Post-9/11 Lawyers

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Post-9/11 Lawyers

TREVOR C.W. FARROW

Autumn in New York (September 2009)

Below: a breathtaking scope of destruction and tragedy.
Above: an unexpected expanse of wide open—free—blue sky.
All around: palpable emotions emanating from the diverse faces of fellow onlookers.
What are we to make of all this?

INTRODUCTION

THIS EXCERPT IS FROM notes I made to myself during a visit to the World Trade Center site in lower Manhattan. It was late on a clear September Friday afternoon: almost eight years to the day after the terrorist attacks. The city was busy as usual. The visitor centre was closed. Local pedestrian walkways were not. An unofficial observation point was located nearby in an adjacent building. While many people walked by without moment, numerous others—me included—stood in silent amazement as we looked out over the vast expanse of Ground Zero. Many different faces,

* I am grateful to Adam Dodek, Allan Hutchinson, Stephen Pitel, and Alice Woolley for providing me with very helpful comments on an early draft of this chapter. I am also grateful to Elena Losef for excellent research assistance.

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presumably with many different backgrounds, stories, families, and cultures of origin, and with many different emotional responses, all looked on with a similar palpable intensity.

Whether others there that day shared any of my thoughts, noted above, I do not know. I assume they must have shared some; it would be virtually impossible not to. Did they ask or answer my silent question in the same way? Again, I do not know. For me, however, these were the observations and the question that I could not avoid either that day or for the rest of my visit. They are also the observations and the question, to me, that ultimately animate the topic of this chapter. What I was thinking about that day amounts to the challenge that the recent history of that place has brought into sharp relief. It is a challenge created for many stakeholders: families, friends, politicians, policy makers, security personnel, urban planners and dwellers, religious leaders and communities, and many others. And it is a challenge created for lawyers: “What are we to make of all this?” What are lawyers—post-9/11 lawyers—to make of the destruction and tragedy, the unexpected feelings of (or desires for) freedom, and the plurality of people directly or indirectly affected by that place? Framed through the lens of the theme of this book—being a lawyer—“What are we to make of all this?” is the question that I take up in this chapter.

While there are many ways to approach this question, I am going to look at two. My first attempt at this question, largely from a descriptive perspective, looks at how lawyers have engaged in the discussion of how to properly balance individual and collective security issues with often competing issues of civil rights and freedoms in light of the massive destruction caused by, and anger and fear resulting from, the events of 9/11. Balancing security and freedom is not a new exercise. The events of 9/11, however, have significantly heightened the tensions that can exist between those two important values. As I stood at Ground Zero that day, the juxtaposition of destruction and space, of rubble below and clear blue sky above, so clearly represented to me the juxtaposition of these often competing values. Because of 9/11, that juxtaposition and balance have been the focus of much thought and discussion in recent years. And there is good reason to continue to work on and refine our thinking on this question, on which I comment in the first part of this chapter.

But in order to do so, we ultimately need to get at a more fundamental question for lawyers, which existed pre- and now post-9/11. That is: how are we to conceive of the role of the lawyer, in a rights-seeking, diverse society in which we are fundamentally guided by robust notions of the public interest, justice, substantive equality, and the rule of law? To me, that is
the foundational question (which was not changed by 9/11) to which we now need to recommit. What has been the challenge of the tragedy of 9/11 now becomes the opportunity of 9/11 as a reflective moment for lawyers to think again about what impact our core democratic values have on the lawyering project. Specifically, do traditional notions of the lawyering role still make sense, do current alternative visions provide credible options, or are we now at a stage to recognize that a new vision must be found? What 9/11 has done is brought some of the problems with, and tensions between, the various lawyering models into sharp relief, and in so doing, has provided an opportunity to reflect on options for a new vision of lawyering. These are the issues that I take up primarily in the second part of this chapter.

BALANCING SECURITY AND FREEDOM

THE DESTRUCTION AND tragedy that occurred at Ground Zero was captured by President George W. Bush in his September 2001 address to the nation:

Good evening. Today our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. The victims were in airplanes, or in their offices; secretaries, business men and women, military and Federal workers; moms and dads, friends and neighbors. Thousands of lives were suddenly ended by evil, despicable acts of terror . . . . The search is underway for those who are behind these evil acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them . . . America and our friends and allies . . . stand together to win the war against terrorism.¹

Eight years later, the massive scope and impact of what happened in New York can still be seen and felt. And while fear of terrorism is not new, there is no doubt that the events of 9/11, which also included attacks on the Pentagon and in Pennsylvania, created a new sense of fear for many

people in many parts of the world. As Chief Justice Beverley McLachlin commented, the "events of 9/11 have come to represent a pivotal moment in history. They mark the time when many people first became conscious—fully conscious—of the phenomenon of terrorism." And now, according to a New York Times article entitled "Rethinking What to Fear," almost a decade after 9/11, the "spectre of terrorism still haunts the United States." Here in Canada, similar statements continue to be made. For example, Richard B. Fadden, director of the Canadian Security Intelligence Service, commented that "terrorism is still the most important threat we face." There is no doubt—on whatever calculus—that fear of terrorism and lack of security continue to resonate through much of our individual and collective sensibilities and thinking.

In addition to a pervasive sense of fear, another feeling shared immediately after 9/11—which I think, at least in part, fuelled the collective sense of fear—was that, because of the terrorist attacks, "everything had changed." There were a number of statements from high-level political leaders to that effect. For example, according to former UK Prime Minister Margaret Thatcher, following the "horror" of the 9/11 terrorist attacks, the US "will never be the same." One further comment along those lines, that strikes me now as being quite significant for purposes of this chapter, was a comment reportedly made by John Manley, Canada's then minister of foreign affairs and chair of the ad hoc cabinet committee on public security and anti-terrorism, that "[e]ither nothing changed on September 11 or everything changed." As I will argue in this chapter, both sides of that statement have something to add to this discussion.

