

## THE EFFECT OF LEGAL PROFESSIONALIZATION ON MORAL REASONING: A REPLY TO PROFESSOR VISCHER AND PROFESSOR WENDEL

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### INTRODUCTION

I am grateful to Professor Vischer and Professor Wendel for their responses to my essay, *Professionalizing Moral Deference*;<sup>1</sup> I learned a great deal from each piece. I also appreciate their patience in enduring my finalization of the essay and am indebted to them both for their personal indulgence and intellectual stimulation.

The aim of my earlier essay was to open a new discussion of lawyers and morality through my reflections on the so-called “Torture Memo.”<sup>2</sup> Specifically, my essay focuses on the effect of *legal* training and practice on lawyers’ *moral* reasoning.<sup>3</sup> It explores the ways in which we, as lawyers, “come to engage in . . . strategic reasoning,” and express “concern[] about

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<sup>1</sup> Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUY 1 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/25/LRColl2009n25Hatfield.pdf> (link); Robert K. Vischer, *Professionalizing Moral Engagement (A Response to Michael Hatfield)*, 104 NW. U. L. REV. COLLOQUY 33 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/27/LRColl2009n27Vischer.pdf> (link); W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58 (2009) <http://www.law.northwestern.edu/lawreview/colloquy/2009/29/LRColl2009n29Wendel.pdf> (link).

<sup>2</sup> Hatfield, *supra* note 1, at 1–2. I have elsewhere summarized the reasoning in the Torture Memo as follows: “18 U.S.C. section 2340A does not prohibit as ‘torture’ merely cruel and inhuman interrogation techniques, but only those interrogation techniques that inflict pain akin in severity to death or organ failure. But if we are wrong, to the extent 18 U.S.C. [s]ection 2340A prohibits interrogation techniques the President approved, the law would violate the American Constitution. This is because it is inherent in the Presidential office to determine what interrogation techniques shall be used, and neither Congress nor the Supreme Court has a greater power than the President on the subject. However, if the President’s commands were found subject to 18 U.S.C. [s]ection 2340A without violating the Constitution, then, nevertheless, the President’s endorsement of such interrogation techniques could still be justified as a matter of necessity and self-defense, being the moral choice of a lesser evil: harming an individual enemy combatant in order to prevent further Al Qaeda attacks upon the United States.” Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511, 514 (2006).

<sup>3</sup> See, e.g., Hatfield, *supra* note 1, at 4, 11.

[the] cost to our moral reasoning skills.”<sup>4</sup> The core argument is that “lawyers are professionalized in a manner that undermines moral reasoning skills,”<sup>5</sup> and that “[t]o suggest that we who are officers of the American judicial system are deficient in moral reasoning is to suggest a deep problem.”<sup>6</sup> To address this deep problem, I suggest lawyers accept personal moral accountability for professional projects undertaken, idealizing those lawyers who choose their professional projects on personal moral grounds.<sup>7</sup> Thus, I believe lawyers—such as the authors of the Torture Memo—are subject to criticism on grounds of morality and not merely professional technique.

The responses of Professor Vischer and Professor Wendel, though thought-provoking, do not address my focus on the effect of legal training and practice on lawyers’ *moral* reasoning. Instead, the responses of Professor Vischer and Professor Wendel focus on the role of moral reasoning in *legal* reasoning.

## I. MORAL REASONING

In response to my essay Professor Vischer urges increasing moral engagement between lawyers and clients, while Professor Wendel emphasizes the value of understanding law as a shared craft.<sup>8</sup> I appreciate Professor Vischer’s and Professor Wendel’s responses on their own terms. Professor Vischer’s response expresses optimistic encouragement of greater moral engagement between individual lawyers and clients, while Professor Wendel’s response provides a valuable reminder that the complexity of legal institutions intentionally and necessarily exceeds that of moral engagement between individuals.

Professor Wendel misunderstands the essay, however, when he opens his response by suggesting that I would “have lawyers act directly on the claims of their own consciences rather than on the requirements of law.”<sup>9</sup> This overlooks that I expressly disclaim any suggestion “that moral analysis be substituted for legal analysis.”<sup>10</sup> His response then addresses the reasons a lawyer’s moral analysis ought not to be substituted for legal analysis, describing differences between laws and morals and the legitimacy of legal

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<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 11 (“If we choose to implement a client’s objective, it ought to be because doing so reflects what we personally value, not because we have been assured that what we help our clients do does not reflect our ‘nonprofessional’ personal morality.”). *See also id.* at 5–6.

