Moral Engagement Without the "Moral Law": A Post-*Canons* View of Attorneys' Moral Accountability

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Several years ago in my Professional Responsibility class, I wanted to see how far I could push my students in their embrace of the notion that the moral evaluation of conduct depends on the professional role one occupies. I asked students to imagine that they were medical researchers in Nazi Germany, and that the authorities brought them to a concentration camp, inviting them to experiment on live human subjects. Would they, as scientists, proceed with the experiments? The first three students I called on answered that they would do the experiments if it would advance the research. One explained that morality is constructed by society, and in that particular society, the experiments would not be considered immoral. Another asked, "If those inmates are going to die anyway, why not have them contribute to the greater good?" The third insisted that the job of the researcher is to expand scientific knowledge, and the job of the government is to define the limits of that research. Absent government prohibition, the researcher has no moral reason not to proceed.

These students, I am confident, did not believe what they were saying. They were engaging my question according to the rules of good lawyering, as they perceived them—figuring out a way around any and all obstacles standing between the actor and a given course of conduct. Indeed, much of the blame for their answers belongs with the messages they receive about the values of the legal profession. Much of the law school experience sends the message, subtly but unmistakably, that cleverness is valued over wisdom, and that the law is simply a problem to be solved, rather than an inescapably moral endeavor.

More pointedly, the third student's answer was an extreme example of the common conception that professional identity is premised on the actor's capacity to stay within his or designated role, and to treat as irrelevant any moral considerations that distract from the role's primary objective. The primary objective, when it comes to lawyers, is to attain the client's stated objectives to the extent permitted by law. The dominant view holds that lawyers are not morally accountable for these objectives,[1] which presumes that lawyers are able and willing to disconnect

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1. MODEL RULES OF PROF'L COND. R. 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."),

their own moral convictions from their evaluation of the causes and clients they are asked to represent.

In comparison to the era when the American Bar Association, via the 1908 *Canons of Professional Ethics*, could confidently instruct lawyers to "impress upon the client and his undertaking exact compliance with the strictest principles of moral law,"[2] today we are more skeptical about the existence of any "moral law," much less that it could or should be impressed upon the client. Recognizing the variability of moral convictions and complexity of moral analysis has understandably made lawyers reluctant to judge their clients by moral standards not reflected in positive law. But this reluctance to judge seems also to have brought a reluctance to engage the client on moral terms. The resulting technocratic view of law is evidenced far beyond the walls of my classroom. A refusal to acknowledge the moral dimension of legal practice has contributed to several of the leading lawyer-fueled scandals of recent years, as well as to the broader malaise that has afflicted the profession for some time.[3] Nevertheless, the prospect of putting morality onto the table of legal representation is unsettling to many. This essay looks to reframe our conception of morality's relevance to professionalism, using the *Canons*' espousal of moral accountability as an insightful point of entry.

Moral Accountability and the *Canons*

The conception of the lawyer as an amoral facilitator of the client's legal objectives has met formidable challenges in recent years. William Simon's "contextual view" asks lawyers to "take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."[4] David Luban brings moral accountability into the center of the professionalism debate, insisting that "[t]o back off from moral activism on the grounds that it would be presumptuous to judge the morality of someone else's projects would imply that the lawyer possesses less moral insight than anyone else: it would amount to a plea of diminished moral capacity."[5] Luban suggests that the ethics codes should "be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends."[6] Similarly, Deborah Rhode calls for attorneys "to accept personal responsibility for

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cmt 2 ("[L]awyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.").

2. ABA CANONS OF PROF. ETHICS, Canon 32.

3. Patrick J. Schiltz, *On Being a Happy, Healthy, Ethical Member of an Unhappy, Unhealthy, Unethical Profession*, 52 VAND. L. REV. 871 (1999) (collecting statistics from various studies of attorney well-being).

4. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9 (1998).

5. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 171 (1998).

6. *Id.* at 159.

their professional actions," and to "make decisions as advocates in the same way that morally reflective individuals make any ethical decision."[7]

Though these scholars' theories of lawyering are more sophisticated and nuanced than those that prevailed in past generations, their bottom-line rejection of the nonaccountability thesis is not new. Much of the impetus behind the 1908 *Canons*, in fact, derived from the perception among the bar's elite that a form of the nonaccountability thesis was overtaking the profession. It is not clear whether this concern derived purely from principled convictions, rather than from a thinly veiled class-based elitism, but the concern, as articulated, remains insightful. Much of the conversation at the time sought to remind lawyers that they operated not only under the authority of the positive law, but also under the authority of the moral law.

