

## DEFERENCE TO CLIENTS AND OBEDIENCE TO LAW: THE ETHICS OF THE TORTURE LAWYERS (A RESPONSE TO PROFESSOR HATFIELD)

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### I. INTRODUCTION

In the early months of the Obama administration, we are learning a great deal more about the previous administration's program of using "enhanced interrogation techniques" on alleged al-Qaeda detainees.<sup>1</sup> On April 16, 2009, the new administration released to the public several memos, prepared by lawyers at the Office of Legal Counsel ("OLC") in the administration of George W. Bush, dealing with certain legal aspects of whether detainees in U.S. custody could lawfully be subjected to torture. I and many others have criticized the quality of legal reasoning in previously disclosed memos,<sup>2</sup> and it is now conventional wisdom that something went terribly wrong with the legal advising process in the previous administration, at least with respect to terrorism and national security issues. At the time of this writing, it remains uncertain whether an investigative report of the Justice Department's Office of Professional Responsibility ("OPR") will be released to Congress, and whether there will be a public version of the report.<sup>3</sup>

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<sup>1</sup> See Mark Danner, *US Torture: Voices from the Black Sites*, NYBOOKS.COM, Apr. 9, 2009, <http://www.nybooks.com/articles/22530> (link). In a series of blog postings and print articles, Scott Horton and Andrew Sullivan detailed the origin of the euphemism "enhanced interrogation techniques." See, e.g., Scott Horton, *Defending Enhanced Interrogation Techniques*, HARPERS.ORG, June 15, 2007, <http://www.harpers.org/archive/2007/06/hbc-90000279> (link); Andrew Sullivan, *Bush's Torturers Follow Where the Nazis Led*, TIMESONLINE, Oct. 7, 2007, [http://www.timesonline.co.uk/tol/comment/columnists/andrew\\_sullivan/article2602564.ece](http://www.timesonline.co.uk/tol/comment/columnists/andrew_sullivan/article2602564.ece) (link).

<sup>2</sup> See, e.g., David Luban, *The Torture Lawyers of Washington*, in LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 162 (2007); Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to "A New Type of Warfare,"* in THE TORTURE DEBATE IN AMERICA 136 (Karen J. Greenberg ed., 2006); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005) (link); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005) (link).

<sup>3</sup> See Charlie Savage & Neil A. Lewis, *Release of Memos Fuels Push for Inquiry into Bush's Terror-Fighting Policies*, NYTIMES.COM, Mar. 3, 2009, <http://www.nytimes.com/2009/03/04/washington/04legal.html> (link).

Not surprisingly, the OPR report is rumored to be highly critical of the conduct of the lawyers who prepared these documents.<sup>4</sup>

Professor Hatfield concludes, in my view correctly, that the legal analysis produced by the OLC in the Bush administration was intended not as a good-faith attempt to determine what the law requires, but to lay the groundwork for American personnel to later claim reliance on the advice of counsel if subjected to prosecution for human-rights violations. There are two strands to Professor Hatfield's critique of the advising process. The first is positive, or empirical, and the second is normative. The positive claim is that OLC lawyers such as Jay Bybee and John Yoo lost sight of their moral compass because as lawyers they were professionally socialized into a kind of moral anesthesia.<sup>5</sup> The normative claim is that the profession's stance toward the immorality of client activities is passive instead of active, that it impermissibly commends a morality of deference to authority over the insistence on the moral responsibility for complicity in wrongdoing.<sup>6</sup>

I will have something to say about each of these points in turn, but my overall reaction is that Professor Hatfield's proposed reform is much too strong. He would have lawyers act directly on the claims of their own consciences rather than on the requirements of law (including tort, contract, and agency law norms structuring the attorney-client relationship).<sup>7</sup> This is surprising given his diagnosis of the reason for the bad lawyering in the OLC memos:

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. Whoever was ultimately responsible for requesting the Torture Memo apparently had such an objective, and the lawyers . . . accepted that position as a morally acceptable starting point. They made a bad moral conclusion, and I believe it drove them to make a bad legal argument.<sup>8</sup>

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<sup>4</sup> See, e.g., David Johnston & Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, NYTIMES.COM, May 6, 2009, <http://www.nytimes.com/2009/05/06/us/politics/06inquire.html> (link).

