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# What's Wrong with Being Creative and Aggressive?

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# CORNELL LAW FORUM

SPRING 2006

What's Wrong with Being  
Creative and Aggressive?

Habeas Corpus and Enemy Combatants

The Court's Purpose: Secular or Anti-strife?

Summer Law Institute in  
Suzhou, China



Cornell University  
Law School

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# What's Wrong with Being Creative and Aggressive?



## W. Bradley Wendel

When I tell people that I am a law professor specializing in legal ethics, they usually have one of two reactions: “Legal ethics—that’s an oxymoron!” or “I bet you always have a lot to do.” The second reaction is the more interesting of the two, because it rightly implies that legal ethics is a fascinating field, in part because lawyers are always thinking of new ways to get into trouble. The academic discipline of legal ethics got a substantial boost from the Watergate scandal, which led to the ABA’s mandate that all law students take a course in “the history, goals, structure, duties, values, and responsibilities of the legal profession and its members . . .”<sup>1</sup> In academic terms, however, Watergate was fairly straightforward—the participants engaged in outright criminal wrongdoing. In the words of former White House counsel John Dean, “I knew the things I was doing were wrong, and one learns the difference between right and wrong before one enters law school.”<sup>2</sup> In other words, the lawyers caught up in the Watergate scandal were simply crooks. And if the norms we call legal ethics were simply aimed at restraining crooks, the subject would not have much intellectual vitality independent of the subjects of criminal and regulatory law. In fact, many run-of-the-mill lawyer disciplinary cases involve simple wrongdoing, such as stealing from client funds, which does not present conceptually interesting issues.

Contemporary high-profile legal ethics scandals, by contrast, are made considerably more complicated by the attempt by lawyers, at least on a superficial level, to comply with the law. Think of any embarrassment to the legal profession from the 1980s or 90s—the savings-and-loan crisis, the proliferation of abusive tax shelters, or the financial accounting debacle at Enron—and in each case highly sophis-

**Legal ethics is a fascinating field, in part because lawyers are always thinking of new ways to get into trouble.**

ticated lawyers attempted to excuse their conduct by claiming to have complied with the law in the pursuit of their clients’ goals. After an executive in the finance department of Enron warned presciently that the company might “implode in a wave of accounting scandals,” the company hired one of its regular outside law firms to investigate the allegations. The firm reported back that lawyers and accountants had been “creative and aggressive” in seeking favorable accounting treatment for various transactions, but that they had done nothing legally wrong.<sup>3</sup> Similarly, when the media first reported that U.S. government lawyers had prepared memos advising the military and CIA on how to avoid criminal liability for engaging in the cruel and inhumane treatment of detainees,<sup>4</sup>

two law professors from the University of Chicago dismissed the criticism of their authors as the failure to appreciate that the government lawyers were simply giving legal advice. The memos were “standard fare, routine lawyerly stuff,” they argued.<sup>5</sup>

The Enron collapse and the torture-memo controversy present one of the central challenges for legal ethics—differentiating the act of aiding and abetting wrongdoing from transactional counseling and planning that avoids legal liability in a legitimate way. In the parlance of tax lawyers, the issue is how to locate the line between *avoiding* legal penalties (acceptable) and *evading* the law (unacceptable). Lawyers sometimes forget that it is not a sufficient defense to legal liability for a lawyer to point out that he or she was acting in a professional capacity, doing the sorts of things that lawyers do. It is well established that a lawyer may be civilly or criminally liable for conduct that is in many respects indistinguishable from typical “lawyer work,” such as preparing opinion letters to be used in closing financial transactions.<sup>6</sup> As a matter of generally applicable criminal, tort, and regulatory law, if the lawyer knows facts from which a reasonable person would conclude that the client’s proposed course of action is criminal or fraudulent, the lawyer may have a duty to avoid assisting that conduct. In addition, lawyers are separately prohibited by state disciplinary rules from counseling or assisting a client’s unlawful conduct.<sup>7</sup>

At this point some lawyers might object that it begs the question to analyze the lawyer’s liability in terms of whether the client’s proposed course of action is criminal or fraudulent. The law may be sufficiently manipulable that a clever lawyer will be able in almost all cases to make a straight-faced argument that the client’s conduct was lawful. Or, the law may simply be understood in terms of what the client can get away with. This perspective is known in legal theory as the “Holmesian bad man” stance, after Oliver Wendell Holmes’ definition of the law as a prediction about how legal officials might decide particular cases, illustrated through the metaphor of a “bad man” who is interested only in avoiding legal penalties that might attach to his

conduct.<sup>8</sup> The trouble with the Holmesian bad man stance is that it drains all normativity from the law. The fact that something is a legal norm is not itself a

## **Lawyers are prohibited by state disciplinary rules from counseling or assisting a client’s unlawful conduct.**

reason to act; it is merely a datum that a lawyer will take into account in predicting whether an official will sanction her client’s conduct. Perhaps some system of social control could work in this way, but it would not be recognizably a system of *law*.