<sup>8</sup> *See, e.g.,* Vischer, *supra* note 1; Wendel, *supra* note 1. Their responses apply their general approaches to legal ethics issues. *See, e.g.,* Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 *GEO. J. LEGAL ETHICS* 225 (2006); W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickmire Memorial Lecture*, 31 *DALHOUSIE L.J.* 247 (2008).

<sup>9</sup> Wendel, *supra* note 1, at 59.

<sup>10</sup> Hatfield, *supra* note 1, at 5.

institutions.<sup>11</sup> If, on the whole, what Professor Wendel intends to convey is that the law is to be valued as “an accumulation of hard-won institutional wisdom”<sup>12</sup> that “serves us best when we presume its wisdom rather than our own,”<sup>13</sup> and that lawyers should “respect the law as an external stop” to our “personal instinct of what [is] best to be done,”<sup>14</sup> I certainly agree. In fact, I have made those points, in those words, elsewhere.<sup>15</sup>

Like Professor Wendel, Professor Vischer suggests that I would have “a lawyer’s own moral convictions . . . shape her personal decisionmaking and professional decisionmaking in identical ways.”<sup>16</sup> Professor Vischer worries that I champion an unrefined moral intuition as a sufficient guide to both moral and legal reasoning.<sup>17</sup> But I do not claim that moral intuition ought to replace legal reasoning. As mentioned above, I clearly deny “that moral analysis be substituted for legal analysis,” or that “legal duties *ought* to track moral duties exactly.”<sup>18</sup> Nor do I claim a native and infallible intuition subject neither to constraint nor improvement, a claim that Professor Vischer rightly fears might lead us “into fairly heady epistemological waters.”<sup>19</sup> I do not use the term “intuition” in a way that precludes refinement, development, or strengthening through the study of moral philosophy, for example, which Professor Vischer would expand in the law school classroom.<sup>20</sup> Rather, I would supplement this proposal by asking law students to consider how their broader legal education may influence their own moral sensibility.

Neither Professor Vischer nor Professor Wendel responds to the essay’s central suggestion as to the effect of legal training and practice on lawyers’ *moral* reasoning. Both instead interpret the essay as encouraging the supplanting of legal reasoning with moral reasoning.<sup>21</sup> This is not my suggestion. I distinguish between moral and legal reasoning, and I suggest that lawyers *qua* lawyers suffer impaired moral reasoning.<sup>22</sup> My focus is on

<sup>11</sup> See, e.g., Wendel, *supra* note 1, at 60, 64.

<sup>12</sup> See Hatfield, *supra* note 2, at 521.

<sup>13</sup> *Id.* at 513.

<sup>14</sup> *Id.* at 522.

<sup>15</sup> See *supra* notes 12–14.

<sup>16</sup> Vischer, *supra* note 1, at 34.

<sup>17</sup> See *id.* at 33–34, 36.

<sup>18</sup> Hatfield, *supra* note 1, at 5.

<sup>19</sup> Vischer, *supra* note 1, at 36.

<sup>20</sup> See *id.* at 44.

<sup>21</sup> See, e.g., *id.* at 33; Wendel, *supra* note 1, at 60.

<sup>22</sup> See Hatfield, *supra* note 1, at 4, 5, 10. The essay’s only characterization of the legal reasoning in the Torture Memo was that it was “bad.” *Id.* at 3. Rather than criticizing the Torture Memo’s legal reasoning, the essay began with the criticism that the torture lawyers had concluded that torture “is a morally acceptable objective for a legal memorandum.” *Id.* at 4. Once the project objective was accepted as morally sound, the objective “drove them to make a bad legal argument.” *Id.* at 3. Describing the distorted legal analysis was not the essay’s purpose, nor was suggesting that it would have been a better memo had the torture lawyers given freer reign to their bad moral reasoning. Instead, the essay’s pur-

the *moral* reasoning lawyers use when choosing projects, not the *legal* reasoning lawyers use when implementing projects.<sup>23</sup>

## II. PROFESSIONALIZATION AND MORAL REASONING

The essay aims to provoke discussion on whether or not becoming and being a lawyer may negatively affect moral reasoning.<sup>24</sup> Three reasons a negative relationship between moral reasoning and legal training may arise are suggested. First, lawyers are professionalized to reason strategically.<sup>25</sup> Second, lawyers are not only professionalized to reason strategically but also become so personally habituated in doing so that it becomes a fixed part of their personality.<sup>26</sup> Lawyers cannot easily “turn on” and “turn off” the lawyering mindset (and I suspect that a poll of lawyers’ family members would confirm this). Third, given that moral and legal reasoning are deceptively similar in structure and consequence, it is especially difficult to “turn off” the lawyers’ strategic orientation when considering moral questions.<sup>27</sup> Accordingly, when it comes to honest moral reasoning, which is never strategic, lawyers’ habituated strategic reasoning imposes a substantial cost.<sup>28</sup>