3. Scott Shane, "Rethinking What to Fear" New York Times (27 September 2009) wk-1. The article argues that, according to "students of terrorism," there may be a potential decline in support for "Al Qaeda and its ideology."
Because I have commented relatively extensively elsewhere on the issues of terrorism, fear, and the balance of security and freedom, I will not speak at length on those issues here. One issue I do want to take up in the first part of this chapter, however, is the issue of balancing security and freedom, and in particular, the role that lawyers have played and are playing in that balancing act. Because, again, while 9/11 did not create the tension between security and freedom, it certainly brought that tension into sharp relief.

Here in Canada, shortly after the 9/11 attacks, Anne McLellan, Canada’s minister of justice at the time, argued that the concept of “reasonable limits” in section 1 of Canada’s Charter had shifted after 9/11. In a similar vein, Justice Constance Hunt of the Alberta Court of Appeal, who described the period after 9/11 as a “changed landscape” with “sweeping effects . . . on all sectors of Canadian society,” argued that, as a result of those effects, “many elements of the justice system had been, and would continue to be, profoundly altered.” It was those kinds of sentiments, backed up by the numerous post-9/11 anti-terror legislative and administrative initiatives, which encouraged commentators and academics like John Edwards to state that: “[I]t is security, not rights, that now trump[s].”

9 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 1, which provides that: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in this subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
All of those comments appeared to be correct, particularly in the months and years after 9/11. And it is in this “changed” context that the justice system became immediately involved in the post-9/11 response. Not surprisingly, lawyers were at the centre of that involvement. One of the first and foremost elements of that response was the enactment, by many states, of new or renewed anti-terror statutes.\(^1\) It was felt at the time, regardless of the strengths or capacities of various states’ criminal codes, that new legislation was required to deal with this new threat. As soon as statutes were drafted, vigorous debates about their reach and constitutional propriety (in light of free speech and other potential limits) occurred. Lawyers—from governments, private practice, civil liberties associations, immigration and refugee organizations, bar associations, and so forth—participated on all sides of that legislative drafting, redrafting, critiquing, and enacting. As such, it was in the context of the immediate legislative response with which lawyers first engaged with this post-9/11 world. At the same time, immigration, refugee, and other security-related statutes, as well as policies relating to border and police security, were examined to determine their adequacy. Again, lawyers were centrally involved on all sides of those initiatives and subsequent debates. At that point, it did look like everything was changing.

Very quickly, the result of all of those initiatives was, in essence, a polarized debate about too much security versus too much freedom. Or put differently, one side of the many debates typically argued that the various state responses to the terrorist attacks and the following international environment of fear went too far and as a result overly curtailed other constitutionally-protected rights including, for example, rights of security of the person, freedom of speech, and freedom of religion. On the other side were the voices who argued that the responses were at least warranted, if not too soft.

What then quickly emerged was a developing jurisprudence, which took up this debate, and which began to test and evaluate the various state responses to terror and threats from immigration. One of the earliest (and yet clearest) statements of that emerging jurisprudence—which has since further developed—came from the Supreme Court of Canada in a case that looked at the constitutionality of certain provisions of Canada’s immigration legislation. The case was Suresh v. Canada (Minister of Citizenship and Immigration). For purposes of this chapter, what is useful about that case is the Court’s statement about the balance that was at issue in

\(^{13}\) See, for example, Canada’s Anti-terrorism Act, S.C. 2001, c. 41.
that case and what was required—at the time as well as now—of a state when responding to threats of terrorism:

The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society—liberty, the rule of law, and the principles of fundamental justice—values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.14

Shortly after the Suresh case, the Supreme Court of Canada confirmed the challenge created for states by the need to balance security and freedom: "The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so."15 How this balance would play out in the courts would unfold over the next number of years. However, the complicated flavour of how it would do so (as it continues to do) came early on in a very interesting pair of US Federal Court of Appeals judgments in the area of post-9/11 immigration law. The first case, Detroit Free Press v. Ashcroft,16 involved an appeal from a decision of the United States District Court for the Eastern District of Michigan at Detroit to the United States Court of Appeals for the Sixth Circuit. At issue was the closure to the public of "special interest" immigration cases: essentially including cases allegedly involving issues of national security, terrorism, and individuals potentially linked to the events of 9/11. The executive branch, through the office of the chief immigration judge, under the authorization of the Attorney General's office, had designated these "special interest" cases to be held in secret, closed to public view. The district court rejected the government's blanket closure approach to such hearings. The

15 Application under s. 82, 28 of the Criminal Code (Re), [2004] 2 S.C.R. 248 at para. 5, Iacobucci and Arbour].
16 303 F. 3d 681, 2002 U.S. App. LEXIS 17646 (6th Cir. Mich. 2002) 1, petition for rehear-
Court of Appeals affirmed, expressly stating, repeating comments from the lower court decision, that:

It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individual rights.  

The court's ruling—allowing closure on a case-by-case, not a blanket basis—was made notwithstanding its finding that the US government certainly had a compelling interest in preventing terrorist attacks. However, as the court concluded, when ultimately rejecting the government's arguments based on the court's application of exacting, "strict" scrutiny to the facts of that case:

Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy. Today, we reflect our commitment to those democratic values by ensuring that our government is held accountable to the people and that First Amendment rights are not impermissibly compromised.

