

PROFESSIONALIZING MORAL ENGAGEMENT (A RESPONSE TO MICHAEL HATFIELD)

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In *Professionalizing Moral Deference*, Michael Hatfield argues that the way we form lawyers “begins with moral desensitization,” a technique that teaches future lawyers “to override [their] moral intuition.”¹ In making his case, Hatfield offers the infamous torture memos as Exhibit A, but they may not be the best vehicle for proving his thesis. As the work of John Yoo shows, some of the most scandalously deficient legal advice may stem (at least in part) from the lawyer’s inability or unwillingness to override his moral intuition. There is no reason to believe, however, that Yoo’s moral intuition would have led him to reject the conclusions set forth in the memos, and there is some evidence that his moral intuition helped shape his analysis. Seen in this light, the memos could be construed—in direct opposition to Hatfield’s characterization—as evidence that law schools need to redouble their efforts to train lawyers to override their moral intuition. But this reaction would miss the partial truth underlying Hatfield’s analysis. The torture memos do underscore a desensitizing that afflicts many lawyers, though its implications are broader—and perhaps less insurmountable—than Hatfield describes. Although he is undoubtedly correct that lawyers should “stop telling [one another] that overcoming personal moral squeamishness is the great call of the law,”² the law’s call is a bit more nuanced: although lawyers should not ignore their own moral squeamishness, neither should they wallow in it. The lawyer’s cognizance of her own moral intuition should mark the beginning, not the end, of her inquiry into the moral dimension of the representation.

I. WHY (AND HOW) A LAWYER’S MORAL INTUITION MATTERS

Lawyers need to take stock of their own moral intuition in order to help clients unpack the moral dimension of what is at stake in the case. Occasionally, the case or client may require the lawyer to facilitate conduct that the lawyer cannot, in good conscience, facilitate; under such circumstances, the Model Rules permit withdrawal.³ That withdrawal is sometimes permit-

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

² *Id.* at 11.

³ See MODEL RULES OF PROF’L CONDUCT R. 1.16 (2009) (link).

ted is not the same as asserting, as Hatfield does, that “[i]f I would not foreclose on a particular orphanage, I should not be encouraged to help one else to foreclose upon it. If I would not drown a man to make him talk, I should not be encouraged to help someone else to do it.”⁴ If Hatfield means that professional norms should not pressure a lawyer to ignore her conscience in her decisionmaking, then I wholeheartedly agree. But if he means that professional norms should embody a presumption that a lawyer’s own moral convictions will shape her personal decisionmaking and professional decisionmaking in identical ways, then he is misconstruing the moral dimension of the lawyer-client relationship.

Assume that if I held the mortgage on an orphanage, I would not foreclose on it. But as a lawyer, after (an inescapably moral) dialogue with my client who holds such a mortgage, perhaps I can understand and respect his reasons for foreclosing—even if I would choose not to foreclose if I were in his position. My decision to assist in the foreclosure does not reflect moral desensitizing or a willingness to override my own moral intuition. Rather, it reflects the fact that I am, as a lawyer, a partner in a moral dialogue; I am not a moral arbiter. My participation in those dialogues may need to begin with a cognizance and articulation of my moral intuition (or squeamishness), but it need not end there.

The problem with the torture memos—and I’ll focus on the August 2002 memo, as Hatfield does—is not that John Yoo overcame his own moral squeamishness about torture; the problem, more likely, is that he refused to even acknowledge his own moral squeamishness (and contrary to what Hatfield suggests, it seems that Yoo was squeamish about *prohibiting* torture in the wake of 9/11). The torture memo is so egregious because it reflects professional failure on both legal and moral fronts: Yoo’s shoddy legal analysis, it seems, was shaped by his moral intuition, but the apparent lack of moral engagement between Yoo and the White House kept that moral intuition beneath the surface of his representation. The governing statute provides that pain or suffering must be “severe” to constitute torture, but does not define the term.⁵ In his August 2002 memo, based on the dictionary definition, Yoo concluded that “the adjective ‘severe’ conveys that the pain or suffering [of the subject] must be of such a high level of intensity that the pain is difficult for the subject to endure.”⁶ Logically, this would seem to be the end of the inquiry, since coercing the subject to provide in-

⁴ Hatfield, *supra* note 1, at 11.

⁵ See 18 U.S.C. § 2340 (2006) (link).

