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Professionalizing Moral Deference

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PROFESSIONALIZING MORAL DEFERENCE

*Michael Hatfield**

I. THE TORTURE MEMO

As I write this Essay, legal memoranda about torture, once again, are headline news.¹ This Essay considers these memoranda. However, this Essay does not address the legality of torture or the legal limits of interrogation or even if lawyers who provide bad advice on these issues should be punished.² Instead, this Essay uses what has come to light about the “torture memoranda” to consider broader issues about the contemporary state of becoming and being an American lawyer. With new memoranda being released, for the sake of convenience, this Essay refers only to the best-known example (at least as things currently stand), which is the August 1, 2002 memo to Alberto Gonzales signed by Jay Bybee and prepared by John Yoo.³ Without substantive consideration of counterarguments, that memorandum concluded that torture was not illegal—at least not if the President ordered the torture.⁴ To many, it seems undeniable that the memorandum

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¹ See Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, NYTIMES.COM, Apr. 16, 2009, <http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=print> (link).

² Cf., e.g., Peter Finn, *Holder Urged to Probe Allegations of Torture*, WASHINGTONPOST.COM, Mar. 18, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/17/AR2009031702639.html> (chronicling the ACLU’s efforts to convince the Attorney General to launch a criminal investigation into the conduct of the Bush administration) (link).

³ Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter the Torture Memo], available at <http://fll.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> (link). See Paul M. Barrett, *A Young Lawyer Helps Chart Shift in Foreign Policy*, WALL ST. J., Sept. 12, 2005, at A1.

⁴ The Torture Memo, *supra* note 3, at 1–2, 33–39, 46.

was not written in a good-faith effort to constrain any possibly illegal behavior, but rather as a shield against future prosecution.⁵

II. THE QUESTION

The overwhelming consensus of the American bar is that torture, even when called “enhanced interrogation,” is not permissible.⁶ I do not write to question or defend this conclusion. I begin with it. I write for those who accept that conclusion, and I write to ask: how do otherwise competent lawyers persuade themselves that torture is permissible? How could otherwise good lawyers get such a serious issue so wrong?

The question has no readily apparent answers. We ought not to answer that Jay Bybee, John Yoo, or others were merely political hacks.⁷ That is not an explanation. Rather, it would only push the question into a slightly different format. We ought not to answer that they were otherwise immoral men. No one has alleged that to be the case. Nor can we answer that they were poorly trained, under-educated, or generally incompetent—they had risen, after all, to the position of legal advisers to the President of the United States.⁸ There is no reason of which I know to characterize these lawyers as anomalously defective.

⁵ According to *Origins of Aggressive Interrogation Techniques*, these memoranda were intended to “create a shield to make it difficult or impossible to hold anyone accountable for” torture. *The Origins of Aggressive Interrogation Techniques: Part I of the Committee’s Inquiry into the Treatment of Detainees in U.S. Custody: Hearings Before the S. Comm. on Armed Services*, 110th Cong. 9 (2008) [hereinafter *The Origins of Aggressive Interrogation Techniques Hearings*] (link); Richard Neuborne et al., *Torture: The Road to Abu Ghraib and Beyond*, in *THE TORTURE DEBATE IN AMERICA* 31 (Karen J. Greenberg ed., 2006) (quoting Stephen Gillers). Richard B. Bilder and Detlev F. Vagts note that Donald Rumsfeld invoked the “advice of counsel” defense in a televised interview. See Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, in *THE TORTURE DEBATE IN AMERICA*, *supra*, at 151, 160 n.32.