Strategic reasoning pursues pre-determined objectives.<sup>29</sup> And lawyers, day in and day out, reason from the client’s calculated objectives.<sup>30</sup> This habituated deference to someone else’s value calculations is a specific characteristic of lawyers’ strategic reasoning.<sup>31</sup> This is what I called “moral deference.”<sup>32</sup> Of course, moral deference is not unique to lawyers, but rather is an enduring human tendency often associated with morally repugnant actions, including lynching, genocide, and torture.<sup>33</sup>

And this is the speculative end of the essay’s provocative suggestions: Jay Bybee and John Yoo’s professionalization as lawyers made it more

pose was to suggest that the lawyers’ professionalization as lawyers made them more likely, rather than less likely, to conclude that the project objective was *morally* sound in the first place. *Id.* at 7. I want to condemn the morality of choosing the project, and not merely the legal reasoning articulated after the project was chosen.

<sup>23</sup> See, e.g., *id.* at 11. Note that I state: “If I would not foreclose on a particular orphanage, I should not be encouraged to help someone else to foreclose upon it. . . . The orphanage may still be foreclosed upon . . . , but not with my help. Some other lawyer may help, but not at a cost to my conscience.” *Id.* If I declined this representation, it would not be because I decided such a foreclosure was not legally permissible, but rather that it was morally impermissible for me to participate in it. The legal reasoning related to foreclosures is not the issue.

<sup>24</sup> See, e.g., *id.* at 4, 11.

<sup>25</sup> *Id.* at 4–5.

<sup>26</sup> *Id.* at 6–7.

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 5, 7.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 8.

likely, rather than less likely, that they would become persuaded that torture is *morally* justified.<sup>34</sup> This is because the typical utilitarian justification of torture demands deference to “intelligence experts who assure you that torture yields good information”; deference to the professionalism of torturers to “torture effectively rather than sadistically”; and deference to the detention apparatus’ competence in detaining and torturing “only those most likely to have valuable information.”<sup>35</sup>

Neither Professor Vischer nor Professor Wendel reflects on the suggestion that lawyers are exceptionally bad at moral reasoning as a result of the process of becoming—and the experiences of being—a lawyer. I am sure their reflections would have been illuminating; I was especially interested in how Professor Vischer would respond, insofar as he promotes lawyers as moral engagers rather than mere legal technicians.<sup>36</sup> Perhaps scholars adept at empirical research will explore how legal professionalization tends to affect lawyers’ moral reasoning. We should be interested.

### III. IDEALIZING MORAL CONSISTENCY

The essay suggests that the legal profession should idealize the lawyer who works for ends she morally endorses rather than idealizing the lawyer who does not.<sup>37</sup> We could, for example, focus law students’ attention on the practicing lawyer’s right to choose her projects, and encourage choices that would be personally morally fulfilling.<sup>38</sup> Specifically, I encourage law students to consider whether they would find it personally and morally fulfilling to represent someone who failed to be a good Samaritan and watched someone drown rather than rescuing him.<sup>39</sup> Whether or not defending the “bad Samaritan” is morally fulfilling has nothing to do with what the tort law requires.<sup>40</sup> There is no moral paternalism here.<sup>41</sup> It is simply a matter of emphasizing the discretion lawyers have to bring their personal moral values to bear on the direction of their careers. This suggestion seems quite modest in that these choices are clearly permitted (though, I contend, under-emphasized). My suggestion has nothing to do with deceiving the client as to what the law provides.<sup>42</sup>

Professors Vischer and Wendel, on the other hand, seem to believe that I advocate a sea change—each expresses concern that my proposal will un-

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<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.*

<sup>36</sup> See Vischer, *supra* note 1, at 38.

<sup>37</sup> Hatfield, *supra* note 1, at 6 & n.19.

<sup>38</sup> See *id.* at 5.

<sup>39</sup> *Id.*

<sup>40</sup> Professor Wendel suggests this would encourage a distortion of tort laws. See Wendel, *supra* note 1, at 59.

<sup>41</sup> Professor Vischer implies this makes me a moral paternalist. See Vischer, *supra* note 1, at 37.