<sup>5</sup> Michael Hatfield, *Professionalizing Moral Deference*, 104 N.W. U. L. REV. COLLOQUY 1, 4 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/25/LRColl2009n25Hatfield.pdf> (link).

<sup>6</sup> *Id.* at 8–9.

<sup>7</sup> See *id.* at 11.

<sup>8</sup> *Id.* at 3. I am not quite sure how to square this passage with what is apparently a critique offered later in the paper of the process of intentional suspension of personal moral identity in favor of the moral conclusions of someone else. *Id.* at 6. If the problem with the OLC memos is that they were driven by the moral convictions of the lawyers, then presumably the response is to recommend suppression of ordinary (or first-order) moral reasoning in favor of the reasons given by someone or something else—that is, deference to authority.

An appeal to conscience would therefore entrench the problem identified by Professor Hatfield. The last thing lawyers like Jay Bybee and John Yoo should be encouraged to do is to act on their sincere moral convictions in violation of the requirements of law.

A more general theoretical flaw in Professor Hatfield's argument is suggested by a polemical sentence near the end of his essay: "It should not be controversial to claim that the rule of law is better protected by those who are responsive to conscience than it is by those who intentionally disregard conscience for pay and promotions."<sup>9</sup> Leaving aside the "pay and promotions" bit for a moment, it actually is quite controversial to claim that the *rule of law*, as distinct from ordinary morality, is well served by directing officials, including judges and lawyers, to refer to conscience when deciding how to act. The whole point of the rule of law is to limit the authority of actors to make all-things-considered judgments about what ought to be done. Insofar as one wishes to claim that an action was lawful (as opposed to morally right), one is required to act on the basis of certain reasons, namely those validated in the appropriate way by the legal system. The rule of law will not be well protected by asking lawyers to act directly on the requirements of morality. Morality may be better protected under Professor Hatfield's approach, but that is a different matter.

## II. THE CAUSAL STORY

How did extremely bright, talented lawyers bungle the legal analysis so badly in the torture memos? It is not as though the OLC employs hacks—the Office has a tradition of hiring only the best and the brightest in the legal profession. Professor Hatfield argues that the involvement of elite government lawyers in the torture memos scandal is a failure of legal education. The aspiring lawyer is trained to "suspend [her] personal moral instincts and to have faith that the legal system accomplishes a greater moral good by [her] accepting a truncated personal moral role . . ."<sup>10</sup> But there is more. More than a critique of education based on books, essays, classrooms, and discussion groups, this is an indictment of modernity as a whole.<sup>11</sup>

Although Professor Hatfield seems to make a broad attack on an entire cultural tradition, I will focus here on the claim that legal education encourages lawyers to inhabit a simplified moral universe. Professor Hatfield's essay takes the view that law school tends to inculcate the attitude that the job of lawyers is to mold the law into whatever shape suits the client's interests.<sup>12</sup> That answer may have a jurisprudential component, in the form of

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<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> After all, as Professor Hatfield says himself, "The German intellectual heritage did not prevent Nazism, and enlightened French culture did not prevent the French from torturing Algerians." *Id.* at 9.

<sup>12</sup> *Id.* at 6.

a claim that authoritative legal materials underdetermine legal analysis such that a judgment that the law permits such-and-such will often be essentially a political determination. Applied to the OLC advising case, the jurisprudential position is backstopped by democratic theory: if the law may support a range of reasonable interpretations, then executive branch lawyers must worry about acting undemocratically if they advise the President against doing something that he was elected to do and that is (at least arguably) legally permissible.<sup>13</sup> More broadly, Professor Hatfield describes a version of what has come to be known as the standard conception of legal ethics.<sup>14</sup> The standard conception holds that a lawyer should be a “neutral partisan”—that is, a lawyer should defend her client’s interests in litigation, press for lawful advantages in transactions, and prospectively counsel clients about the legality of their actions, all with reference to the interests of the client, not the requirements of ordinary morality.<sup>15</sup>