⁶ See, e.g., W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 *CORNELL L. REV.* 67 (2005) (providing a detailed criticism of the infamous Torture Memo) (link). Calling the Torture Memo a legal analysis of which no one “could be proud,” *id.* at 68, Wendel cites several sources identifying ethical lapses and even blatant incompetence in the preparation of the memo: “[I]n my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read.” *Id.* at 68 n.2 (quoting *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of Harold Hongju Koh). See also Gail H. Miller, *Defining Torture*, 3 *FLOERSHEIMER CENTER OCCASIONAL PAPERS SERIES* (2005), available at <http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf> (explaining the technical definition of torture under international and U.S. law) (link); Robert K. Goldman, *Trivializing Torture: The Office Of Legal Counsel’s 2002 Opinion Letter And International Law Against Torture*, 12 *NO. 1 HUM. RTS. BRIEF* 1 (2004) (discussing the legal prohibitions of torture beyond those contained in international treaties) (link).

⁷ See, e.g., Scott Horton, *Yoo Two*, *HARPERS.ORG*, Apr. 3, 2008, <http://www.harpers.org/archive/2008/04/hbc-90002785> (link).

⁸ As a legal matter, the purpose of an Office of Legal Counsel memo is to advise the President as to the state of the law and to serve as a legal interpretation binding on the executive branch of the federal

If these were not anomalously defective lawyers, the question becomes harder to answer: how could well-trained, competent, otherwise moral lawyers conclude that torture is permissible? It is the same type of question that would arise if well-trained, competent, otherwise moral lawyers concluded that slavery is permissible so long as it is termed “permanent employment.” If we cannot trust the arguments of well-trained, competent, otherwise moral lawyers on the torture issue, I believe we ought to consider not merely the individual lawyers involved, but also the process of becoming and being a lawyer.

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, apparently, 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.⁹

That characterization raises a reasonable and appealing response. If the problem is that a bad moral conclusion drove bad legal reasoning, then perhaps the solution is to tell lawyers to put moral reasoning aside and focus on legal reasoning.¹⁰ Perhaps the problem is simply that the Torture Memo was “crummy legal advice” motivated by the personal morality of the lawyers.¹¹ If so, the solution is to insist that the morality of the greater good requires that a lawyer’s personal moral convictions be laid aside so that the lawyer can focus on the craft of lawyering.¹²

To interpret the problem with the Torture Memo as one of craftsmanship makes the issue into a matter of sufficient memo length and citations. The solution for failing to cite contrary authorities is to cite them, and then to argue their inapplicability. Ignoring an authority is poor craftsmanship; citing and distinguishing that authority is good craftsmanship. 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. Perhaps some mad genius lawyer counterpart to the mad genius scientist could,

government. See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305 (2000) (link).

⁹ A separate issue is whether their moral conclusions were formed prior to their engagement in the memorandum production or as a result of that engagement. See David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 279–83 (2003) (link).

¹⁰ W. Bradley Wendel, *W.F. Wickmire Memorial Lecture: Executive Branch Lawyers in a Time of Terror*, DALHOUSIE L.J. (forthcoming) (manuscript at 23, on file with SSRN.com, last revised Apr. 4, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372744 (link).

¹¹ *Id.* (manuscript at 14).

¹² *Id.* (manuscript at 5–6, 13).

in fact, tightly argue to the pro-torture legal conclusions.¹³ But is the problem really that these lawyers were insufficiently genius? That their memos simply were too hasty, too short, and too shoddy?

Such a formulation conceives of the practice of law as one of technical rather than strategic advice. But lawyers reason strategically.¹⁴ Lawyers are not paid to answer “yes” or “no.” The lawyerly response is always, “This is how we get there,”—or, at least, as *near to there* as we can get *from here*—with the definition of “there” determined by the client’s situation, of course.

Diagnosing the problem as one of craft distracts us from a more troubling question. Lawyers fail to meet professional performance standards on a daily basis. It is, I suppose, the common cold of our profession. And it is an ethical issue. But it is not headline news.

On the other hand, that highly trained officers of the American judicial system—a system with a legitimate claim of belonging among the most just in the world, and moreover the judicial system of the most powerful nation in the world—would accept that torturing those held in American custody is a morally acceptable objective for a legal memorandum Now *that* is headline news. What went wrong with these lawyers? Everyone agrees the Torture Memo is shoddy. But why were these lawyers willing to write it?