⁶ Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President 5 (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf (defining “severe” as “[i]nflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture” (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2295 (2d ed. 1935)) (quotation marks omitted)) (link). Though signed by Bybee, it is widely reported that Yoo was the memo’s author.

formation because he is unable to endure the pain is the whole point of torture.

This is the point where Yoo's own "moral intuition" may have kicked in, compromising the quality of his legal analysis in the process. Apparently, to equate torture with the infliction of pain that is difficult to endure would, from Yoo's perspective (or from Yoo's morally laden embrace of the White House's perspective), have ruled out too many interrogation techniques. He therefore decided to look to the use of the term "'severe pain' . . . in statutes defining an emergency medical condition for the purpose of providing health benefits."⁷ The statutory language defines an emergency condition as one:

[M]anifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.⁸

The statute provides that severe pain is *one* type of symptom that *might* lead a person to believe that another's health is in serious jeopardy, that her bodily functions are seriously impaired, or that an organ is seriously dysfunctional. The language of the emergency health benefit statute implies that other symptoms might also lead a person to such beliefs. Nevertheless, Yoo concludes that severe pain, for purposes of the unrelated torture statute, should be equated with the level of pain associated with the three emergency health conditions: "death, organ failure, or serious impairment of body functions . . ."⁹

The possibility that Yoo may have been unwilling or unable to override his own moral intuition in crafting his memo is highlighted by one morally charged assertion he makes in the memo's concluding section. On the assumption that the torture statute could apply to the interrogation of suspected al Qaeda members, Yoo explores the availability of the necessity defense, noting that it "can justify the intentional killing of one person to save two others."¹⁰ He then asserts: "Clearly, any harm that might occur during an interrogation would pale to *insignificance* compared to the harm avoided by preventing [a terrorist] attack, which could take hundreds or

⁷ *Id.*

⁸ *Id.* at 6 (quoting 18 U.S.C. § 1395w-22(d)(3)(B) (2000) (emphasis added)).

⁹ *Id.* Yoo's conclusion regarding the level of mental pain and suffering that amounts to torture was similarly driven by unspoken considerations that did not flow directly from governing law.

¹⁰ *Id.* at 40.

thousands of lives.”¹¹ Analyzing the availability of the necessity defense does not lead inexorably to the unabashedly utilitarian conclusion that any possible harm that might be inflicted on an individual in order to extract information that could avert a terrorist attack is “insignificant.” A similarly utilitarian theme can be discerned in some of Yoo’s comments to the media,¹² further exemplifying that Yoo’s own moral intuition appears to have informed his conclusions about the interrogation techniques.

Hatfield believes that lawyers such as Yoo “began with the objective of justifying torture,” given that “[w]hoever was ultimately responsible for requesting the torture memo apparently had such an objective, and the lawyers, apparently, accepted that position as a morally acceptable starting point.”¹³ As such, Yoo’s “bad legal reasoning” was driven by “a bad moral conclusion.”¹⁴ But whether Yoo personally believed in the moral acceptability of torture, or whether he simply believed in the moral acceptability of deferring to the White House’s belief in the moral acceptability of torture, he could not erase the underlying moral dimension of his legal analysis, even if he did his best to avoid acknowledging it.

Still, the question remains: what would have happened if Yoo acknowledged the moral dimension of the legal question he faced? If Hatfield means to suggest that Yoo’s moral intuition, if operative, would have invariably led to the rejection of torture as immoral, Hatfield is taking us into fairly heady epistemological waters. After all, even in the wake of the recent disclosures about waterboarding, a majority of Americans believe that the use of harsh interrogation techniques against suspected terrorists is justified.¹⁵ Relying on the moral intuitions of lawyers may be no more reliable for getting to Hatfield’s preferred moral outcomes than relying on the moral intuitions of Americans in general. Simply unleashing the lawyer’s conscience from the constraints of professional deference may not solve the problem of the torture memo.

¹¹ *Id.* at 41 (emphasis added).

¹² Nat Hentoff, *Don’t Ask, Don’t Tell*, THE VILLAGE VOICE, Feb. 7, 2006, at 28 (“[Professor] Doug Cassel: ‘If the President deems that he’s got to torture somebody, including by crushing the testicles of the person’s child, there is no law that can stop him?’ Yoo: ‘No treaty.’ Cassel: ‘Also, no law by Congress . . . [?]’ Yoo: ‘I think it depends on why the [P]resident thinks he needs to do that.’ (quoting debate)) (link); Frontline: The Torture Question, <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html> (last visited Jun. 10, 2009) (“[I]t seems to me that if something is necessary for self-defense, it’s permissible to deviate from the principles of Geneva.” (quoting interview with John Yoo broadcast July 19, 2005)) (link); Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106 (“Historically, there were people so bad that they were not given protection of the laws. . . . If you were an illegal combatant, you didn’t deserve the protection of the laws of war.” (quoting phone interview with John Yoo)) (link).