Even the most vigorous defender of the standard conception must admit that there are limits. At some point, a lawyer is no longer engaging in “zealous advocacy *within* the bounds of the law,” but is serving only to set up an advice-of-counsel defense in the event that the client is later charged with wrongdoing. But the distinction between aggressive legal representation within the law and evasion of legal prohibitions can be difficult to discern in practice. The usual explanation given for this is the indeterminacy of law. Although one could cite innumerable academic statements of the indeterminacy claim, it also functions in the rhetoric of political officials. For example, after the Supreme Court ruled that American personnel overseas had to comply with Common Article 3 of the Geneva Conventions, which prohibits outrages upon human dignity, President Bush responded, “It’s like—it’s very vague. What does that mean, ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation.”<sup>16</sup> Similarly, Attorney General Michael Mukasey equivocated on the question of whether waterboarding is illegal:

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<sup>13</sup> This argument has been advanced by many conservative former OLC lawyers. See, e.g., John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437 (1993) (link). But it is not an inherently conservative position, and lawyers who have served in the OLC under Democratic Presidents have also noted it. See, e.g., Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004) (link).

<sup>14</sup> For good recent accounts of the standard conception, by a defender and a critic, respectively, see TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE* (forthcoming 2009); David Luban, *The Adversary System Excuse*, in LUBAN, *supra* note 2, at 19, 20.

<sup>15</sup> Luban, *supra* note 14, at 20.

<sup>16</sup> Transcript of Press Conference of President George W. Bush at 6 (Sept. 15, 2006), available at [http://www.nytimes.com/2006/09/15/washington/15bush\\_transcript.html](http://www.nytimes.com/2006/09/15/washington/15bush_transcript.html) (link).

If this were an easy question, I would not be reluctant to offer my views on this subject. But, with respect, I believe it is not an easy question. There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question.<sup>17</sup>

Thus, one might state Professor Hatfield's critique as follows: Lawyers are trained to answer the question, "What is permissible?" with a further question, "What does my client want to do?"<sup>18</sup> Thus, when they run up against an apparent legal prohibition, they immediately put their creative reasoning skills to work and devise a way to work around the law. Lawyers who do that sort of thing repeatedly lose any sense of obligation to interpret the law in good faith.

Professor Hatfield suggests that the cause has something to do with failure to respect the rule of law; he says that we lawyers are socialized to "reason[] backwards from the conclusion we ultimately want to reach for our clients rather than forwards from principles we discover by 'digging into' the law."<sup>19</sup> This explanation only pushes the causal question back one step. We can assume that the OLC lawyers who participated in drafting the torture memos recognized this obligation in the abstract. What factors would explain why they abandoned this obligation when advising on the legality of torture? The answer, I believe, is not anything as apocalyptic as the "perennial evil" of surrendering our moral consciences to the conclusions of another.<sup>20</sup> Professor Hatfield cites to the Milgram experiments and David Luban's suggestion that people are susceptible to corruption of judgment resulting from the gradual transformation of a situation from ambiguous into clearly wrongful.<sup>21</sup> If Luban is right about this, however, the response is not to focus on lawyers' education or moral character. A better approach would be to look carefully at the features of a situation that tend to produce corruption in judgment.<sup>22</sup> In the case of the torture memos, the drafting process was set up in ways that virtually guaranteed that the legal analysis would be flawed. Lawyers for the State Department, the Justice Department's criminal division, and uniformed services lawyers were ex-

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<sup>17</sup> Letter from Att'y Gen. Michael B. Mukasey to Sen. Patrick J. Leahy at 2 (Jan. 29, 2008), available at <http://i.a.cnn.net/cnn/2008/images/01/29/letter.to.senator.leahy.pdf> (link).

<sup>18</sup> Cf. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 259–60 (1978) (arguing that law students learn that the correct answer to, "How do you come out on this case?" is, "It depends on what side I'm on") (link).

<sup>19</sup> Hatfield, *supra* note 5, at 5.

<sup>20</sup> Hatfield, *supra* note 5, at 8.

<sup>21</sup> See *id.* at 8 n.33 (citing LUBAN, *supra* note 2, at 239–66).