<sup>42</sup> Professor Vischer appears to suggest this is my view. See Vischer, *supra* note 1, at 45.

duly limit the legal rights of clients.<sup>43</sup> Yet, if one does not object to lawyers choosing clients for reasons of personal *financial* reward, how could one object to lawyers choosing clients for reasons of personal *moral* reward? How is choosing clients based on personal moral fit a more problematic restriction on potential clients' assertion of their legal rights than choosing for better personal pay? Even if I do not want a project that involves foreclosing on widows and orphans, *regardless* of the fee, I am nearly certain that someone up or down the building's elevator bank would be happy to take the project *because* of the fee.<sup>44</sup>

Professor Wendel focuses on the very important duties lawyers owe clients, describing the ways in which a lawyer's imposition of her own morality on the attorney-client relationship would distort it.<sup>45</sup> My suggestion is to idealize the lawyer who chooses to form an attorney-client relationship with those individuals whose projects dovetail with her own moral values.<sup>46</sup> I do not suggest idealizing lawyers who deceptively impose their moral agenda on a client through distorted legal advice or otherwise.

Professor Vischer similarly focuses on existing attorney-client relationships. He sensibly flags the ethical complications of a lawyer's withdrawal from an engagement due to the lawyer's moral objections.<sup>47</sup> I agree that an attorney withdrawing from an existing relationship is complicated. A lawyer personally opposed to divorce ought not advertise as a family lawyer, accept a family law client, and then abandon the client when she learns the client wants a divorce. However, the lawyer who chooses not to practice as a family lawyer on the grounds that divorce is inconsistent with her own personal moral values is in an altogether different situation. It is the latter sort of consideration that I want to encourage, not the former.<sup>48</sup>

Idealizing the lawyer whose selection of projects reflects her personal moral values is intended as a partial solution to the negative effect of legal professionalization on moral reasoning. It is one way to encourage lawyers to "struggle" with the risk of "a *dis*-integrated moral personality," that is to say the risk of having one set of moral values in one's personal life and another in one's career.<sup>49</sup> I believe that such struggle would sharpen the moral reasoning skills of lawyers. And, better yet, I believe it would lead to a profession in which lawyers invest their limited time "working from the

<sup>43</sup> See, e.g., *id.* at 38; Wendel, *supra* note 1, at 64–65.

<sup>44</sup> See Hatfield, *supra* note 1, at 11.

<sup>45</sup> See Wendel, *supra* note 1, at 64–65.

<sup>46</sup> Hatfield, *supra* note 1, at 5–6.

<sup>47</sup> Vischer, *supra* note 1, at 33–34.

<sup>48</sup> Professor Bruce Green analyzes the conflicts of a family law lawyer who opposes divorce. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 36–38 (1997).

<sup>49</sup> Hatfield, *supra* note 1, at 11.

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conviction that they are personally responsible [for the matters they undertake] rather than from the conviction that they are not.”<sup>50</sup>

But there are other reasons to emphasize the professional spaces for a lawyer’s personal morality. I anticipate that lawyers who work for ends they morally endorse are happier than those who do not. Happiness is likely to confer benefits on others. Lawyers who are morally happy are probably less likely to suffer from drug abuse, marital discord, and suicide, for example, and will, therefore, do a better job for their clients.<sup>51</sup>

### IV. MORAL ACCOUNTABILITY

I believe that when a lawyer accepts a project, she knows what she is accepting. In important and practical ways, she begins with an answer rather than a question, though the form of written legal memoranda usually suggests to the contrary.<sup>52</sup> True, as the legal reasoning proceeds, the details of the answer are elaborated.<sup>53</sup> But in the main, when she accepts the job, the lawyer knows what the job is. She is paid to answer “how,” not “No.”<sup>54</sup>

In large part, it is for this reason the lawyer is morally accountable for the job she performs and is not shielded from moral criticism on the grounds that she is just doing her job. The choice to adopt a particular project is a moral choice, and law students ought to be taught and encouraged to choose projects that reflect their personal morality, rather than encouraged to accept a vision of lawyers as those who implement projects regardless of personal morality. I believe it follows that one should condemn lawyers who undertake projects one morally opposes, in addition to condemning any poor craftsmanship demonstrated in carrying the projects out.

This is a broader issue, however, on which Professor Wendel and I disagree.<sup>55</sup> There is a craft of lawyering, and failing to remain within its boundaries subjects a lawyer to discipline (or malpractice claims).<sup>56</sup> Professor Wendel would limit one lawyer’s criticism of another to grounds related to

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<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874, 876–78, 880–81 (1999). According to a 1990 study, lawyers top the list of professionals with major depressive disorder. *Id.* at 874. A 1991 researcher estimated that fifteen percent of all lawyers are alcoholics. *Id.* at 876. A 1990 study found that twenty-six percent of lawyers have used cocaine at least once, which is “a rate over twice that of the general population.” *Id.* at 877. Several studies show that the divorce rate among lawyers is, likewise, higher than among other professionals, *id.* at 878, and a 1992 study found that the “suicide rate for white male lawyers may be over twice that of other white males.” *Id.* at 880. “[L]awyers are indeed unhappy . . .” *Id.* at 881.