James Altman's research shows that the *Canons* were, in significant part, a response to President Theodore Roosevelt's criticism of lawyers during a 1905 commencement speech at Harvard, in which he urged the graduates to pay "scrupulous heed not only to the letter but to the spirit of the laws, and by acknowledging in their heartiest fashion the moral obligations which cannot be expressed in law, but which stand back of and above all laws."[8] This apparently had an immediate impact on Henry St. George Tucker, the ABA President, who gave a responsive speech to the delegates two months later in which he spoke of the legal profession as having "more potential for good than any other profession, excepting the Christian ministry, and in some respects even more powerful for good than even that high profession."[9] He went on to compare favorably a lawyer's moral impact against a minister's, pointing out that the latter gave weekly sermons on right and wrong, whereas the "the lawyer appears in a different role, as the minister of weekday ethics as applied to men in their everyday business affairs, as the expositor of justice and right unaided by priestly exegesis or any other sources than those of natural law and justice."[10]

At Tucker's urging, the ABA formed a drafting committee to create a new code of lawyer's ethics. The committee consulted several past codes, all of which embodied, to varying extents, the conviction that lawyers are morally accountable for their work. David Hoffman's *Resolutions*, considered by some to be the nation's first legal ethics code, included the bold statement: "I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right."[11] George Sharswood's *Ethics* considered it "an immoral act to afford that assistance, when [the attorney's] conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage

7. DEBORAH RHODE, IN THE INTERESTS OF JUSTICE 66-67 (2000).

8. James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2403 (2003).

9. *Id.* at 2407 (quoting Henry Tucker, *Address of the President*, 28 A.B.A. REP. 299, 384).

10. *Id.* at 2408 (quoting Tucker at 385).

11. *Id.* at 2424 (quoting David Hoffman, Resolution XXXIII).

the law may have afforded him."[12] According to Susan Carle, both Hoffman and Sharswood embraced a view "based on religious conviction and a belief that a divine intelligence gave human beings moral faculties that would not lead them astray, posited that lawyers could and should exert their sense of justice in individual cases to steer the legal system toward just results."[13]

These were not the only voices seeking to influence the *Canons*' shaping, of course. Legal realists at the time were questioning the assumption that law and morality were invariably tied together, that law was a "brooding omnipresence in the sky."[14] If law and morality were separate, then lawyers no longer needed to "serve as gatekeepers for the justice of their clients' causes."[15] The focus could shift instead to the procedural justice made possible by the system, and thus "the lawyer, as one player in this system, should concern himself solely with playing his role as an advocate in order for this process to work effectively."[16]

These newer voices were not yet strong enough to carry the day, however. In fact, some of the *Canons*' framers pushed to heighten a lawyer's moral accountability beyond that which had been contemplated in previous ethics codes. *Canons* committee member Thomas Hamlin Hubbard, for example, proposed that the *Canons* provide that a lawyer "may counsel and maintain only such actions, proceedings and defenses as appear to him just, except in the defense of a person charged with a public offense."[17] The Boston Bar Association, in response to the committee's request for comments, proposed that the *Canons* provide that "[i]t is quite as wicked, unworthy and dishonorable for a member of the bar to assist a rich and powerful corporation . . . in working an injury of any kind to the public or to an individual merely because he had been or wishes to be employed as counsel, as it would be for him to do similar things in his own business and for his own personal benefit."[18]

While not reflecting such sentiments verbatim, the ultimate wording of the *Canons* left no doubt that the lawyer's professional obligations are inseparable from the lawyer's moral obligations. The Preamble stated that "Justice" can only be maintained if "the conduct and the motives of the members of the profession are such as to merit the approval of all just men."[19] Canon 15 instructed the lawyer to "obey his own conscience and not that of his client."[20] Canon 16 admonished

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12. *Id.* at 2429 (quoting George Sharswood's Ethics, 32 A.B.A. REP. 96 (1907)).

13. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 10 (1999).

14. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the voice of some sovereign or quasi-sovereign that can be identified.").

15. Carle, *supra* note 13, at 13.

16. *Id.*

17. *Id.* at 18 (quoting Alexander 1908 at 107).