¹³ Hatfield, *supra* note 1, at 3.

¹⁴ *Id.*

¹⁵ Jeffrey M. Jones, *Slim Majority Wants Bush-Era Interrogations Investigated*, GALLUP, Apr. 27, 2009, <http://www.gallup.com/poll/118006/Slim-Majority-Wants-Bush-Era-Interrogations-Investigated.aspx> (describing a Gallup poll conducted Apr. 24–25, 2009) (link).

II. THE GOOD OF MORAL DEFERENCE

Hatfield argues that lawyers are professionalized into accepting “the moral good of moral deference.”¹⁶ Pinning the blame on moral deference, though, creates the impression that lawyers carry around a fixed set of moral convictions and that their only moral responsibility in dealing with clients is to determine whether the client’s objectives align with those convictions. According to Hatfield, lawyers fail to fulfill even this singular obligation. They no longer formulate a set of moral convictions—they simply adopt (or defer to) the convictions of their clients. Thus, the same moral deference that leads the lawyer to help her client foreclose on the orphanage spawns the torture memo.

I agree that lawyers *should* think about their moral convictions. I have turned down a case on moral grounds, and I do not believe that lawyers should leave their consciences at the office door.¹⁷ But while I agree with Hatfield that a lawyer’s moral intuition is professionally relevant, we disagree about the implications of that relevance. Presuming that my moral views should always be in harmony with my client’s objectives (and that deference to my client’s objectives implies that I have compromised my moral beliefs) gives an overly simplistic view of the lawyer-client relationship, thereby obfuscating the deeper failures of lawyers’ professional formation. Moral deference is not the problem. The problem is moral disengagement, by which I mean the tendency of lawyers to disclaim any responsibility for the moral dimension of the representation. Lawyers insist on moral deference because they mistakenly believe that it is the only alternative to moral paternalism, and moral paternalism is exactly what critics will accuse Hatfield of embracing.

For example, Hatfield writes that we might avoid creating lawyers willing to “sign off on torture if legal education did not begin with disintegrating the skills for intellectual agility from the skills for moral resolution.”¹⁸ But we do not need lawyers to reach “moral resolution.” It is not the lawyer’s job to resolve the moral questions that clients face. To do so infringes on client autonomy, particularly if clients are not empowered to participate in the resolution. We do need lawyers, on the other hand, to ensure that clients are aware of the moral questions that are often embedded in the legal questions raised by the representation. Lawyers’ recurrent failure to raise moral questions infringes on client autonomy by precluding the client’s ability to fully consider what is at stake in the case. Our approach to professional formation—both during and after law school—almost totally ignores this “moral due diligence” dimension of the attorney-client relationship. Especially in cases where the governing law is indeterminate,

¹⁶ Hatfield, *supra* note 1, at 6.

¹⁷ See, e.g., Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J. L. & RELIGION 427 (2004).

¹⁸ Hatfield, *supra* note 1, at 11.

lawyers need to be able to engage their clients in a moral dialogue, which requires both familiarity with, and sensitivity to, moral reasoning. But lawyers' capabilities in this regard should not be deployed in order to resolve the moral questions; rather, they should be deployed in order to assist the client in resolving the moral questions. It is not only the lawyer's conscience, after all, that is at stake during the representation. Moral engagement brings the full stakes of the representation into relief.

III. THE GOOD OF MORAL ENGAGEMENT

If, as Hatfield argues, cultivated moral deference allows lawyers to let themselves off the hook, then I would add that cultivated moral disengagement allows lawyers to let their clients off the hook also. Lawyers can help bring their clients' consciences into play on a matter by bringing the moral dimension of the representation to the surface. Although this observation may strike non-lawyers as obvious, it unfortunately runs counter to some mainstream interpretations of the lawyer's role.