III. ANSWERING THE QUESTION

Why would well-trained, competent, otherwise moral lawyers accept that torture is a morally acceptable objective for a legal memorandum, and then prepare and sign such a shoddy memorandum to accomplish that objective? I suggest that the answer to this question is that lawyers are professionalized in a manner that undermines moral reasoning skills. To suggest that we who are officers of the American judicial system are deficient in moral reasoning is to suggest a deep problem. I do not do so casually.

I can cite no empirical study, but I can generalize from my personal experience as a law student, lawyer, law professor, and friend and colleague of many other law students, lawyers, and law professors. Beginning in law school, we learn to lay aside our moral sense when facing complicated,

¹³ See *id.* (manuscript at 25). If the only rightful means of criticizing these lawyers is “digging into the law” on torture, *id.*, we must concede before we “dig” that we may be surprised by what our digging unearths. Surely the pro-torture lawyers conceive the problem this way, insisting that enough open-minded and skillful consideration of the law would swing the consensus of the bar behind their conclusions. If we were to dig in good faith, should we not assume that the consensus of the bar might be changed? I label the lawyer who could swing the consensus to be “the mad genius lawyer.”

¹⁴ Strategic reasoning does not involve rejecting the notion that there are genuine obligations of lawfulness, or insisting that some arguments are technically implausible. See *id.* (manuscript at 15, 25). I simply do not think that clients ask, “What are my rights and duties?” See *id.* (manuscript at 14). Instead, I think they ask, “What are my options?” And I do not think lawyers ever answer, “You are legally permitted to do such-and-such,” *id.* (manuscript at 16), but rather, “The first option is such-and-such, but that requires this-and-that. Let me explain how the second option differs.”

high-stakes issues. We are taught to accept a division between lawyers' morality and clients' morality, and the primary principle of zealous advocacy, as if these were part of the natural order.¹⁵ As lawyers, we spend our days reasoning backwards from the conclusion we ultimately want to reach for our clients, rather than forwards from principles we discover by "digging" into the law. Sometimes we have to adjust how close to the conclusion we can come, but we start with a clear objective of, at least approximately, where we must arrive. The objective, of course, reflects the client's goals and situations. I think that is a noncontroversial description of what lawyers do every day. This Essay explores my reflections on how lawyers come to engage in this type of strategic reasoning, my concerns about its cost to our moral reasoning skills, and my limited hope for how we may be able to recover.

A. *Professionalizing Moral Deference*

The act of being professionalized as a lawyer begins with moral desensitization. We were taught to override our moral intuition in our first year of law school.¹⁶ We were taught to ignore our intuition that a debt is morally owed, and were taught instead to debate only the price of refusing to pay. We were taught to ignore that a passerby is morally obligated to prevent a man from drowning, and instead to debate only the risks of a tort suit if the passerby watches the drowning man die.

How would first-year law students learn to think about debts if, alongside the statute of limitations, they learned that the first systematic legal ethicist concluded it unethical to plead the statute for a client who is "conscientious he owes the debt?"¹⁷ I am not suggesting that moral analysis be substituted for legal analysis. Nor am I suggesting that legal duties *ought* to track moral duties exactly.¹⁸ I am suggesting only that when a difference between the two exists, law students could learn to focus on whether or not the difference is justifiable, and whether or not they, as individual lawyers, would choose the passerby as a client. Whether there is a duty under tort law to rescue a drowning man does not answer whether I want to be hired so that I can defend someone's right to watch a man die. Day-in, day-out during law school, fact situations raising obvious moral issues are re-characterized as having none.

¹⁵ I do not doubt there may be a substantial difference between what our law students are learning and what our professional ethicists are intending to teach about zealous advocacy, for example. I am considering what it is I believe law students and lawyers think they hear when ethicists speak, rather than what ethicists actually say.

¹⁶ Others, of course, have also noted that law schools do not teach students to think through the moral consequences of their actions, only to obsess about "precedent" without any understanding of the moral choices lawyers make. See Neuborne et al., *supra* note 5.

¹⁷ See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 175–176 (5th ed. 2008).