Less than two months after the Court of Appeals for the Sixth Circuit released its ruling in the Detroit Free Press case, however, the Court of Appeals for the Third Circuit released its ruling in North Jersey Media Group, Inc. v. Ashcroft. In virtually identical circumstances, the Third Circuit in North Jersey Media Group came to the opposite result as the Sixth Circuit in Detroit Free Press. The North Jersey Media Group case again involved an action brought by a consortium of media groups seeking access to closed "special interest" deportation hearings. The district court found for the media groups, enjoining the Attorney General from denying the groups access. The Attorney General sought a stay of that decision from the United States Supreme Court, which was granted "pending the final dis-

17 Ibid. at 71–72.
position of the government’s appeal of that injunction.”21 On appeal, the Court of Appeals for the Third Circuit allowed the appeal. Unlike the court in Detroit Free Press, the court in North Jersey Media Group was clearly motivated by a strong sense of deference: “We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise.”22 In finding itself “in disagreement” with the Sixth Circuit in the Detroit Free Press case, the court acknowledged that the “importance of this case has not escaped us.” Further, it also acknowledged that “[w]e are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis.” However, the court went on to find that “[o]n balance . . . we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.” When considering the “eternal struggle between liberty and security,” the court was persuaded that the “primary national policy must be self-preservation” and that, “to the extent open deportation hearings might impair national security,” those hearings should be closed.23

These two cases, in my mind, provide clear, early bookends to the range of debates that started on 11 September 2001 and that continue today: debates about how best to balance security and freedom. The courts in the United States, Canada, and elsewhere have had further opportunities to look at this balance over the past several years.24 While a close reading of those cases is not the subject of this chapter, the ways that lawyers are choosing to engage in this post-9/11 balancing act is. Again, we have many examples. As mentioned earlier, there were legal voices on all sides of the various legislative and administrative initiatives and debates in the immediate aftermath of 9/11. And there were lawyers involved on all sides of the cases that were brought before the courts shortly thereafter, including those mentioned above. However, one legal brief that has garnered significant attention over the past several years is the brief regarding US

22 North Jersey Media Group, above note 19 at 61. The court avoided the application of the exacting “strict” scrutiny standard of review, which was applied in the Detroit Free Press case, by finding no first amendment right to attend deportation hearings. See ibid. at 61–62, n.14. See also ibid. at 66.
23 See ibid. at 7, 10, and 63–64.
24 In Canada, see, for example, Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350. See further the cases mentioned below at notes 57–58.
government lawyers who were charged with the duty of advising the Bush Administration if, and to what extent, Central Intelligence Agency (CIA) agents could use torture when questioning alleged terrorists. It is also a legal brief that provides a useful example for examining our various understandings of the lawyering role.

In the aftermath of 9/11, the CIA came to understand that important information was known to certain detainees. The CIA was also of the view that, to get at that information, it would need to use some form of torture. Before doing so, counsel to President Bush and acting general counsel to the CIA sought legal advice on the permissible use of torture under those circumstances. Memorandums were prepared by the office of legal counsel of the Department of Justice. Those memos, which have subsequently become known as the “Torture Memos,” essentially opined that methods of interrogation that—on essentially all accounts—would amount to torture, could be used under certain circumstances (such as those that purportedly existed at the time).

Following the issuance of those memos, torture was used.

Support for aggressive interrogation techniques, which likely amounted to torture, has apparently not stopped with the Torture Memos. For example, recently, Jonathan Evans, director general of Britain’s MI5 Security Service, defended Britain’s co-operation with foreign intelligence agencies that are highly suspected of using interrogation techniques that amount to torture. While not supporting various “abuses that have recently come to light” within the post-9/11 US system, he did say: “In my view we would have been derelict in our duty if we had not worked, circumspectly, with overseas liaisons who were in a position to provide intelligence that could safeguard this country from attack.”


27 Jonathan Evans, Director General, MI5 Security Service, “Defending the Realm” (speech at Bristol University, 15 October 2009), online: UK Government www.mi5.gov.uk/output/mi5_defending_the_realm.html.

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Clearly the legal advice given by the Bush Administration lawyers was at the far end of the scale of protecting security rather than rights. The authors would likely (and do) acknowledge that fact.\textsuperscript{28} Others, including me, think that the advice improperly tipped the scale in terms of any sense of professional, balanced views of how domestic and international law understood and prohibited torture. The opinions contained in the memos, put simply, could not be sustained on a fair and balanced reading of the law (I say more about what I think should have happened in the second part of this chapter). As such, according to David Luban, the Torture Memos amounted to an “ethical train wreck.”\textsuperscript{29} And to the extent that UK lawyers have been involved in advising MI5 on the merits of its approaches to intelligence gathering (which no doubt they have been), that advice—given MI5’s public position on the issue—is also very likely at the far end of the scale. There is very good reason to be extremely critical of the legal substance of those memos and that advice, both in terms of their correctness in law in light of US or UK domestic law, as well as their correctness in law in light of US or UK obligations and commitments under international law. However, because the creation, (in)correctness, use, critique, or potential criminality of the Torture Memos (or similar advice) has been the subject of significant popular\textsuperscript{30} and academic\textsuperscript{31} discussion and debate, I will not go further over that specific ground here. What does interest me for the first part of this chapter is the understanding of the role of a lawyer, under traditional notions of ethics and professionalism, that might have resulted in the creation of those memos.