<sup>22</sup> See, e.g., John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177 (2005) (link).

cluded from the discussion of interrogation policy.<sup>23</sup> The process was also conducted with the utmost secrecy. These flaws ensured that dissenting perspectives would be excluded, thus making it more likely that the decisionmaking process would be affected by psychological mechanisms such as the “false consensus effect,” which operates to make people believe that others see the world in the same way that they do,<sup>24</sup> and the pressures that exist in small, cohesive groups to maintain unanimity and not disrupt intra-group solidarity.<sup>25</sup> Some of the torture memos were also drafted relatively soon after the September 11 attacks, ensuring that the collapse of the Twin Towers, and therefore the threat of future terrorist attacks, would be the most highly salient, or “available” frame for assessing the relative weights to be assigned to competing considerations such as human rights and the development of evidence that might be useful in preventing attacks.<sup>26</sup>

If the causal story is best explained in terms of features of this decisionmaking environment, the implication follows that if we are concerned about wrongdoing by lawyers, a more effective response might be to focus on the aspects of an institutional decisionmaking process that tend to corrupt the ethical judgment of lawyers.<sup>27</sup> The advising process in this case was so badly structured that it is hardly surprising that the result turned out to be one-sided advice that is hard to take seriously as good-faith legal analysis.<sup>28</sup> Responding to concerns such as this, several former OLC lawyers, including President Obama’s nominee to head the Office, Dawn Johnsen, drafted a set of Principles to Guide the Office of Legal Counsel.<sup>29</sup> These principles emphasize procedural norms, such as seeking the input of affected agencies, respecting the coordinate powers of the courts and Congress, and the public disclosure of OLC opinions.<sup>30</sup> This kind of response

<sup>23</sup> See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008).

<sup>24</sup> See, e.g., Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75, 101–03 (1993).

<sup>25</sup> IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 2–13 (2d ed. 1982).

<sup>26</sup> See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 24–25 (2008).

<sup>27</sup> See Alice Woolley, *Regulating Dignity*, 11 LEGAL ETHICS 261 (2008) (reviewing DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007)).

<sup>28</sup> See, e.g., Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006). Indicia of the lack of good faith include the failure to cite and discuss adverse authority (such as the Steel Seizure Case in the analysis of executive power), the peculiar analogies used (including the use in the August 1, 2002, Bybee memo of a Medicare reimbursement statute as the source for the definition of severe pain), and failure to even consider the history of treating many of the techniques at issue, including waterboarding, as paradigm cases of torture. On the latter point, see Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007).

<sup>29</sup> See Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004), reprinted as App. 2 to Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints to Executive Power*, 54 UCLA L. REV. 1559, 1603 (2007).

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

assumes, however, that we want lawyers to respect the law when advising clients, and not to rely on ordinary moral considerations, the demands of conscience, or the public interest. The following section takes up the question of whether this is the right way to conceive of the ethics of lawyers acting in an advisory capacity.

### III. THE NORMATIVE CRITICISM

One way to criticize both the OLC lawyers and the standard conception of legal ethics would be to say: *The standard conception is wrong because it denies the moral agency of lawyers. Lawyers should not surrender their conscience to their clients. Instead, lawyers should act as morally sensitive people ordinarily would under like circumstances, and not blindly defer to the obligations of their role.* The criticism would then follow from this position that the moral wrongfulness of the torture memos depends on the moral wrongfulness of torture. John Yoo, Jay Bybee, and others failed in ordinary moral terms because they provided assistance in accomplishing a grave moral wrong, namely the torture of detainees. There are instances of this criticism in Professor Hatfield's essay, where he raises the problem of authority—that is, the question of whether it can ever be consistent with individual moral agency to defer to the directives of others. The problem of the torture memos, he suggests, is one of lawyers' learned deference to the norms laid down by the legal system, with the tacit assumption that whatever the law commands is therefore moral.<sup>31</sup>