¹⁸ Wendel, *supra* note 10 (manuscript at 15).

The moral issues are easily swept away by the claim that the lawyer is not the moral endorser of his or her client's objectives.¹⁹ If the client has the legal right to foreclose on the orphanage, the lawyer is not personally responsible for helping the client foreclose, even if the lawyer is morally opposed to it. From the beginning, we are taught that we may suspend our personal moral identity while we wholeheartedly invest the remainder of ourselves in advocating clients' objectives.²⁰ What if, instead of idealizing the image of a lawyer who is not the moral endorser of her client's objectives, we idealized for students the image of a lawyer working toward objectives she does morally endorse?

From the beginning of law school, a lawyer is idealized as a zealous advocate for her client's objective. This biased zealotry is justified by an appeal to the adversarial American legal system.²¹ Each side has a lawyer, and each lawyer is devoted to one side. The professional role is to further the client's objective, even if, personally, the lawyer opposes it. The young lawyer learns to defer to the client's moral conclusions about the objective. But the young lawyer also learns to defer to the legal system's conclusions that this is what lawyers should do. We are told to suspend our personal moral instincts and to have faith that the legal system accomplishes a greater moral good by our accepting a truncated personal moral role than it could accomplish if we accepted full personal moral responsibility for what we help our clients do. We are professionalized into believing that we are at no personal moral risk so long as we do a professional job (for which we will be well paid). We are told to accept the moral good of moral deference—both to our clients and to the system. We are professionalized to believe that moral deference is simply what lawyers do, as if it were a self-evident, natural principle that pardoned our moral misgivings.

Lawyers begin learning moral deference in law school, and then that deference is internalized through the routine practice of law.²² Through 2,400 hours a year on the job, lawyers internalize that there is “a special[,] professional morality” that has nothing to do with the morality of nonprofessional lives.²³ Lawyers transition “from one form of [moral] life to the

¹⁹ The American Bar Association's *Model Rules of Professional Conduct* state that “[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.” ABA CTR. FOR PROF'L RESPONSIBILITY, MODEL RULES OF PROF'L CONDUCT § 1.2(b) (2002) ([link](#)). An example is a lawyer who opposes smoking but lobbies for a tobacco company.

²⁰ I believe this answers Burt Neuborne's question, “Is there something that we are doing in American law schools that is allowing the best and the brightest . . . to drift into a situation where they think that all they have to do is find an argument that will justify their client's goal . . . ?” Neuborne et al., *supra* note 5, at 14. This understanding of the profession is termed “neutral partisanship.” DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 9 (2007).

²¹ See LUBAN, *supra* note 20, at 9.

²² See Luban, *supra* note 9, at 301.

²³ *Id.*

other, with no sense of tension or contradiction.”²⁴ How could such fluidity not become a “fixed part” of a lawyer’s “moral personality”?²⁵ Deference to others’ moral conclusions becomes not only intellectually justified, but personally comfortable and natural. And, as a matter of moral psychology, the more lawyers defer to clients, the more “rightness” they begin to see in the client’s objectives.²⁶ This self-deluding process is part of how lawyers earn their pay, and it seems to me inescapable that such a process undermines the capacity for moral reflection.

B. *Moral Deference and the Pro-Torture Argument*

I believe lawyers come to regard moral deference as natural. I believe this comes from the process of becoming and being a lawyer. I believe it undermines lawyers’ moral reasoning, in large part because moral and legal reasoning are so similar. Both moral and legal reasoning involve considering competing values in high-stakes matters. Lawyers do this daily. Lawyers get comfortable doing it. But lawyers do it strategically. Their professional skill lies in cutting through the complicated issues on high-stakes subjects in order to advance the client’s objective, not reflectively discerning the moral rightness or wrongness of the objective pursued. But honest moral reasoning is never strategic.