For example, Stephen Pepper has famously compared a lawyer's client to "someone who stands frustrated before a photocopier that won't copy," and who needs "a technician . . . to make it go."¹⁹ The technician is ordinarily not concerned with "whether the content of what is about to be copied is morally good or bad."²⁰ At one level, Pepper's analogy tells us something important about what it is lawyers do: lawyers provide citizens with access to a machine that they would not know how to work on their own. Hatfield's implicit suggestion (that lawyers should represent only those clients whose legal objectives align comfortably with their own moral claims) seems to switch the lawyer's role from expert facilitator to moral arbiter. Just as we do not want the photocopier technician telling us that he will only fix our machine if we promise not to use it to copy pornography or radical political literature, we do not want the lawyer to restrict his clients' legally available options based on the lawyer's own moral convictions.

The legal profession rightfully would be concerned about access to law if the lawyer's conscience were to operate as a trump card. But the polar opposite view—the one that sees lawyers as photocopier technicians—is equally problematic. The law does not function like a photocopier. When I copy something, I know exactly what I am putting in, and I know exactly what I get back, even if I do not understand everything that happens in between. By contrast, clients often will not recognize, much less understand, the inputs and outputs of the law "machine." In terms of "input," the machine does not simply apply black-letter law to the client's stated objective. Moral considerations—among other external norms—are part of the equation, whether they arise from the lawyer's own moral perspective, the law-

¹⁹ Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 624.

²⁰ *Id.*

yer's perception of the client's (often unstated) moral perspective, or the lawyer's application of the profession's moral perspective.²¹ Further, the "output" is not an exact reproduction of the input; pursuing the client's objectives may have consequences beyond the attainment of that objective. Those consequences—the collateral effects on the client's public standing or moral integrity, harms to the opposing party or third parties, damage to the reputations of the lawyer or her colleagues—may not be readily apparent to the client. It is not difficult to appreciate what one has wrought with the use of a copy machine; the same cannot be said for one's use of the law. The lawyer is not simply a technician, nor is she a moral arbiter. As legal advisors, lawyers are partners in a dialogue that brims with moral significance, whether or not they choose to acknowledge it.

The profession tends to view both the lawyer and the client as bearers of fixed sets of moral convictions. As Tom Shaffer puts it, the profession's assumption "is that the lawyer and client both operate in moral worlds but that their worlds are isolated from one another."²² The resulting inclination is to equate moral dialogue with a paternalistic power play by the overbearing lawyer. The profession would be better served by acknowledging that both the lawyer and client are moral agents, capable of meaningful moral reflection. Might the torture memos have looked different if the profession were to recognize that the "[l]awyer and client depend on one another and influence one another," and that this "moral interdependence is the basis of [their] conversation?"²³ By articulating the moral dimension of his analysis, Yoo could have cued the administration that his legal reasoning was a function, in part, of his (or his perception of the administration's) utilitarian moral premise, rather than a straightforward explication of settled law. At a minimum, Yoo would have forced the administration to face the content of the moral claims embodied in its policies.

IV. WHAT DOES MORAL ENGAGEMENT LOOK LIKE (AND NOT LOOK LIKE)?

Recognizing the moral dimension of the representation is one thing; facilitating a conversation about the moral dimension is another. This is where Hatfield's indictment rings (partially) true, for our professional formation desensitizes lawyers to questions of moral judgment primarily by ignoring those questions. Hatfield asserts that "lawyers are professionalized in a manner that undermines moral reasoning skills" because lawyers are taught "to lay aside our moral sense when facing complicated, high-

²¹ See Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225 (2006).

²² THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 133 (1981).

²³ Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 244 (1979).

stakes issues.”²⁴ Moral avoidance is not unique to lawyers, of course, and Hatfield walks through history to demonstrate that the human tendency to do something we believe may be wrong because someone else tells us it is okay is a “perennial evil.”²⁵ This tendency “seems to be a recurring temptation for everyone,” and one for which “there is no effective cure.”²⁶

But what if the problematic tendency is not, as Hatfield suggests, the lawyer’s willingness to follow the client’s orders? What if the problem is the lawyer’s failure to help the client reflect meaningfully on the moral premises and implications of those orders? The client’s tendency to equate legality with moral permissibility is made possible by the opacity and malleability of legal advice. Clients can avoid difficult moral questions by allowing lawyers’ legal advice to cloud, and occasionally block altogether, the moral inquiry at the heart of a legal matter. Using lawyers to finesse the stark moral reality of torture is not, after all, a technique that was invented by the Bush administration.²⁷ Lawyers can use their analytical tools to conceal the law as adeptly as they may use them to clarify its purposes. This is especially true when professional norms remove an entire category of considerations from the attorney-client conversation.