Elsewhere, however, Professor Hatfield gives up a great deal of the criticism of torture in ordinary moral terms, when he concedes that the OLC lawyers began with a moral conclusion that they ought to seek to justify torture.<sup>32</sup> Of course he may still say that these supporters have the moral analysis wrong, and that the problem could be addressed by ensuring that lawyers reason through moral problems in the correct manner, and reach the correct result. However, Professor Hatfield's appeal to ordinary moral analysis leaves him vulnerable to the "oligarchy of lawyers" argument.<sup>33</sup> If reasonable people can disagree about the morality of some action, and the action is permitted by law, then a lawyer who refused to assist the client would be depriving the client of something valuable by denying the client the opportunity to exercise a legal right. This legal right may not have moral value—a point made by critics of the standard conception—but it is something of value to the client, and thus the lawyer would appear *prima facie* to owe some obligation of justification to the client. If the only justification offered is, "I think what you wanted to do is morally lousy," then what is the lawyer supposed to say when the client responds, "Oh yeah,

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<sup>31</sup> Hatfield, *supra* note 5, at 6.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> Stephen L. Pepper, *The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 613, 617.

well *I* don't think it is morally lousy, and who are you to tell me about right and wrong?"

This is, in other words, the problem of moral pluralism. Moral pluralism is the claim that there is a diversity of authentic goods and values within even one well-lived human life, as well as a diversity of conceptions of the well-lived human life.<sup>34</sup> Rawls refers to the “burdens of judgment” for citizens living together in a community characterized by moral pluralism; this refers to the fact that people may be fully rational and reasoning in good faith, but still may disagree about matters of morality and justice.<sup>35</sup> There are some moral principles about which all rational agents agree—for example, that there are certain objectively valuable goods such as human life, health, and freedom from hunger, oppression, and abuse. If these principles are understood and agreed upon at a high level of abstraction, however, they must be specified and given application to concrete cases, and disagreements may arise over how these values are to be applied, and how conflicts among them are to be resolved. In the context of the treatment of detainees, we might all agree that torture is a grave moral evil, but disagree about how torture is to be defined in marginal cases, how it can be differentiated from aggressive but permissible questioning, whether it is justified in dire circumstances,<sup>36</sup> and so on. Fully rational people, reasoning in good faith, may come to different resolutions of those issues. From the point of view of legal ethics, the problem is that if a lawyer were giving advice to a client on the basis of moral considerations, there would be no reason for the client to follow the lawyer's advice, as long as the client's views were within the range of reasonable positions that people might take on the matter.

What lawyers do have expertise in is the law. In the case of the torture memos, the special professional knowledge of lawyers must be understood with respect to the law, not ordinary morality. Lawyers are no more able than anyone else to say whether torture is unjustified in all circumstances, or whether some “enhanced interrogation technique” should be deemed permissible in the specific context of a detainee who might have information that could be used to save American lives. However, lawyers are able to—and are required by the obligations of their role to—ascertain whether it is *legal* to use these interrogation techniques. The important theoretical question for legal ethics concerns the relationship between the role-based obligations of fidelity to law and what would otherwise be the duties of

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<sup>34</sup> See JEREMY WALDRON, *LAW AND DISAGREEMENT* 112 (1999) (“On any plausible account, human life engages multiple values and it is natural that people will disagree about how to balance or prioritize them.”); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 131–34 (1987); THOMAS NAGEL, *MORTAL QUESTIONS* 128–41 (1979).

<sup>35</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 55–58 (1993).

<sup>36</sup> Not surprisingly, there has been a great deal of recent scholarship on the morality of torture and the ticking bomb hypothetical. See BOB BRECHER, *TORTURE AND THE TICKING BOMB* (2007); Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 *CASE W. RES. J. INT'L L.* 231 (2006) (link); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *VA. L. REV.* 1425 (2005) (link).