I speculate that a strategic, lawyerly mentality made Jay Bybee and John Yoo more, rather than less, susceptible to the argument that torture is morally permissible. The high-quality training they had received, and the high-quality experience they had gained, was in moral deference—deferring to others to decide what the project is, and then thinking strategically about how to implement it. This type of moral deference is not only inherent in contemporary lawyering, it is essential to the pro-torture argument.

Deference is essential to the pro-torture argument in several ways.²⁷ It is essential to defer to intelligence experts who assure you that torture yields good information. It is essential to defer to the good faith and skills of the torturers to torture effectively rather than sadistically. It is essential to defer to the detention apparatus so that only those most likely to have valuable information are detained and tortured. In other words, in order to justify torture, you must defer to the moral clarity and practical abilities of everyone involved in the torture institution. Your personal, moral squeamishness must give way to these experts who know the “real truth.” They are the only ones who can really say what works, what does not, what is tru-

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at 281–83, 301–04.

²⁷ In particular, I have in mind the deference required to accept the “ticking time bomb” rationale. *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1426 (2005); *see also* Stephanie Athey, *The Terrorist We Torture: The Tale of Abdul Hakim Murad*, in *ON TORTURE* 87 (Thomas C. Hilde ed., 2008) (providing a critical history of the recent usage of this narrative).

ly right, and what is truly wrong. Your only moral job is to support them. It is your moral job to be adult enough, sober enough, serious enough, and strong enough to defer to their moral clarity and authority.²⁸

C. Moral Deference and Lawyering

The pro-torture argument demands substantial moral deference, and the mainstream of the American bar assumes moral deference is justifiable. Are we really surprised, then, that lawyers whose “client” had concluded that torture was a morally justified objective were willing to pursue the objective (and that, eventually, even if not initially, most likely came to share the moral conclusion behind the objective)?²⁹ I believe lawyers are inclined to set aside initial moral squeamishness and get comfortable cutting through competing values on high-stakes subjects—once told which way to cut. Without deference, lawyers do not know in which direction to argue.

Deferential reasoning is an intentional diffusion of moral responsibility.³⁰ I believe it fits our natural inclination, which, despite what we may tell ourselves, is to follow rather than lead.³¹ We want to believe that someone else knows better. We want to believe that we need not take the risk of following our own conscience, or even the trouble of discerning its voice. As lawyers, we are told to defer to the client, to the system, and to accept the role as the most helpful (and among the best paid) followers of all.³²

But I believe this inclination to surrender personal conscientiousness in deference to another’s moral conclusions is a perennial evil. Moral deference opens the Bible as the first sin. It is behind all state-sanctioned uses of violence. It promotes lynch mobs. It enabled Nazi atrocities. It was evident in the subjects of Stanley Milgrim’s study, who administered electric “shocks” to screaming patients because they were told to do so by the instructor.³³ Milgrim’s subjects chose to administer “shocks,” over their

²⁸ See Darius Rejali, *Torture Makes the Man*, in ON TORTURE, *supra* note 27, at 165–83 (discussing the “manliness” of torture). We have “the worry that we have become sissies and our enemies know it.” *Id.* at 180.

²⁹ See Luban, *supra* note 9, at 281–83, 301–04.

³⁰ The intentionality of the lawyer’s deference distinguishes it from the more commonly understood “diffusion of responsibility.” It is a “well-known fact,” for example, “that groups of people are often less likely to respond helpfully in emergency situations than are individuals.” Luban, *supra* note 9, at 283. In the lawyer-client situation, however, the diffusion is not a result of a dysfunctional group dynamic but an intentional choice.

³¹ By contrast, it is notable that the military lawyers who did, by and large, consistently object to torture are trained to provide moral analysis as well as legal analysis. Neuborne et al., *supra* note 5, at 27 (quoting Michael (Dan) Mori).

³² My conclusion reflects the observation by Tzvetan Todorov that, “in any human collectivity, there is a convinced, resolute minority who act, and a passive, indecisive majority who prefer to follow, and that the minority almost always prevails.” Tzvetan Todorov, *Torture in the Algerian War*, in ON TORTURE, *supra* note 27, at 23 (Arthur Denner trans.).