18. *Id.* at 20 (quoting Alexander 1908 at 123).

19. ABA CANONS OF PROF. ETHICS Preamble.

20. Canon 15.

lawyers "to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses, and suitors."[21] In addressing the lawyer's treatment of witnesses and litigants, Canon 18 cautions that "the client cannot be made the keeper of the lawyer's conscience in professional matters."[22] Most dramatically, according to Canon 32, the lawyer "advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking the exact compliance with the strictest principles of moral law."[23]

The *Canons* Through the Lens of Value Pluralism

The *Canons*' language seems archaic today, and perhaps paternalistic. To presume the existence of a "moral law" beyond the positive law, much less that such moral law is discernible to the attorney and agreeable to the client, would raise more than a few eyebrows within the profession. Almost all of us are, to varying extents, value pluralists now, meaning that we acknowledge, in Isaiah Berlin's words, "that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathizing and deriving light from each other."[24]

Value pluralism helps explain the predominant amoral conception of the lawyer's role, which rejects the notion of a lawyer's moral accountability for the clients and causes they represent. Norman Spaulding, for example, sees pluralism as a reason to demand "thin identity" between a lawyer and her client, which entails a "commitment to the principle that effective service and open access to law demand uninhibited orientation of their faculties towards the realization of their clients' lawful objectives," so that "to serve a client is not to identify with her."[25] Thus, our rejection of any professionally relevant "moral law" and embrace of value pluralism suggests that lawyers are to "not only perform competently for their existing clients irrespective of any personal approval of their ends, they are open to taking new clients on the same terms."[26] By contrast, "thick" professional identity—that is, intense identification between the lawyer and client—is perceived, in a pluralist world, as threatening to spawn "role confusion, lawlessness, maldistribution of legal services, and positional balkanization of the profession."[27]

In the one hundred years since the *Canons*' creation, moral judgment has come to be viewed more as a function of personal opinion than as an application of

21. Canon 16.
22. Canon 18.
23. Canon 32.
24. Isaiah Berlin, The Crooked Timber of Humanity 11 (Henry Hardy ed., 1990).
25. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. Colo. L. Rev. 1, 7 (2003).
26. *Id.*
27. *Id.*

shared moral truth. Seen in these terms, there is wisdom in keeping a lawyer's personal views at arm's length from her representation of clients. Mingling the two is a threat to client autonomy—not in service of moral law, it is feared, but in service of the lawyer's own agenda. Spaulding and other critics appear to presume that the only alternative to "thin identity" is paternalism. If our legal system is to be fairly and fully accessed by the diverse masses of the twenty-first century United States, carefully guarded neutrality toward the otherwise legal objectives of those seeking access appears to be in order.

But if we really believe, as value pluralism holds, that there are many authentic moral values, and that these values often conflict and are not susceptible to being ranked in some easy hierarchical framework, the implications for the attorney-client relationship might be different than conventional wisdom suggests. Value pluralism does not suggest that moral considerations are irrelevant to legal advice—if anything, the inescapable moral diversity, ambiguity, and nuance of the pluralist framework makes a moral conversation between attorney and client more important, not less.

Under value pluralism, the moral conversation is not a vacuum, for value pluralism is not value relativism. Meaningful distinctions between good and bad can be rationally and defensibly drawn.[28] Even if there are not universal values, in Berlin's words, there are values "without which societies could scarcely survive."[29] As Bernard Williams puts it, Berlin recognized that "different values do each have a real and intelligible human significance, and are not just errors, misdirections or poor expressions of human nature."[30] There is truth about human nature that has been revealed "in the only way in which it could be revealed, historically."[31] Stuart Hampshire echoes this point, noting that there "are obvious limits set by common human needs to the conditions under which human beings flourish and human societies flourish," and that "[h]istory records many ways of life which have crossed these limits."[32] Moral discourse among communities holding divergent conceptions of the good is possible because moral claims correspond to observable truths about human nature and experience.

Because moral truth is not reducible to a single overarching set of claims, however, society must be cautious not to structure the discourse in a way that presumes we can construct—much less enforce—such a set of claims. That does not mean that moral truth is nonexistent or unknowable. From the value pluralist perspective, while we are rightfully resistant to the *Canons*' language empowering lawyers to take responsibility for clients' compliance with "moral law," there is no corresponding rationale for abdicating responsibility for helping clients engage the

28. WILLIAM GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 5 (2002).

29. *Id.* at 18.

