a wider perspective—of deep and inestimable value. In this vein, a passage written by C.S. Lewis seems worthy of reflection:

[M]any of us have had the experience of living in some local pocket of human society—some particular school, college, regiment or profession where the tone was bad. And inside that pocket certain actions were regarded as merely normal (“Everyone does it”) and certain others as impracticably virtuous and Quixotic. But when we emerged from that bad society we made the horrible discovery that in the outer world

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31. On the merits, I am happy to accept the accuracy of Keohane’s account.

our “normal” was the kind of thing that no decent person ever dreamed of doing, and our “Quixotic” was taken for granted as the minimum standard of decency.<sup>32</sup>

It is a chilling thought. And it seems particularly applicable to settings where people move in a closed world, intoxicated by power and reinforcing one another in their contempt for what many regard as the simplistic standards and ideals of international legality. Even in that situation, everyone has some scruples; but in a closed culture, people work hard to suppress the scruples, to coax others out of them, to discredit them as best they can. But a reading of C.S. Lewis suggests that when an individual emerges from such a milieu, she may well find that “[w]hat had seemed . . . morbid and fantastic [Kantian] scruples . . . [while] in the ‘pocket’ [of the Federalist Society] now turned out to be the only moments of sanity [she] there enjoyed.”<sup>33</sup>

Think about that. For many lawyers in the administration, it might have seemed that international law was something to be derided. So long as they remained in that environment, they could afford to laugh at the residue of their own legalistic scruples about torture, rendition, indefinite detention, and the violation of the Geneva Conventions as unwelcome leftovers of their liberal legal education. But when they came out into the world, they could see the country’s reputation reeling from the damage done. They could hear their friends and family saying: “What could you have been *thinking*, to have been a party to all this?” This Article does not attempt to answer any of the hard legal questions that have to be faced in relation to the war on terror and other issues. Yet, it is important to recognize that any lawyer may end up regretting what she says or writes on these matters if she loses her bearings on the issue of the rule of law.

Whether this particular analysis is right or wrong, the rule of law is an important scruple to hang onto, a key not only to moral health but also professional honor. Lawyers’ self-esteem may initially be bound up with the skills and clever opinions that they pledge to their unscrupulous bosses, like the Robert Duvall character in the movie, *The Godfather*. But the legal profession’s honor is bound up with something beyond that. It is

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32. C.S. LEWIS, *THE PROBLEM OF PAIN* 56 (HarperCollins 1996) (1940).

33. *Id.*

bound up with the ethos of the rule of law. The intimate connection between the rule of law and good lawyering in government service applies equally in the international realm as it does in constitutional law, administrative law, or anywhere else.