A statement about what the law requires is inherently a statement about a standard of behavior that others in a social group believe to be obligatory. This means that a lawyer engaged in the process of interpreting and applying the law must take into account the expectations of other lawyers and judges who are concerned with the meaning of the relevant legal norms. The expectations of these other participants are very likely not structured only around the variety of superficially plausible readings of the text of a statute or regulation that could be concocted by a clever lawyer. Rather, the community of interpreters also relies on considerations such as the overall sense of purpose or function that a given regime of rules possesses. If this all sounds obscure, it may be useful to consider the process of interpreting legal norms in the context of specific cases.<sup>9</sup>

## **Structured Finance Transactions at Enron**

The transactions designed by Enron employees, along with outside accountants and lawyers, were mind-bogglingly complicated in their details, but fairly simple in theory. The idea was to move debt off the balance sheet of Enron and onto the books of an unrelated entity in order to prop up Enron’s credit rating and enable it to continue borrowing at low interest rates. There are a variety of legitimate ways to accomplish

this goal, but as Enron's financial condition deteriorated, it needed to continue hiding debt. It therefore put pressure on its lawyers and accountants to figure out novel ways to structure off-balance-sheet financing transactions, even if they seemed to be pushing the boundaries of acceptability. Like any other reasonably complex regime of legal norms, the rules governing the accounting treatment of corporate transactions have an underlying sense and rationale, but the spirit or purpose of the rules is expressed by detailed textual provisions that are subject to manipulation. Eventually, the pressure by upper management to bend the rules to accommodate preferred transactions led to the kind of abuse that is colorfully illustrated by a former Enron employee:

Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to your accountants, "This is a duck! Don't you agree that it's a duck?" And the accountants say, "Yes, according to the rules, this is a duck." Everybody knows that it's a dog, not a duck, but that doesn't matter, because you've met the rules for calling it a duck.<sup>10</sup>

The point of this illustration is that eventually, as a purported interpretation of law becomes too detached from the underlying rationality of the rules, it becomes, clearly, flimflam, and can be recognized as such by any competent observer. Everyone knows a dog is still a dog, even with the pasted-on beak. Similarly, a bogus off-balance-sheet financing transaction can be characterized as abusive, despite superficial compliance with the financial accounting rules. A legitimate transaction of this nature involves a genuine transfer of ownership of an asset from the originating company

(Enron) to a special-purpose entity. For there to be a "true sale" of an asset, the originating company may not retain any of the economic benefits of ownership of the asset, and a creditor of the special-purpose entity

## **Lawyers have an obligation to treat the law with respect, and not merely as an inconvenient obstacle to be planned around in furtherance of their clients' ends.**

may not have any recourse against the originating company in the event of bankruptcy of the special-purpose entity.<sup>11</sup> Although it is possible to create elaborate transactions that simulate the transfer of ownership, a competent lawyer or judge can evaluate the transaction to determine whether ownership of the asset was actually transferred. In many of the Enron transactions, there were side-agreements or quirky options provisions that had the effect of permitting Enron to retain control over the asset. Moreover, the whole point of structured finance transactions using special-purpose entities is to reduce transaction costs by removing banks and other intermediaries from the financing process. The numbing complexity of the Enron transactions—which were, naturally, costly for lawyers and accountants to create—suggests strongly that the off-balance-sheet deals were not reducing the costs of obtaining financing, which would have been a legitimate use of structured finance, but were being used for some improper purpose.

None of these reasons is sufficient in itself as a basis for concluding that the Enron special-purpose entity transactions were a sham. But the reasoning *process* is important here, because it shows that the conclusion that some purported duck is really just a dog with a pasted-on beak is not merely a gut reaction. Distinguishing dogs from ducks is not just a matter of saying, as Justice Stewart famously remarked about pornography, "I know it when I see it." Instead, it is the conclusion of an argument made on the basis of the structure and purpose of the legal and accounting

rules in question—that is, a process of interpretation that is sensitive to the substance of rules and not only the words of a statute or regulation. Thus, we can conclude that the lawyers working on the special-purpose entity transactions for Enron failed to comply with the actual law, even while they pretended to comply with the apparent law. Note, too, that the argument here does not make reference to some amorphous standard like the public interest.