In this regard, moral engagement honors the client’s dignity by acknowledging her moral agency. Presuming that a client is unsuited for (or uninterested in) a moral dialogue regarding the representation treats the client as a caricature, as a set of legal objectives unconnected to a broader worldview or deeper set of values. If the lawyer and client engage each other as moral subjects, they act in recognition of the relational quality of human dignity. It is not about the lawyer working to bring the client into conformity with some free-floating moral principles, or, worse yet, into conformity with the lawyer’s own moral convictions. Morally engaged lawyering should assist the client in exploring her own moral accountability to others affected by the representation.

Philosopher Stephen Darwall identifies and emphasizes this special relationship as the “second personal” nature of moral obligation.²⁸ He believes that being “responsible for” certain conduct is tied to being

²⁴ Hatfield, *supra* note 1, at 4–5.

²⁵ *Id.* at 8.

²⁶ *Id.* at 9.

²⁷ Stephen Holmes notes that creating legal justifications for torture is part of a long history: even the ancient Romans “muffled” unease with the practice by drawing distinctions between those who could be subjected to torture and those who could not, in order “to prevent terrifying policies from hitting too close to home.” Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in *THE TORTURE DEBATE IN AMERICA* 118, 119 (Karen J. Greenberg ed., 2006) (quoting Edward Gibbon on Romans’ legal justifications of torture, which “applied this sanguinary mode of examination only to servile bodies, whose sufferings were seldom weighed by those haughty republicans in the scale of justice or humanity; but they would never consent to violate the sacred person of a citizen till they possessed the clearest evidence of his guilt”).

²⁸ STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 69 (2006).

“responsible to” another moral agent to whom the actor relates. Moral responsibility “concerns how, in light of what someone has done, she is to be related to, that is, regarded and addressed (including by herself) within the second-personal relationships we stand in as members of the moral community.”²⁹ Refusing to account for the client’s moral accountability diminishes the client’s standing as an agent within the moral community. Still, while moral engagement will enhance the client’s accountability for her decisions, the engagement should not be divisive or privilege the lawyer’s moral claims over the client’s. Neglecting the need for moral engagement compromises the lawyer’s commitment to the common good, and we should not presume that the client herself rejects such commitments.

Our acknowledgment of moral pluralism should not obscure the fact that lawyers and their clients often share a belief in certain fundamental moral values. The problem is that the lawyer’s silence allows the client to avoid seeing the relationship between those commonly held moral beliefs and the legally permissible options. As David Luban puts it, “cases of . . . intense moral disagreement are rarer than a different sort of case: one in which the moralistic lawyer and the client largely agree in their moral values but differ because the client simply doesn’t want scruples to get in the way of a favorable outcome.”³⁰ In the many cases “where the client’s decision results from cognitive distortion rather than a genuinely different moral code, moral acquiescence on the lawyer’s part will reinforce the distortion, while moral activism may break the spell and reveal that the moral codes of the lawyer and the client [are] not so different after all.”³¹ The lawyer’s moral claims should not drive the representation, but that does not mean that the profession should not care about the lawyer’s own moral development. The lawyer’s counseling function depends on her ability to understand the client’s moral reasoning.³² In the case of the torture memo, John Yoo compounded the failure of his skewed legal analysis by failing to force the White House to face the moral implications of “aggressive” interrogation practices. In combination, these failures took Yoo out of the roles of advocate or advisor and into the role of “absolver.” Luban explains:

Giving the client skewed advice because the client wants it is a different role than either advocate or advisor. One might call it the Lawyers As Absolver, or, less nicely, the Lawyer As Indulgence Seller. . . . The important thing to notice is that the role of Absolver, unlike the roles of Advocate and Advisor, is totally illegitimate. . . . In the cour-

²⁹ *Id.*

³⁰ David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1448 (2008) (link).

³¹ *Id.* at 1449.