\textsuperscript{31} See, for example, Lavitt, above note 26.
Assuming, for a moment, the *bona fides* of the counsel who created the Torture Memos, it would happen in that circumstance might not be understood as being that different from what happens under the circumstances of many legal retainers. A client retains a lawyer to argue for or provide advice that, although independently given, will hopefully and forcefully justify a certain course of action or result. That is what lawyers have always done, and it is what lawyers continue to do. Lawyers are agents for the rights and interests of themselves, but of their clients. It would be trite to say that clients are not typically agnostic to the outcome of their disputes or the context of their legal needs. And provided that the client is seeking to do is legal (as presumably judged by the lawyer, in good faith, based on a balanced and independent review of relevant and applicable legal materials), then the lawyer’s job is to carry out that work. That is the traditional and still dominant view of lawyering. And it is the view of lawyering, at least according to its authors, which animated the production of the Torture Memos. Again, putting the best possible light on the legal process that resulted in those memos, one would want to assume that the lawyers from the office of legal counsel did believe—based on a review of what they felt were the relevant facts, laws, and treaties—that their advice concerning the appropriate use of extreme interrogation techniques was correct. For example, the 1 August 2002 memo signed by Jay S. Bybee, assistant Attorney General, provides that “[b]ased on the forgoing [analysis], and based on the facts . . . provided, we conclude that the interrogation procedures . . . would not violate Section 2340A of title 18 of the United States Code regarding the “prohibition against torture.” Therefore, at face value, one reading of what occurred was a lawyering process that accorded with a traditional advocacy model.

We have many sources of support for this traditional vision of the lawyer’s role, which amounts, essentially, to a zealous advocacy model. For example, according to the *Rules of Professional Conduct* by the Law Society of Upper Canada (LSUC), in the context of acting as an advocate,

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32 It is important to acknowledge that most commentators do not assume the *bona fides* of the lawyers who prepared the Torture Memos. For example, according to David Luban: “I believe it’s impossible that lawyers of such great talent and intelligence could have written these memos in the good faith belief that they accurately state the law.” Testimony of David Luban, above note 29.

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. When acting as an advocate, a lawyer should refrain from expressing the lawyer’s personal opinions on the merits of a client’s case.

In essence, raising “fearlessly” difficult or “distasteful” arguments in support of extreme interrogation techniques could describe the work of creating the Torture Memos, including the dictate that a lawyer should refrain from opining on the “merits of a client’s case.” The rules of the Law Society of Alberta (LSA), again in the context of acting as an advocate, take this point even further, stating “what the lawyer believes about the merits of the case is essentially irrelevant.”

If the lawyers did in fact engage in a balanced review of the law, and further, if they did not exhibit what appears to have been a strong preference for the underlying conclusion that their memos sought to justify and that drove their findings, then the lawyering exercise that resulted in the production of the Torture Memos could potentially be seen as an exercise of traditional zealous advocacy. And, particularly given the result, there would be reason to criticize that process, as I further discuss in the second part of this chapter. However, that is not what happened. It is clear that their reading of the law was not balanced (or fair), and further, that they did not find their advice “distasteful.” Rather, they appear to have maintained a strong sense of personal and political agreement with the security interests of their instructing officials and the resulting events that were justified by those memos. It appears that the authors of those memos not only reached the edges of the zone of zealous advocacy, they in fact crossed that line into the territory typically occupied not by neutral lawyers but rather by partisan clients and cause advocates. The authors of those memos appear to have engaged in an overly aggressive and purposeful interpretation of existing domestic and international law in the spirit of advancing a preferred course of action for eager instructing officials.

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34 LSUC, Rules of Professional Conduct (adopted by council on 22 June 2000, in effect on 1 November 2000, as amended) r. 4.01 (commentary) [LSUC, Rules of Professional Conduct].
35 LSA, Code of Professional Conduct (2009_Vt) c.10, r. 11 (commentary 11).
36 See LSUC, Rules of Professional Conduct, above note 34 at r. 4.01 (commentary).
37 See, for example, Yoo, “Rewriting,” above note 28.
(with whom they also happened to personally agree). So even on the zealous advocacy model, these authors—in my view—went too far.

Clearly I am not interested in justifying the Torture Memos, or in absolving their authors of any responsibility for how the memos were written or what the memos subsequently purported to justify. I am also, in the end, content to leave the ultimate critique of the specific process to others who have already examined these issues.39 However, what the post-9/11 debates about balancing security and freedom have highlighted for me, in addition to the complexity and challenge of that balance, is the model of lawyering that we currently champion as the traditional, or “dominant,” model of lawyering—the “zealous advocate” model of lawyering—that has allowed the legal profession to engage in those debates on numerous occasions in ways that have, at least to many (including me38), erred too far on the side of infringing on core values of human rights, fundamental freedoms, and the rule of law. Even if we assume, again for the moment, that the personal views of the authors of the Torture Memos were not the ultimate driving force behind their conclusions (which is likely an incorrect assumption, and one that I look at further below in the second part of this chapter38), allowing those lawyers to rely on an aggressive version of the zealous advocacy model, which largely purports to release lawyers from any moral or practical responsibility stemming from the fruits of their labour, essentially encouraged, or at least permitted, the kind of lawyering exercise that occurred. Debates about appropriate balances will continue, including the role of the legal profession in those debates. However, what seems to me to be at the root of these discussions about the role of lawyers in the post-9/11 context goes to the heart of what it means to be a lawyer in the first place. And it is to that more normative discussion that I now turn in the second part of this chapter.