lawyers, qua moral agents. Professor Hatfield brings together the concepts of the rule of law and ordinary morality in his conclusion that the rule of law is better protected by officials who are directly responsive to the demands of conscience. I will conclude this Response by arguing briefly that the relationship between the values underlying the rule of law and the ethics of lawyering is less direct, and in fact the value of legality requires that lawyers exclude ordinary moral considerations when reasoning about what they owe to clients.<sup>37</sup> Any social role may be more or less directly responsive to the demands of morality.<sup>38</sup> The obligations of a role are directly related to ordinary morality if role-specific duties are nothing more than applications of ordinary morality to the context of acting as a professional—here, representing clients and advising them on the requirements of law. In that case, “[t]he institution and the role are eliminable”,<sup>39</sup> they are not doing any real normative work, but are merely serving as placeholders for a detailed specification of how ordinary moral obligations apply in these circumstances. On the other hand, the relationship may be indirect, if the professional role is justified as part of a scheme of social institutions and practices that is aimed at some morally worthwhile end. The norms internal to some institution or practice may preclude case-by-case reference to ordinary morality if the whole point of the institution or practice is to generate freestanding demands. In Rawls’ example, the whole point of the practice of promising is to create obligations that are independent of what an agent has reason to do, all things considered, on some subsequent occasion.<sup>40</sup> The normative force of a promise is not captured entirely by the reasons that exist at that subsequent occasion; rather, a promise functions by excluding consideration of some of the reasons that otherwise would apply to the promisor. In my view, the obligations of lawyers should be understood along these lines. When acting in a professional capacity, lawyers should not refer back to ordinary moral considerations because the whole point of the social institution of the legal system is to establish a basis for social solidarity, coexistence, and cooperation that stands apart from the contested moral positions taken by individual citizens.<sup>41</sup>

Lawyers may act on the obligations of professional roles, including respecting the exclusionary character of role obligations, if the institution as a whole is justified. No one can deny that the rule of law and the value of legality may be abused by government actors intent on doing wrong. Merely mentioning the idea of obedience to law tends to provoke objections

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<sup>37</sup> As noted above, this position may be implicit in Professor Hatfield’s criticism of John Yoo and others, for having acted on their own moral beliefs that torture is permissible in certain circumstances.

<sup>38</sup> For a valuable discussion of this concept, see DARE, *supra* note 14, at 29–58, in Chapter 3, “The Idea of Role-Obligation.”

<sup>39</sup> *Id.* at 36.

<sup>40</sup> John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (link).

<sup>41</sup> The full argument for this position is in W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (forthcoming 2010).

based on Nazi laws or the Jim Crow regime in the American South. But these examples only show that the form of lawful government can be abused, not that the moral attractiveness of the role of lawyer is not connected with the goods enabled by the social institution of a legal system. As Joseph Raz observes, a good knife must be, among other things, a sharp knife, but the quality of sharpness does not prevent a knife from being used for wrongful ends.<sup>42</sup> My argument here is that the rule of law has certain good-making properties associated with it. These include the capacity of a legal system to safeguard against the abuse of power and to enable people to give a justification for their actions, which refers to considerations adopted by using tolerably fair procedures, in the name of the community as a whole. To the extent a lawyer's actions further or are required by these institutional ends, they partake in the good of the institution. The institutional end to which lawyers are particularly committed is the value of legality.<sup>43</sup> This makes out a justification for the lawyer's actions, as against the demands of ordinary morality, and also explains why lawyers should not act directly on what they take to be the demands of ordinary morality. Legality requires the exclusion of morality. Thus, the OLC lawyers, ironically, can be criticized in ethical terms for trying to do the right thing, in response to what they took to be the demands of morality.

Professor Hatfield cites my 2008 Wickwire Lecture at Dalhousie Law School, in which I argued that the torture memos were a failure of legal craft.<sup>44</sup> Professor Hatfield suggests that the notion of craft does not constrain the range of legal advice that could be offered: "To diagnose the problem as one of poor craftsmanship suggests that, among all the possible legal memoranda, one memorandum could perhaps be crafted to reach the same conclusions in a defensible manner. It is just not this one."<sup>45</sup> There would be a difficult moral issue presented if the applicable domestic and international law really did permit torture in some circumstances. Although a lawyer is permitted to refer to "moral, economic, social[,] and political factors" when advising a client,<sup>46</sup> this is a permission only, not a duty, and a lawyer may withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant . . ."<sup>47</sup> Of course, withdrawal is a drastic remedy—particularly when the client is also the employer of the lawyer. If it is possible to imagine a democratic society, characterized by respect for the rule of law, in which torture was deemed

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<sup>42</sup> Joseph Raz, *The Rule of Law and Its Virtue*, in RAZ, *THE AUTHORITY OF LAW* 210, 225 (1979).