<sup>52</sup> See Hatfield, *supra* note 1, at 4, 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Wendel, *supra* note 1, at 68–70.

<sup>56</sup> See, e.g., *id.* at 58–59 & nn.2–4.

craft standards,<sup>57</sup> whereas I would not limit the criticism of lawyers to the craft-arena. I do not claim that a lawyer could never prepare a well-crafted memo concluding that torture is legal; I do claim that she should not do so. For the obvious reasons, today we tend to focus on Jay Bybee and John Yoo, the ensuing revelations of the torture, and the accompanying and on-going fallout. We think of the August 1, 2002 Torture Memo, which invoked the Medicaid statute to conclude that torture was legal if the President ordered it.<sup>58</sup> But even if the so-called “war” on terror had never been, and the facts of the past few years never come to pass, some lawyer might have craftily argued that the President could legalize torture. Perhaps John Yoo would have devoted a year and a team of eager research assistants to carefully crafting just such a memo. And he may have done so in a way that no lawyer alleged to be beyond the bounds of craft. Even so, lawyers, I believe, could conclude it was an immoral project.

In my mind, the most distressing problem with the August 1, 2002 Torture Memo is not that the lawyers were “insufficiently genius,” and that the memo itself was “too hasty, too short, and too shoddy.”<sup>59</sup> It is that well-trained and highly-placed lawyers *chose* the project of narrowing the definition of torture so as to maximize its use.<sup>60</sup> Those lawyers deserve moral condemnation for choosing the project, in addition to any professional discipline for the manner in which they discharged it.<sup>61</sup> As the choice of the project is the first choice in the project’s history, that seems an especially appropriate place to emphasize constraint. That choice is grounds for moral accountability, and it is the most important decision the lawyer makes.<sup>62</sup>

## CONCLUSION

Moral condemnation stings us, and that is why even its threat can affect behavior. If a lawyer anticipates moral condemnation for his choice of project, he is likely to struggle with the moral issues it implicates. That struggle, I think, is good.<sup>63</sup> I think it is likely to improve moral reasoning. Conversely, habitually avoiding the struggle with some version of “I’m just the lawyer” impairs moral reasoning.<sup>64</sup> I believe that lawyers struggling

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<sup>57</sup> *Id.*

<sup>58</sup> See Hatfield, *supra* note 1, at 1–2 & nn.1–5; Vischer, *supra* note 1, at 34–36; Wendel, *supra* note 1, at 58–59.

<sup>59</sup> Hatfield, *supra* note 1, at 4.

<sup>60</sup> See Louise-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9, 23–30 (2005).

<sup>61</sup> See Wendel, *supra* note 1, at 58–59 & nn.1–4.

<sup>62</sup> Hatfield, *supra* note 1, at 3. Note that I state: “I believe these lawyers began with the objective of justifying torture. They concluded that they were obligated to justify torture, and then they set out to do so. . . . They made a bad moral conclusion, and I believe it drove them to make a bad legal argument.” *Id.*

<sup>63</sup> Hatfield, *supra* note 1, at 11.

<sup>64</sup> *Id.* at 7–9.

with the moral implications of potential projects would necessarily improve the quality of our legal system. Professor Wendel disagrees.<sup>65</sup>

Of course, there are those who believe torture is morally justified. Indeed, the essay claims that lawyers are especially susceptible to the argument that it is. On any serious moral issue, there will be serious disagreement about who deserves moral condemnation and who deserves moral praise. But that is the nature of serious moral debate. By condemning those with whom we disagree on serious moral issues, we express our concern for them—for their moral reasoning skills, for their moral personality, perhaps for their souls. We signal to them our conviction that they ought to apologize or repent, or perhaps atone.<sup>66</sup> We signal the same to society in general, and to those we believe have been victimized by those we condemn. Such expressions reflect and protect our own moral dignity, the moral dignity of those to whom we express our condemnation—and the moral dignity of those whom we condemn.

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<sup>65</sup> Wendel, *supra* note 1, at 60.

<sup>66</sup> See LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW, AND POLITICS (2009) (discussing restitution, repentance, and atonement in morality, law, and politics).