PUBLIC INTEREST, ACCESS TO JUSTICE, AND THE RULE OF LAW IN A DIVERSE SOCIETY

HOW ARE WE to conceive of the role of the lawyer, in a rights-seeking, pluralistic society in which we are fundamentally guided by notions of the public interest, access to justice, and the rule of law? To the extent that

38 See, for example, above notes 30–32 and accompanying text.
39 See my various earlier discussions on these issues cited at above note 8.
40 See below note 53 and accompanying text.
the events of 9/11 have raised the question of the proper balance of security and freedom, or in a specific context, for example, how the Torture Memos could have been created, then 9/11 is a particularly relevant moment for this discussion. Again, my various observations of the physical space at Ground Zero that day permeate this discussion. However, at the same time, the question at issue here clearly transcends the events of that day and that space. Again, as the chief justice of Canada acknowledged, “[T]errorism is an historic, ongoing phenomenon that neither started nor ended with 9/11.” On this reading, drawing on the other part of John Manley’s earlier statement, perhaps “nothing has changed,” at least not in terms of the root issue of which we are ultimately now speaking, which is: what is it to be a lawyer—a “post-9/11 lawyer”?

As introduced in the first part of this chapter, one way to think of the lawyer’s role is as a “zealous advocate.” The typical version of this model sees the moral questions raised by the substance of a given retainer as the concern of the client, not the lawyer. That has been our dominant model of lawyering for centuries. Again, take the Torture Memos as an example: what many commentators think happened in that case was that the administration was looking for a result, and the lawyers that had been hand-picked to do the legal research worked hard to justify that result. Even if the memos concluded with a permissive approach to torture, had they at least included, in good faith, a fair reading of the law and a robust contemplation of the arguments against their conclusions, then they would have likely fallen on the right side of the ethical line of vigorous, zealous advocacy. And while I would still think that scenario fell short of what the lawyering process could have looked like, particularly for government lawyers in that circumstance, I would have at least recognized the exercise as a much more familiar—although still very much wanting—exercise in traditional zealous lawyering. Even that, unfortunately, did not happen.


What appears to have happened instead is that the lawyers twisted the law, essentially beyond reasonable recognition, to justify the interrogation preferences of the administration. Further, they also seem to have been driven by an overriding sympathy for strong presidential wartime powers and prerogatives (again, something that was clearly favoured by the Bush Administration).44 David Luban’s Senate Judiciary Committee testimony clearly articulates the lawyer’s obligation for fair and independent advice, and further, the clear difference between the high ethical standards that such independent advice requires, and the much lower ethical standards that appear to have been achieved in the case of preparing the Torture Memos. According to Luban:

When a lawyer advises a client about what the law requires, there is one basic ethical obligation: to tell it straight, without slanting or skewing. That can be a hard thing to do, if the legal answer isn’t the one the client wants. Very few lawyers ever enjoy saying “no” to a client who was hoping for “yes.” But the profession’s ethical standard is clear: a legal adviser must use independent judgment and give candid, unvarnished advice. In the words of the American Bar Association, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”

Unfortunately, the interrogation memos fall far short of professional standards of candid advice and independent judgment. They involve a selective and in places deeply eccentric reading of the law. The memos cherry-pick sources of law that back their conclusions, and leave out sources of law that do not. They read as if they were reverse engineered to reach a pre-determined outcome: approval of waterboarding and the other CIA techniques.

Over the past number of years, the zealous advocacy model has come under increased scrutiny and is now the subject of significant critique.45 For one thing, the model does not fit nicely with the bargain made by collectives of lawyers, at least in Canadian jurisdictions that retain the notion of self-regulation, that in exchange for regulating their members’ conduct, law societies promise to “maintain and advance the cause of justice and the rule of law; act so as to facilitate access to justice; [and to] protect the


45 See Farrow, “Sustainable Professionalism,” above note 42.
public interest." For another thing, it is often difficult to reconcile the notion of the zealous advocate—who is stereotypically agnostic to the moral implications of her client’s instructions—with various professional code obligations that do make significant room for notions of “honour” and “morality.” For example, the Ontario rules provide that: “[w]hen acting as an advocate, a lawyer shall not . . . knowingly assist or permit the client to do anything that the lawyer considers to be . . . dishonourable.” Similarly, the rules of the American Bar Association (ABA) provide that, when acting in the role of counsellor or advisor, a lawyer “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” The traditional model is also unable, given its goal of moral neutrality toward a client’s instructions, to understand its own normative weaknesses and blind spots in cases in which a lawyer is tending to do a client’s bidding that, on a more reasoned, independent reading, amounts to something that is illegal or at least improper (on broad and shared understandings of those terms). As I have discussed, one reading of the Torture Memos provides a good example of that weakness.

As a result of, and in response to, some of these weaknesses of the dominant model, a competing school of legal professionalism has emerged over the past several decades that views lawyers more as ministers of justice and less as neutral partisan advocates for their clients. Substantive justice and the public interest occupy significant space in this alternative vision of lawyering. There are various labels for lawyers under this school of thought: “officers of justice”, “moral lawyers”, “moral activists”, and so on. There is significant merit in this alternative vision of lawyering. It fits with the idea of doing legal work that furthers shared foundational societal values of promoting justice, the public interest, and the rule of law. It fits with policies articulated, for example, by legislation and ethical codes that require lawyers and law societies to promote, not diminish, those foundational societal principles, as well as the individual lawyer’s understandings of what morality and honour might require in a given

46 Law Society Act, R.S.O. 1990, c. L.8, s. 4.2 (1–3) [Law Society Act].
47 LSUC, Rules of Professional Conduct, above note 34 at r. 4.01 (2)(b).
48 ABA, Model Rules of Professional Conduct (adopted in 1983, as amended) r. 2.1 (see further below note 55 and accompanying text) [ABA Model Rules of Professional Conduct].
50 See Law Society Act, above note 46 at s. 4.2 (1–3).
51 See LSUC, Rules of Professional Conduct, above note 34 at r. 4.01(2)(b).
situation. And it fits with the practice preferences of many lawyers who are making good faith efforts to find and make room for ethical meaning in their daily practice activities.  