<sup>43</sup> Cf. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

<sup>44</sup> Hatfield, *supra* note 5, at 3 n.10 (citing W. Bradley Wendel, *W.F. Wickwire Memorial Lecture: Executive Branch Lawyers in a Time of Terror*, 31 DALHOUSIE L.J. 247 (2009)).

<sup>45</sup> *Id.* at 3.

<sup>46</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) (link).

<sup>47</sup> *Id.* R. 1.16(b)(4) (link).

legally permissible in some circumstances,<sup>48</sup> the standard conception of legal ethics would put real pressure on lawyers as moral agents. The justification given above, along the lines suggested by John Rawls and Tim Dare, still holds in that hypothetical situation. The law provides citizens with “a sound and stable framework for their interactions with one another,”<sup>49</sup> which necessarily is based on procedural norms that can be endorsed by citizens regardless of substantive disagreements they may have with one another. In most cases the role-based obligations of lawyers, which flow from the values of legality, mutual respect, and human dignity, supersede what would otherwise be the moral obligations of non-lawyers. Perhaps the torture hypothetical would be a limiting case for this conception of role morality.

However, the whole point of a craft is that it deems certain acts inconsistent with its own internal, regulative standards. We refer to craft norms when we judge a piece of music uninspiring, a poem banal, a wine flabby, an athlete graceless, or an argument unpersuasive. While there may be disagreements among participants, the existence of disagreement does not mean that evaluations within the domain of a craft are subjective or arbitrary. I have a delightful book that collects vituperative critical reactions to pieces by composers like Beethoven, Wagner, and Stravinsky.<sup>50</sup> Although it is fun to read these reviews and feel superior to critics who failed to grasp the genius of someone like Schubert, it is also apparent that these negative judgments are not arbitrary. Rather, they are widely shared, but reflect a too-narrow definition of the relevant craft, one that was expanded by the contributions of forward-thinking practitioners. Craft conceptions of legal ethics have a way of coming off as conservative, when in fact a vibrant craft contains resources for self-criticism, change, and renewal. The craft of music includes not only the critics who said a cat walking down a piano keyboard could produce better music than Schönberg,<sup>51</sup> but also Schönberg himself, who redefined the idea of an admirable piece of music. Similarly, the craft of “doing law” (to make use of Lon Fuller’s way of looking at things) includes critiques by lawyers, judges, and scholars who are dissatisfied with the status quo. Naturally, John Yoo sees himself as such a forward-thinking critic. In his view, the September 11 attacks changed everything, and the law has to adapt to this new threat; to continue to respect outdated legal regimes, such as the Geneva Conventions, is to make a fetish out of the law, rather than to adapt it creatively to changing circum-

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<sup>48</sup> See LON L. FULLER, *THE MORALITY OF LAW* 204 (rev’d ed. 1969). Rather, the law reflects a two-way relationship between the citizens and the government, which in turn is premised on the obligation of citizens to treat each other with respect.

<sup>49</sup> *Id.*

<sup>50</sup> NICOLAS SLONIMSKY, *LEXICON OF MUSICAL INVECTIVE: CRITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN’S TIME* (Norton paperback ed. 2000).

<sup>51</sup> *Id.* at 156.

tances.<sup>52</sup> Professor Hatfield is therefore concerned that there is some conceivable memo—prescient in the manner of Judge Cardozo’s *MacPherson* opinion or revolutionary in the manner of the decision in *Brown v. Board of Education*—that would justify the torture of detainees.