³³ See LUBAN, *supra* note 20, at 239–66 (analyzing Stanley Milgrim’s famous experiments in the context of professional legal ethics).

own moral hesitation, out of trust that the guy in the lab coat and the system that placed the guy in the lab coat in charge had greater moral clarity in the situation than they did. *This* is moral deference.

The lawyer defers to the client's conclusions about the morality of the objective. The lawyer defers to the legal system's conclusion that the client, rather than the lawyer, is morally responsible for the objective. This moral passivity, moral silence, moral deference, is what we associate with lynch mobs, Nazis, those who shock patients because they are told to, and those who conclude torture is permissible because experts tell them it should be. And, I fear, most lawyers have accepted moral deference as justified, as if it were essential to being a good lawyer, and without considering how it affects the capacity to be a good person.

Moral deference is a problem deeper than legal ethics. It seems to be a recurring temptation for everyone, and, best as I can tell, there is no effective cure. Neither intellectualism nor rational enlightenment seems sufficient—at least not sufficient to remove genocide and torture from human experience. The German intellectual heritage did not prevent Nazism, and enlightened French culture did not prevent the French from torturing Algerians.³⁴ The Germans were well-educated and well-cultured, as were the French. So were Jay Bybee and John Yoo. It did not protect their victims.

D. *Darkness and Light*

But there is good reason not to despair. While most of Stanley Milgram's subjects "shocked" screaming patients because they were told to do so, a great many of them did not.³⁵ While most German lawyers who were asked wrote tidy legal opinions to support their Nazi clients' objectives, some did not.³⁶ While some U.S. government lawyers claimed torture was legal, some did not.³⁷ There are always beacons of light, and this provides good reason not to despair.³⁸

³⁴ Not even the memory of having been tortured is sufficient. See Todorov, *supra* note 32, at 18–26 (discussing—and dismissing—the potentially “favorable” and “unfavorable” factors influencing an individual's likelihood of becoming a torturer).

³⁵ See LUBAN, *supra* note 20, at 240–41 (emphasizing that about one-third of the subjects refused to continue administering shocks).

³⁶ In contrast to the more political lawyers, some German lawyers, mostly in the *Abwehr* (the Third Reich's military intelligence agency), consistently argued for the application of the Geneva and Hague conventions to those captured by the German army during World War II. See Scott Horton, *Through a Mirror Darkly: Applying the Geneva Conventions to “A New Kind of Warfare,”* in THE TORTURE DEBATE IN AMERICA, *supra* note 5, at 136. Most of these lawyers ultimately became victims of the Gestapo. *Id.*

³⁷ See discussion *infra* note 39 and accompanying text.

³⁸ While it is encouraging to remember these beacons, I cannot believe the solution is simply to figure out how to “systematically produce more beacons” among American lawyers. See Todorov, *supra* note 32, at 18–26. I do not believe that we can realistically hope to socially engineer lawyers to be willing to be shot by Nazis, rather than simply to sign the legal memoranda the Nazis request.

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The U.S. government lawyers who, by and large, consistently objected to torture were the Judge Advocate General (“JAG”) lawyers. It was the JAG lawyers, rather than the civilian lawyers, who dissented from the pro-torture objective.³⁹ The dissenting role of these lawyers in the torture debate has been well documented by the Senate Armed Services Committee.⁴⁰

What drove the JAG lawyers to dissent? In the simplest terms, I believe it was their fear—a fear of the consequences of violating the categorical imperative, the golden rule. It was a fear in their guts, not in their heads. They feared that Americans torturing those in their custodial care would ultimately result in Americans being tortured. And this fear was not abstract. It was a deep realization that powerless men, men with children, wives, and memories of sunshine and ease would be maimed and mutilated. It was a fear that they could be among the victims. It was the fear that they could pay dearly for endorsing torture—if not themselves personally, then those with whom they personally identified: fellow soldiers. I believe it was this empathetic identification that differentiated those who dissented from those who did not. It was the fear of suffering the consequences of their own decisions.