What we are left with, however, by these two visions of the lawyer—the traditional (zealous) model and the alternative (moral) model—is a set of competing ideas of professionalism that, on their own, are irreconcilable both as a matter of principle and as a matter of policy. Leaving robust room for a lawyer to act as a strong, largely uninhibited advocate for a client, in line with the zealous advocate model of lawyering, makes meaningful space for individual rights and self-determination in a freedom-seeking, modern, liberal democracy. Put simply, once they are within the bounds of the law, people should be free to maximize their preferences to as great an extent as possible. That is a good thing. Further, if we start giving the majority, or lawyers, authority over what counts and what doesn’t count in terms of appropriate moral or other personal preferences, we will quickly jeopardize the kinds of liberal democratic values that we typically seek to promote. We also, potentially, give lawyers the power to act as legislator, judge, and jury. What counts as moral could become simply what the lawyer thinks is moral. For example, let’s again look at the Torture Memos, but this time on the moral lawyer model, rather than on the zealous advocate model. With this reading, what the lawyers in that case themselves thought of torture and of appropriate presidential powers clearly became the lens through which they researched, understood, applied, and advised on the law. Doing otherwise, for them, did not presumably accord with their own personal understandings of honour, morality, and politics in the context of terrorism and war. In this version of the Torture Memos preparation process, making a lawyer’s own moral compass the ultimate arbiter in the lawyering exercise can be problematic.

On the other hand, without making meaningful space for principled notions of honour and morality, we again come back to the concern that lawyers, who typically maintain a self-regulated monopoly over who gets to be a lawyer and dispense legal services, will simply do the distasteful bidding of unprincipled clients in the spirit of pure, unbridled, zealous advocacy. This concern, again, accords with our earlier version of how the Torture Memos were prepared, this time on the theory of zealous advocacy, in the spirit of a foregone conclusion to justify a predetermined course of action. Neither vision of the lawyer (the zealous advocate nor

52 See Farrow, “Sustainable Professionalism,” above note 42 at 77–78.
53 For a brief introduction to this idea, see above note 40 and accompanying text.
the moral lawyer) is therefore adequate. Neither vision of how the Torture Memos were created—a dispassionate exercise designed to reach the foregone conclusion desired by an all-powerful client, or alternatively, a personal project driven by convictions and biases that, while perhaps patriotic, were divorced from the realities of fiduciary obligations and a fair reading of the law—is adequate or desirable.

So where does that leave us? To me, as I have argued elsewhere, neither the traditional nor the alternative vision of the lawyering role normatively or practically understands what the lawyering role does or should require. What the client wants and what the law says still matter. They have to, for all the reasons articulated above. However, justifying a notion of lawyering that is largely agnostic to the moral and social implications of a client’s legal instructions has become, in my view, unsustainable. And while the events of 9/11 did not directly impact this discussion, the events of the post-9/11 response, including the creation and justification of the Torture Memos, has made clear both how unsustainable the traditional model of lawyering has become and, further, that current alternative models do not fully fill the gap. As mentioned earlier, that to me has been the self-reflective opportunity for lawyers that was created by 9/11 and its aftermath. What we need is a contextual understanding of lawyering that balances client interests, contested understandings of what the law requires, and contested notions of the public interest and the rule of law. Additionally, we also need to take seriously other interests at stake, including lawyers’ own understandings of personal and collective moral needs and preferences, as well as individual and collective understandings of ethical and professional obligations and opportunities. Active, critical, self-reflective deliberation about all interests at stake in a given retainer is a precondition to a robust notion of an ethical lawyer. Neither of the current schools of thought, on their own, adequately provides us with an understanding of lawyering that makes room for all of the competing interests that are (and should be) at stake in sophisticated, modern, interconnected societies. We need to draw on the different strengths of both visions of the lawyer, while actively cautioning against their weaknesses. Doing otherwise is not sustainable on any reasoned understanding of the realities of the lawyering process today. In some cases, what the client wants—no matter how controversial (although legal)—will prevail, provided that a full, objective, good faith review of all competing laws and interests has been conducted. In other cases, what the client may have

54 See Farrow, “Sustainable Professionalism,” above note 42.

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initially thought he or she wanted may change or be rejected, with knowledge, based on a robust deliberation with the client’s lawyer regarding other, more pressing needs, interests, and constraints.

In the case of the Torture Memos, while either of these scenarios could have happened, in the end, neither occurred. So what could the lawyering process have looked like on my view of the world? The minimum that was required was a fair review and understanding of the law (domestic and international) and the facts (what was really happening and going to happen with those detainees). Next—and here is where the responsibility on the lawyers comes into sharper relief—I think the lawyers needed to have a very frank discussion with their instructing officials about the moral, ethical, practical, and political implications of the potential available courses of action (regardless of what the outcome was of their legal deliberations and regardless of the personal preferences or desired results of either the lawyers or their instructing officials). And this conversation needed to be more than window dressing or after-the-fact back-patting. Even if the law allowed for torture (which I think most agree it did not), that should not be the end of the matter. There are other issues that are clearly at stake. And there is no reason to think that lawyers, who wield a significant amount of power and persuasive authority in our increasingly law-heavy societies, should not be involved in advising and deliberating with their clients about this broader range of factors. In fact, such factors are expressly contemplated by codes of ethical conduct. For example, according to the ABA’s Model Rules of Professional Conduct, “[t]he Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules,” and further, “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice” and when doing so “may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

To me, these lawyers not only could have done this (relying on the permissive—“may”—language of those rules), they should have done it. Further, I think there needed to be a clear discussion about the specific context of this case, which involved government lawyers and government actors. While it is not universally agreed that government lawyers have any more of a special position in the lawyering process than any other lawyer (both,

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55 ABA, Model Rules of Professional Conduct, above note 48 at Preamble and Scope (para. 16), and further at r. 2.1 (see also above note 48 and accompanying text).