Lawyers serve clients, not the public directly, although in an important sense they respond to the needs of the public indirectly by serving as custodians of the law. As caretakers, lawyers have an obligation to treat the law with respect, and not merely as an inconvenient obstacle to be planned around in furtherance of their clients' ends. In the litigation context, a lawyer may be justified in taking a relatively more aggressive stance toward the law, for example, by making a non-frivolous argument that the client's conduct was not unlawful. Transactional practice is not adversarial litigation, however, and lawyers should not assume that the obligation of "zealous advocacy within the bounds of the law" permits them to base legal conclusions they set out in opinion letters on positions they would be permitted to take in litigation. Thus, while a certain amount of creative and aggressive advocacy may be permissible in litigation, the Enron lawyers erred by assuming that pushing the edge of the envelope, so to speak, was acceptable in seeking to obtain favorable accounting treatment for their client's structured-finance transactions.

### Legal Restrictions on Torture

The invasion of Afghanistan in the wake of the September 11th attacks resulted in the capture of numerous detainees with possible al-Qaeda affiliation, who might have possessed information on the structure of the organization, personnel, or even future terrorist attacks. The Bush administration was therefore faced with an urgent question regarding the limits it should impose on interrogation techniques. Officials in the Department of Defense and advisers to the president naturally turned to lawyers to interpret and apply the domestic and international legal norms



governing the treatment of prisoners. The resulting memos, prepared by the Justice Department's Office of Legal Counsel, were leaked to the press and quickly dubbed the "torture memos." The memos consider a wide range of legal issues, from whether the Geneva Convention protections afforded to prisoners of war extend to suspected Taliban or al-Qaeda detainees, to whether the President's power as Commander in Chief could be limited by an act of Congress criminalizing mistreatment of prisoners. One of the most notorious memos concluded that certain methods of interrogation might be cruel, inhuman, or degrading, yet fall outside the definition of prohibited acts of torture. Moreover, even if an act were deemed torture, the memo concluded that it might be justified by self-defense or necessity.

Where the government lawyers' arguments took a wrong turn was in adopting an artificially narrow perspective on the legal issues, focused only on particular legal texts divorced from their historical and policy contexts. Administration officials referred repeatedly to the novel nature of the conflict with al-Qaeda, implying that the law ought to be interpreted less rigorously. This argument is blocked, however, by specific provisions in the international law against torture. The United Nations 1984 Convention Against Torture contains a non-derogation provision, which bluntly states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>12</sup> The non-derogation language was included specifically to

*An employee carries a box from the offices of Enron in downtown Houston as the company teetered on the edge of bankruptcy in 2001. Enron's bankruptcy remains the corporate world's largest, with costs estimated at \$780 million.*

prevent states from attempting to define a category of crimes so dangerous to society that law enforcement officials should be permitted extraordinary latitude.<sup>13</sup> The enactment history of the 1984 Convention shows that an argument from the unprecedented nature of the conflict with al-Qaeda is simply going to be a nonstarter. States frequently try to justify torture as a reasonable self-defense measure against an extraordinary threat, which is precisely why the non-derogation provision was included in the Convention.

Not only did the government lawyers exclude moral, policy, and historical considerations from their analysis, but they ignored other clearly relevant legal texts, as well as traditional techniques for interpreting texts. Consider, for example, the memorandum which concluded that an act constitutes torture under a federal statute only if it causes severe physical or mental pain or suffering, with “severe” defined in terms of other federal statutes defining a medical emergency for the purpose of establishing a right to health benefits.<sup>14</sup> It is, to put it mildly, peculiar to make an argument drawing an analogy between “severe pain” for the purposes of a statute prohibiting torture and another statute defining a medical emergency as involving a “serious dysfunction of any bodily organ or part.” The health benefits statute notes, almost in passing, that in an emergency the patient will exhibit symptoms including severe pain. This is not a definition of severe pain in terms of organ dysfunction. It is a definition of *emergency* in terms of organ dysfunction with possible accompanying severe pain. Surely they are better analogies for the criminal prohibition on torture than the statute authorizing health benefits for patients experiencing a medical emergency.