Perhaps the right kind of fear is essential to moral resolve. Perhaps deeply fearing that we will become the victims of our own moral decisions imparts moral clarity. Those who support state violence always believe they will be protected by the state rather than subjected to its violence.⁴¹ Those who support torture believe they will be protected by the torture they support; they do not believe they will ever be subjected to it.⁴² The deep fear that our own moral decisions will damn us cannot be lost. To put it in old and unambiguous language: the deep worry that we will go to hell if we take the wrong turn keeps us on the straight path. The JAG lawyers, it seems, could more easily imagine what that hell would look like and how it is they would get there.⁴³ I suggest that their imaginations allowed them to connect the risks of their reasoning with the reality of human pain in a way that made them realize the moral risk was their own and not someone else’s. There was no room for deference. The risk could be neither delegated nor avoided. It was inescapably personal. It was the risk of hell.

³⁹ Neuborne et al., *supra* note 5, at 16–17.

⁴⁰ See *The Origins of Aggressive Interrogation Techniques Hearings*, *supra* note 5; 151 CONG. REC. S878972–S88013 (daily ed. July 25, 2005) (documenting many of the lawyers’ activities).

⁴¹ See Athey, *supra* note 27, at 98.

⁴² See *id.* Perhaps torture supporters blame the victim; that is, perhaps they believe there is something about the victim that makes torturing him at least somewhat justifiable. Often such a belief is based on some distinction the torturer creates between himself and the victim. Cf. Luban, *supra* note 9, at 291.

⁴³ Cf. Pilar Calveiro, *Torture’s New Methods and Meanings*, in *ON TORTURE*, *supra* note 27, at 124 (William Nichols & Thomas C. Hilde trans.). These lawyers did not have an obscured awareness of the implications for “one’s other, one’s equal, and oneself”; for them it was not a “game.” *Id.*

IV. IMPLICATIONS

I fear that, as lawyers, we have been convinced that we do not risk hell when we implement our client's objectives.⁴⁴ If we cannot resurrect a fear of hell among ourselves, then at the very least we should stop telling ourselves that overcoming personal moral squeamishness is the great call of the law. We should stop the professional program of suffocating the light that flickers in personal consciences. If I would not foreclose on a particular orphanage, I should not be encouraged to help someone 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. The orphanage may still be foreclosed upon, or the man drowned, but not with my help. Some other lawyer may help, but not at a cost to my conscience.

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. But it is. It is inconsistent with the self-understanding of the contemporary bar. One long-term project needs to be pulling away the comfortable insulation lawyers feel in deferring to the bar's self-serving assurance of what is moral.⁴⁵ To extend the religious imagery, I submit that God has delegated nothing to the American Bar Association. What is morally required of each us is not a bar committee's decision. Lawyers, as individuals, need to struggle with the discomfort caused by a *dis*-integrated moral personality, and with the numerous moral anomalies routinely defended in the name of a well-paying professionalism. Each of us must choose what kind of person to be. That choice ought to determine our professional choices. 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.

I speculate that many fewer lawyers would sign off on torture if legal education did not begin with dis-integrating the skills for intellectual agility from the skills for moral resolution. How different the bar would be if law schools convinced young lawyers that what they implement for clients *does* reflect their personal morality. How different the bar would be if lawyers spent 2,400 hours a year working from the conviction that they are personally responsible rather than from the conviction that they are not. But, as it stands, we do not train moral leaders in our law schools; we train facilitators. We do not expect lawyers to say "no;" we expect lawyers to figure out "how." I cannot pretend to be shocked by the results.

⁴⁴ Perhaps clients are taking their cues as to the morality of their actions from their lawyers' silence, while the lawyers are taking their cues from the clients. Luban describes this process as "pluralistic ignorance," in which the lawyers and the clients reinforce one another's wrong beliefs. Luban, *supra* note 9, at 284 (emphasis omitted).

⁴⁵ See generally LUBAN, *supra* note 20 (analyzing the implications of professional ethics for human dignity and the rule of law).