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on a traditional reading, are officers of the public trust); it is clear that the actions of most government lawyers—and in particular, these government lawyers and officials (remember that context matters)—can and do have a major impact on the lives and affairs of the communities in which they operate and serve. It is not enough to say that zealous advocacy allows for an aggressive reading of this situation. In this context, in my view, there were bigger issues and principles at stake that transcended the potential immediate practical interests of the US administration (even including potential and important security interests). The very foundation of the rule of law was, in essence, in the balance. The lives and interests of people under the direct influence of American forces were at stake. The long-term reputation of the United States as a member of the community of nations that purports to respect basic notions of human rights was at play. These were important background factors that needed to matter in the context of the Torture Memos retainer. Pursuing those various interests, or at least having a robust discussion about and a very good answer to those interests, was clearly required of any kind of adequate notion of the lawyering process in that case. Finally, if the client in that case was adamant that such a deliberative lawyering process was not on offer, then it needed to be open to the lawyers, as a real and credible option, to get off the file. Unfortunately, it appears that none of these circumstances and factors meaningfully existed in the Torture Memos context. Either the client predetermined the result, or the lawyers opined on the law in ways that they personally believed should prevail. A combination of both is what probably occurred, neither of which made space for these special obligations and contextual considerations. And as a result, neither is justifiable or sustainable on any modern notion of what it means to be an independent, professional lawyer.

One further issue, however, that I have yet to directly engage, is the issue of pluralism in our modern communities. And here again I come back to my observations at Ground Zero. The people around me who were looking on that day could not have been from more diverse backgrounds. Clearly the history of that place touches us all. That event was not a “we” versus “they” experience (which the Torture Memos tend to imply), at least not when it comes to thinking about our communities as welcome zones for people from diverse and pluralistic backgrounds. And here too we see the role of the lawyer coming back into focus. This time, again, there are different ways of looking at that role. One, the traditional view, does not

56 See Dodek, “Lawyering,” above note 43; and Hutchinson, “In the Public Interest,” above note 43.

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adequately respect the vast diversity that lives within our communities and diversity of rights and interests that are at stake. Doing a client’s bidding (particularly when the client is a government agency or an entity in a position of significant power, influence, or authority) in ways that do not take seriously, or worse, that actively reject the needs and interests of a diverse society—as required by robust notions of the public interest, access to justice, and the rule of law—requires an approach to lawyering that is not sustainable given today’s social needs, values, and realities.

The debates about balancing security and freedom discussed in the first part of this chapter raise these concerns. Many of the arguments, made by lawyers, in favour of increased legislative or administrative powers in anti-terror legislation or policies, which amount to unsustainable tools of racial and religious profiling, raise these concerns. Many other examples also come to mind. Government lawyers who are actively or passively involved in hiding, or only partially disclosing, relevant evidence required under good faith disclosure obligations in security certificate hearings in the context of immigration and refugee proceedings unfairly tip the balance against the proper protection of basic procedural requirements as well as basic rights of non-Canadians.  

Similarly, lawyering in the context of terrorism and repatriation cases raises similar constitutional and procedural (and political) concerns. Or more generally, acting on a client’s instructions—perhaps as a government lawyer in an immigration law context—in ways that fail to adequately understand the social contexts and realities of all players in the system, does not live up to the promises made to society when taking on self-regulation in the first place. We have seen the problems that arise in those circumstances. Promoting the “cause of justice,” the “rule of law,” “access to justice,” and the “public interest” for members of society must mean doing so in a way that promotes, and that does not limit, the interests of all people in that community.

A fundamental point to emphasize here is that it is not the majority’s interest, but rather the “public” interest, which is at stake in this discussion. That is the interest that self-regulators of the legal profession have

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60 *Law Society Act*, above note 46 at s. 4.2 (1–3).
a duty to protect. There is no doubt that the “public interest” is a tough term to define with precision. However, while I acknowledge that various views may obtain, it seems to me that, for the purpose of this discussion, in fact what we are talking about is not that difficult to understand. What is at stake is something different from either the simple majority view or, on the other end of the spectrum, what one client (or one lawyer) thinks is right. The “public interest” in this case must be grounded in robust notions of not only rule of law values, but also with a contextual understanding of the requirements of substantive justice and equality. On this view, reasonable limits on rights cannot be justified by just any grounds, but rather only by grounds that resonate loudly with fundamental rule of law values as contemplated in a free and democratic society. And the notion of a society about which I am talking here must be a pluralistic one.

Thinking of the role of the lawyer in other ways fails to live up to our promise to society and to our potential. For example, gaining a conviction in a terror case on evidence that was obtained using questionable interrogation techniques, while possibly a success on the merits, by no means demonstrates the success of a legal system or the lawyering process. As lawyers we need to do better than that. We need to treat all participants in the system, from whatever faith, background, and so on, in ways that resonate with strong and pluralistic visions of our fundamental values. Doing so accords with the spirit of the court’s ruling in the Detroit Free Press case, for example, when it held that it is important for members of society, “particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11,” to understand that “even during these sensitive times the Government is . . . respecting individual rights.” Doing so agrees with the court’s holding in the same case that, again in “sensitive times” and in sensitive cases, the government (including its lawyers) is “held accountable to the people and that First Amendment rights are not impermissibly compromised.” Doing so also accords with governing professional standards that require lawyers, more so than people of other professions, to take seriously the diversity of the communities in which they live and work. For example, the Ontario rules provide that:

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61 For a recent judicial discussion of this balance, see McLachlin, “The Challenge,” above note 2.