It is interesting that Professor Hatfield includes a critique of legal education, because I have often thought that law school is excessively oriented around paradigm-shifting moments like *Brown*, or great cases like *MacPherson* that mark watersheds in the evolution of legal doctrine. Most of the law does not work like this, however, and one of the things that surprises many recent graduates is how well settled the law often is. Granted, well settled law can sometimes change, as it did in the transition from *Plessy* to *Brown* or from the privity rule to *MacPherson*. But this change seldom happens all at once, and careful lawyers can see indications of a developing trend in the law.<sup>53</sup> Legal reasoning is not deductive, but that does not mean it does not have a structure, an overall sense and purpose, an “immanent rationality.”<sup>54</sup> The reasoning in the OLC memos respects the superficial manifestations of legality—the page numbering and citation formats that Professor Hatfield refers to—but betrays no concern for the deeper structure of legal reasoning. Borrowing the definition of severe pain from a Medicare reimbursement statute (in which “severe pain” was used, among other indicia, as criteria for defining an emergency) is an obvious example. That is almost a parody of textualism, in which words alone are considered, having no regard for the context of their usage. Another example is the failure to recognize the sense and purpose of the Geneva Conventions. Despite the reliance on the category of “unlawful combatants,” the denial of prisoner-of-war status to al-Qaeda or Taliban detainees does not throw these persons outside the protection of international humanitarian law altogether. The whole point of the Geneva scheme is to create a baseline level of mandatory humane treatment for everyone affected by war, with increasing protections afforded to certain classes of persons, such as prisoners of war.<sup>55</sup> If a lawyer’s interpretation of the Geneva Conventions were that a detainee is entitled to no human rights at all, that interpretation would be a failure of craft, for its refusal to consider a basic principle of legal interpretation.

Legal ethics as craft should be identified with some kind of pedantic concern with formalities. The obligation of fidelity to law is quite demanding. Lawyers must respect, interpret in good faith, and maintain in good working order the system of laws that establishes a framework for our

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<sup>52</sup> See PHILIPPE SANDS, TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES 184–85 (2008) (describing Yoo’s position in a debate with the author).

<sup>53</sup> With respect to *MacPherson*, that is the argument of Edward Levi’s great book on legal reasoning. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8–27 (1949).

<sup>54</sup> Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

<sup>55</sup> See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. J. INT’L L. 367 (2004) (link).

common society. The value of legality reflects more than a mere fetish for legal forms. The normative attractiveness of law depends on its capacity to reflect our mutual respect and solidarity. As Lon Fuller puts it, “our formalized interactions with others are accompanied by certain interlocking expectations.”<sup>56</sup> One of these expectations is that the law will be interpreted in good faith, with an eye toward recovering the substantive meaning of a statute, treaty, or line of cases. Violating this expectation is the essence of the unethical conduct of lawyers like Yoo and Bybee. In the absence of a commitment to honoring the expectations of citizens that laws will be interpreted in good faith, lawyers cannot be regarded as doing anything of moral value *qua* lawyers. Instead, they become merely government officials seeking to exercise unrestrained power, and that is antithetical to the rule of law.

#### IV. CONCLUSION

There are many virtues of government. Government actors and institutions can be praised, for example, for their energy, vigor, efficiency, responsiveness, creativity, fairness, incorruptibility, and compassion. One of the virtues of government is legality. Government lawyers are specifically concerned with this virtue of government, and not others. That is what it means to be a lawyer and not, say, a pollster, political adviser, economist, foreign-affairs specialist, or any other kind of expert whose role is defined with reference to other virtues of government. If an executive branch official decides that, all things considered, it is better to act like Jack Bauer in “24” than to respect the obligations of the law, that is a decision he or she may make.<sup>57</sup> This decision carries risks, of course—the official may subsequently be prosecuted for war crimes, or at least may be judged in the court of public opinion to have acted wrongly. The important feature of government lawyering is that the obligations of lawyers are not to be understood with reference to this all-things-considered standpoint. Lawyers are legal advisers, not political or moral consultants. The good-making qualities of their role are related to the virtue of legality, not to other virtues of government. The right way to criticize John Yoo, Jay Bybee, Stephen Bradbury, and other lawyers in the Bush OLC is with reference to the value of legality. In these terms, their advice was an unmitigated fiasco. Professor Hatfield is correct to call this an ethical disaster, but our response should be to insist that lawyers pay more attention to the internal norms of the good lawyering craft, not to be more responsive to the demands of individual conscience.

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<sup>56</sup> FULLER, *supra* note 48, at 217.

<sup>57</sup> Bush administration officials have been reported to be inordinately fond of the television show *24*, whose hero, Jack Bauer, is an antiterrorism agent famously contemptuous of legal niceties. See Jane Mayer, *Whatever It Takes*, THE NEW YORKER, Feb. 19, 2007, available at [http://www.newyorker.com/reporting/2007/02/19/070219fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer) (link).