This style of argument strongly suggests that the lawyers had a motive other than providing their client with an impartial and objective analysis of the law. There is nothing wrong with advising a client to take a novel or creative position under existing law, in the hope that a legal official might treat the client’s position favorably. If transactional lawyers were permit-

## The critique is that the lawyers failed to live up to their obligation to respect the law.

ted to give only the most conservative legal advice, a significant avenue for legal change would be closed off. If a lawyer’s advice is creative and the client’s position is unlikely to prevail, however, the lawyer has an obligation to explain this clearly to the client, so that the client can decide whether to incur the risk of an unfavorable ruling.<sup>15</sup> One of the striking things about the whole set of Justice Department memos is that they do not acknowledge how far out of the mainstream their position is with respect to executive power, the application of international legal norms, the construction of federal statutes, and other legal issues they address. Two of the defenders of the government lawyers argue, in effect, that the position taken in the memos, particularly with respect to executive power, is so cutting-edge that it has wrongly been thought crazy rather than innovative.<sup>16</sup> The trouble



*In a photograph from February, a U.S. Army doctor holds an external feeding tube that is being used to feed five detainees that have been on a hunger strike for over sixty days. U.S. Army Brigadier General Jay W. Hood, Commander Joint Task Force Guantanamo, said that the United States could not stand by and let people commit “suicide” while in their care. Detainees are being fed through their noses via a polyurethane feeding tube.*

with this defense is that nowhere in the memos do the authors flag the argument as a challenge to received wisdom. Instead, it is presented without qualification, almost blandly, as a factual report on what the law is, not what it might be if the innovative arguments of the authors were accepted.

## Conclusion

In both the Enron and torture cases, the Holmesian bad man interpretive stance caused lawyers to give deficient legal advice. The ethical critique of the lawyers' actions is not that structured-finance transactions are bad (they're probably useful, on balance) or that torture is evil (it is, but government officials still need advice on what sorts of interrogation techniques short of torture are permissible). Instead, the critique is that the lawyers failed to live up to their obligation to respect the law. There are situations in which lawyers are permitted, even required, to make creative and aggressive arguments. Outside the context of adversarial litigation, or transactions in which the lawyer's novel interpretation of the law is clearly disclosed to other parties and to regulators, lawyers share some of the responsibility ordinarily assigned to courts: that is, to ensure that the law is interpreted and applied sensibly, with due regard to its underlying purpose and rationality. The lawyers in these cases were not crooks, in the sense of openly disregarding the law. The wrongdoing in the Enron and torture memos cases was much more subtle, involving superficial compliance with the law, but a fundamental disregard for the law as a legitimate source of constraint on the actions of clients. Teachers of legal ethics must therefore address the problem of excessive creativity and aggressiveness by lawyers who claim to be guided by the law, or we can expect more professional failures such as these.

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1. American Bar Association Standards for the Approval of Law Schools, Standard 302(a)(5).

2. Quoted in Thomas Lickona, "What Does Moral Psychology Have to Say to the Teacher of Ethics?," in *Ethics Teaching in Higher Education* 103, 129 (Daniel Callahan and Sissela Bok, eds., 1980).

3. See Loren Fox, *Enron: The Rise and Fall* 259 (2003).

4. The memos are reprinted in *The Torture Papers: The Road to Abu Ghraib* (Karen J. Greenberg and Joshua L. Dratel, eds., 2005).

5. Eric Posner and Adrian Vermeule, "A 'Torture' Memo and Its Tortuous Critics," *Wall Street Journal* (July 6, 2004), at A22.

6. See, e.g., *Klein v. Boyd*, Fed. Sec. L. Rep. ¶ 90,136 (3d Cir. 1998); *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978); *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964).

7. Model Rules of Professional Conduct, Rule 1.2(d) (2002).

8. See Oliver Wendell Holmes, Jr., "The Path of the Law," 10 *Harvard Law Review* 457, 459-62 (1897).

9. The arguments here summarize the more detailed discussion in two recently published articles: "Legal Ethics and the Separation of Law and Morals," 91 *Cornell Law Review* 67 (2005); "Professionalism as Interpretation," 99 *Northwestern University Law Review* 1169 (2005).

10. Quoted in Bethany McLean and Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* 142-43 (2003).

11. See generally Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liability—A Replacement of FASB Statement No. 125, Statement of Financial Accounting Standards No. 140 (Financial Accounting Standards Bd. 2000).

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984), art. 2(2). In ratifying the treaty, the United States stated reservations to the definition of torture (evidently to exempt capital punishment from the reach of the Convention) but it did not state any reservations to the non-derogation provision in Article 2(2).

13. See Edward Peters, *Torture* 6 (2d ed., 1996).

14. See Memorandum from Jay S. Bybee to Alberto Gonzales (Aug. 1, 2002) (citing health benefits statute), reprinted in *The Torture Papers*, *supra*.

15. The state bar disciplinary rules in effect in most jurisdictions require a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rules, *supra*, Rule 1.4(b).

16. See Posner & Vermeule, *supra*.



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