62 Above note 16 at 71–72. See further above note 17 and accompanying text.

63 Ibid. at 93.
The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.64

Lawyers have principle- and policy-based reasons for actively recognizing the diversity of our communities, and for promoting, not limiting, full respect for and access to the rights of the members of those diverse communities. Doing otherwise is not just unprofessional, it again impoverishes the potential of lawyers to do great things in society.

We are going to see many more opportunities for government lawyers and others to engage in difficult cases over the next number of years, often involving competing social and political needs and interests. For example, the recent debates surrounding US Attorney General Eric Holder’s initial plan to hold trials in the US Federal Court system for a number of Guantanamo Bay detainees, and the subsequent reversal of this plan by the Obama Administration, engage some of these competing social and political issues.65 As mentioned earlier, among the individuals currently being held at Guantanamo Bay is Omar Khadr. Whether he will be tried in a US military court, a US Federal Court, or potentially in Canada remains to be seen.66 Even that jurisdictional decision, which has been the

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64 LSUC, Rules of Professional Conduct, above note 34 at r. 5.04 (1) (commentary).
66 In fact, at the time of revising the final draft of this chapter, the case against Omar Khadr has been settled by way of a plea agreement.
subject of significant court attention\textsuperscript{67} and public commentary,\textsuperscript{68} centrally engages the professional issues at stake in this chapter. Regardless of the outcome of any of those cases, what primarily matters for purposes of this chapter is the process by which they will proceed. The initial choice by the American administration to move those cases onto the docket of the US public court system was a good step toward ensuring, as far as possible, that the accused in those cases might be treated according to the fundamental values that, at least in theory, animate the US Constitution and the US justice system.\textsuperscript{69} Doing otherwise, or in this case trying terrorist suspects in non-public military tribunals with potentially questionable procedural safeguards (which is what is now going to happen), creates, according to Gabor Rona (international legal director of the Washington-based advocacy group Human Rights First) what amounts to a “second class justice system.”\textsuperscript{70} Following the initial plan to move the trials to the Federal Court system, Harvard law professor Alan Dershowitz recently commented that, because of the US Department of Justice’s jurisdictional decision to proceed with the trials of various alleged 9/11 terror perpetrators, “America is on trial” as much as the accused are.\textsuperscript{71} Equally on trial will be the lawyers involved. And while this chapter largely focuses on examples of tough lawyering cases in the immediate context of 9/11 and its aftermath, all of the requirements and opportunities contemplated by a notion of deliberative, sustainable professionalism, which is animated by robust notions of pluralism and the public interest broadly defined, can and should apply equally to essentially all lawyering exercises in our modern, complex societies. In this sense, guided by a notion of sustainable professionalism, all lawyers are “post-9/11 lawyers” now.

\textsuperscript{67} See above note 58.


\textsuperscript{69} At the time of revising the final draft of this chapter, it appears that the US administration’s decision to move these trials to civil courts is being blocked by the US House of Representatives.

\textsuperscript{70} See Yakaboski, “Americans Expected More from Obama,” above note 65.

\textsuperscript{71} Alan Dershowitz, “America is on Trial as Much as KSM” \textit{Globe and Mail} (14 November 2009) A27.
CONCLUSION

As I reflect back on my visit to Ground Zero, the question I asked myself that day returns: “What are we to make of all this?” The destruction and tragedy below was clear. So too were the hopes, dreams, and freedoms, reflecting back from the wide-open clear blue sky above, which the Twin Towers could be said to have stood for in the first place. Finding a way to balance what those observations, in essence, stood for—the need for security and the need for freedom—has been the work of many for the past decade. As I have argued, the post-9/11 landscape has brought into the spotlight the work of lawyers in the context of that balance. That has and continues to be important work. And to me, doing so in a way that does not fully respect our core values, in the end, makes us our own worst enemy. As a High Court in the United Kingdom recently stated, “Championing the rule of law, not subordinating it, is the cornerstone of democracy.” That must be our approach as we deal with these difficult issues of balance.

But we do not do so in a vacuum. We live in diverse communities. My fellow onlookers that day reminded me of this diversity, particularly in the context of those affected by the events of that day and that place. The role of the lawyer must now be to recommit to core democratic values, as both reflected in and reflective of our diverse and pluralistic communities. Lawyers are now, as they always have been, trustees not just of their clients’ interests, but more foundationally, they are trustees of fundamental core values that are grounded in robust notions of justice, substantive equality, and the rule of law. Making meaningful space for competing interests, including but not limited to those of the client, the lawyer, and the public, is to be welcomed and not feared. September 11 may have reminded us of this important position of trust. But it did not create it, nor really in the end did it change it. What that day and that place provide us with is an opportunity to recommit to what we stood for in the first place, what the freedom and diversity of that place—in all the good, aspirational senses of that freedom and diversity—stand for. That is what we are, ultimately, “to make of all this.” That is what being a “post-9/11 lawyer” is all about.

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Postscript: Autumn in New York (September 2010)

One year later, almost to the day, I'm back at the same spot. While progress is being made on the construction of the Freedom Tower, my sense of the destruction below and hope for freedom above is still here. Some of the cases in this chapter—like the status of Omar Khadr's case or the location of Guantanamo detainee trials—have now been resolved, appealed, or reversed since I first drafted this chapter. My initial question, however, still remains.