³² See Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4, 11 (2008).

troom, the adversary is supposed to check the advocate's excesses. In the lawyer's office, [while] advising the client, the lawyer is supposed to check the client's excesses. . . . Conflating the two roles moves the lawyer out of the limited role-based immunity that advocates enjoy . . . into the world of indulgence seller.³³

The lawyer-as-absolver is not a deliberate or conscious creation of the legal profession or of the individual lawyer. But it is a role made possible by the profession's failure to take the moral dimension of legal advice seriously. Nothing prevents a lawyer from cultivating moral dialogues with her clients as she deems appropriate. But given the profession's longstanding cultivation of moral disengagement among lawyers, systematic attention to the problem is in order.³⁴

V. FORMING THE MORALLY ENGAGED LAWYER

The most obvious institutional venue for reversing—or at least mitigating—lawyers' inclination toward moral disengagement is law school. Joseph Singer notes that “the ability to make sophisticated arguments about justice and morality is a basic skill all lawyers need.”³⁵ And yet, in his classes at Harvard Law School, he finds it sorely lacking:

[W]hen I ask my students to make or defend arguments based on considerations of rights, fairness, justice, morality, or the fundamental values underlying a free and democratic society, they are mute. They get out the first sentence: “I have a right to use my property as I see fit” or “I have a right to be left alone.” But then they go silent; they do not have a second sentence—they do not know how to go on. Their silence is partly caused by their not knowing what to say; they cannot figure out what vocabulary to use or how to make the argument. But the underlying reason for this uncertainty is their fear that such arguments are merely matters of opinion that have no objective basis.³⁶

³³ David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE*, *supra* note 27, at 35, 70–71.

³⁴ See, e.g., William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 *CORNELL L. REV.* 1365, 1375 (2008) (urging the legal profession to move “toward the creation of institutional structures that encourage reflection, articulation, and transparency”) (link).

³⁵ Joseph William Singer, *Normative Methods for Lawyers* 5 (Harvard Law Sch. Pub. Law Research Paper No. 08-05, 2008), available at <http://ssrn.com/abstract=1093338> (link).

³⁶ *Id.* at 4.

More than thirty years ago, Roger Cramton identified one contributing cause of this phenomenon by noting the pervasive disregard of values in the law school classroom. He observed that the law school professor “typically avoids explicit discussion of values in order to avoid ‘preaching’ or ‘indoctrination.’”³⁷ Judging by last year’s report on legal education issued by the Carnegie Foundation for Advancement of Teaching, not much has changed in recent years.³⁸ After visiting law schools across the country, researchers concluded that “in the minds of many faculty, ethical and social values are subjective and indeterminate, and, for that reason, can potentially even conflict with the all-important values of the academy.”³⁹ In fact, the view that “it is indoctrination even to ask students to articulate their own normative positions was surprisingly prevalent” in law schools.⁴⁰

But the law school classroom as a morality-free zone is more likely to be confusing than clarifying. The report’s authors observe that when first-year law students express “confusions about moral and legal obligations,” course instructors frequently “tell them that their concerns about fairness or other moral issues are not relevant to legal analysis[,] and [they ask their students] to set aside those concerns.”⁴¹ Not only does this “provid[e] a distorted understanding of the nature of law itself,”⁴² but many students find their professors’ reactions to be “bewildering rather than clarifying.”⁴³ Instead, the report’s authors suggest that the instructor could:

[Introduce] a careful discussion of the distinction and relationship between the moral and the legal, illustrate[] something of the breadth of law’s concerns, [and thus] deepen students’ understanding of the law [on] both the particular legal issues in the case under consideration and the law as a social institution.⁴⁴

Our current practice of professional formation—both in and beyond law school—inculcates powerful moral values that emanate from the adversarial system but also, by omitting other moral questions, sends a strong message that they are of marginal importance to the lawyer’s work.⁴⁵ The

³⁷ Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 256 (1978).

³⁸ WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 132–144 (2007).

³⁹ *Id.* at 133.

⁴⁰ *Id.* at 136.

⁴¹ *Id.* at 144.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 142. As a student at a highly selective private law school told the Carnegie researchers, “Law schools create people who are smart without a purpose.” *Id.*

prospect of raising moral considerations with the client tends to be dismissed as subversive of the systemic moral values (client autonomy, access to the law) that are inculcated. Current professional education's pervasive inattention to the moral dimension of legal advice calls into question lawyers' competence to raise such considerations in a way that expands the client's understanding.⁴⁶

Recognizing the institutional complicity in the cultivation of morally disengaged lawyers helps to frame a response that is more specific and hopeful than Hatfield's call to pay greater attention to our moral squeamishness. Moral engagement between lawyer and client is not captured in any single question, much less a question as cut-and-dried as, "Does this client want to do something that I personally would not do?" Moral engagement requires, at base, a willingness and capacity to talk about the moral claims embedded in both the client's objectives and the lawyer's advice, as well as the case's implications for the common good and the client's (and, as appropriate, the lawyer's) moral integrity. Figuring out how to facilitate both the lawyer's willingness and capacity entails recalling the answer to the timeless question: "How do I get to Carnegie Hall?" Practice, practice, practice.⁴⁷

Giving law students the opportunity to practice moral engagement within the role of lawyer is not hard to do. I teach a first-year required course designed to introduce students to essential components of moral analysis from a variety of religious and philosophical perspectives, and to help them trace how those components relate to our understanding of law. We begin with *Buck v. Bell*, the 1927 case in which the Supreme Court upheld a state statute permitting involuntary sterilization of institutionalized persons and Oliver Wendell Holmes infamously asserted that "three generations of imbeciles are enough."⁴⁸ Virtually every student recoils from the Court's reasoning, but they cannot readily articulate their "squeamishness." To ensure that the students have substantive concepts to buttress their intuition, we read excerpts on human dignity from Pope John Paul II, the Talmud, John Stuart Mill, Immanuel Kant, the United Nations, Peter Singer, and Friedrich Nietzsche. The hope is that students will be able to express their moral intuitions in language that is accessible to others. The class follows a similar format for concepts such as economic justice, the social order, the role of the state, and truth and pluralism. We also spend time in the class exploring the relevance of these more general moral considerations to

⁴⁶ It should not be surprising that military lawyers did object to torture, and that they are trained to provide moral analysis, not just legal analysis. See Hatfield, *supra* note 1, at 8 n.31 (citing Burt Neuborne et al., Panel Discussion, *Torture: The Road to Abu Ghraib and Beyond*, in THE TORTURE DEBATE, *supra* note 27, at 13, 27 (quoting Michael (Dan) Mori)).

⁴⁷ See also, e.g., ARISTOTLE, THE NICOMACHEAN ETHICS, book II, ch. 4, at 40 (Terrence Irwin trans., 1985) ("Virtue requires habituation, and therefore requires practice, not just theory." (translator's summary)).

⁴⁸ 274 U.S. 200, 207 (1927) (link).

the specific dialogue between attorney and client. We use case studies like Enron to talk about the relationship between rights and responsibilities, and how that relationship should shape the lawyer's role. Small-group exercises, role-playing, and reflective essays give students an opportunity to use their moral intuition as a starting point for conversation, not as a self-contained "black box" that simply dictates what they can and cannot do as lawyers.

VI. WHAT IS OUR AIM?

Professionalizing moral engagement is not aimed at producing lawyers who are skilled at persuading clients to conform to the lawyer's own moral worldview; the objective is to produce lawyers who are capable of raising the moral considerations embedded in a representation in a way that can actually enhance client autonomy. Most lawyers are not advising the White House about torture, but moral considerations may implicitly shape the advice they give in a variety of routine scenarios. When a lawyer has to advise whether a home seller must return a down payment to a purchaser who cannot proceed with the transaction because he was laid off, or advise a company whether to close a plant in a small town that is economically dependent on the company for jobs, or draft a will for a client who is estranged from her children, or engage in plea bargain negotiations, or help navigate a custody dispute, or interpret a litigation opponent's request for sensitive documents, there is an opportunity for moral engagement.

To be clear, these considerations are not *created* by the morally engaged attorney; they are simply *acknowledged* by the morally engaged attorney. In cases where the law is indeterminate, lawyers may allow, consciously or not, the moral convictions they hold to shape the advice they give. Even in cases where the law is clear, the inaccessibility of legal knowledge permits lawyers to cloud the legal/moral distinction without detection by their clients, leaving the client vulnerable to the lawyer's moral convictions. One way to counter this threat of moral paternalism is to encourage lawyers to bring the moral dimension of legal matters into the open, unpacking relevant moral considerations for the client's own decisionmaking. John Yoo failed to do that. His failure should not, however, be read as an indictment of lawyers' moral deference. Hatfield is correct that moral deference is ubiquitous among today's lawyers, but he is wrong to identify deference as an affliction; it is an important part of a client-centered profession. Moral engagement also plays an important role in a client-centered profession, particularly one that has such wide-ranging moral implications for the client, the lawyer, and the common good. Unfortunately, the morally engaged lawyer is far too rare. Professionalizing moral engagement may not put an end to the sort of base moral reasoning that drove John Yoo's analysis of torture, but it will make it harder to hide that moral reasoning under the cover of law.