30. ISAIAH BERLIN, CONCEPTS AND CATEGORIES xviii (1979) (Bernard Williams introd.).

31. *Id.*

32. STUART HAMPSHIRE, MORALITY AND CONFLICT 155 (1987).

moral dimension of the representation. Moral considerations cannot be written off as manifestations of an individual's subjective preferences. When morality is on the table, there is something real to talk about.

Just as the profession must recognize that clients' decisions and priorities will be shaped by many different moral claims, the profession must also recognize that lawyers' decisions within a given representation are shaped by many different moral claims. The profession must recognize, according to Brad Wendel, that "professional values cannot always be reduced to a single foundational norm."[33] In other words, "legal ethics must be understood as a discipline which accepts the existence of plural, sometimes conflicting values in reasoning."[34] Wendel claims that "the foundational normative values of lawyering are substantively plural and, in many cases, incommensurable," by which he means that "the ends served by the practice of lawyering are fundamentally diverse, and are therefore valued in different ways."[35] Lawyers promote multiple worthy goals, "including not only preserving individual liberty, speaking truth to power, showing mercy, and resisting oppression, but also enhancing order and stability in opposition to the 'ill-considered passions' of democracy, aligning individual action with the public good, and shaping disputes for resolution by particular institutions such as courts and agencies."[36] The pursuit of these goals generates multiple moral norms—none of which can "function by itself as a foundation for a theory of professional responsibility,"[37] some of which create tension with each other, and some of which cannot be compared or ranked against each other—i.e., they are incommensurable values.[38]

With the absence of any sort of unifying theory of professional ethics outside the rudimentary framework set forth by the Model Rules, Wendel finds the lawyer's own values to be integral to the ethical inquiry. He suggests that we look to the values that particular lawyers have adopted and "made central to their moral identities," for the lawyer's "life history provides a resource for working through the problem of weighing values and balancing them against one another."[39] Just as, for example, a nun and a mother have made virtuous life choices that preclude the attainment of certain other virtues, different lawyers make different "human value commitments, both of which are morally worthy, but which would lead [the lawyer] to resolve [a given ethical] dilemma differently."[40] A lawyer is thus faced with "a plurality of right answers," which can only be evaluated in light of the lawyer's

33. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7-8 (1999).

34. *Id.*

35. W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U.L.Q. 113, 116-17 (2000).

36. *Id.*

37. Wendel, *supra* note 35, at 95.

38. Wendel, *supra* note 35, at 116-17.

39. *Id.* at 201-03.

40. *Id.*

own value structure.[41] Wendel believes that, "[a]s long as both ideals are indeed expressions of strands that we consider valuable and worthy of respect within our ethical tradition, either course of action must be regarded as permissible, and neither agent may be criticized in moral terms."[42]

Though we can no longer take the existence of shared moral premises for granted, we can facilitate moral engagement between the attorney and client. Even if we have grown too skeptical to presume a "common morality," we must still face the fact that an attorney's moral claims are not strictly "personal" in the sense of amounting to mere preference. David Hume argued that moral judgment correlates to the sentiment of the subject making the judgment, rather than to any property of the judgment's purported object.[43] But skepticism about the objectivity of moral truth does not mean that moral beliefs do not transcend the person holding them. If the statement "dumping that toxic waste in the river is wrong" only asserts something about the speaker's feelings—i.e., "I feel that dumping that toxic waste in the river is wrong"—there is no readily discernible connection between the assertion and other moral actors or influences, nor is the assertion inherently accessible to others. But if the statement asserts something about dumping the toxic waste—i.e., that it is wrong—the assertion is connected to influences outside the speaker and is accessible to others who can engage and assess the same influences, even if they do not find them persuasive. The former understanding (known as "emotivism") has largely been rejected by philosophers in favor of the latter understanding (known as "cognitivism"). Moral judgment is directed toward a state of affairs outside the moral agent, and thus it carries a potential for interpersonal engagement that is not present when we conceive of moral judgment as simply the expression of an agent's interior preference or instinct.

Why Moral Engagement Matters

Ignoring the potential for interpersonal moral engagement in the course of an attorney's work comes at a significant professional cost. From the attorney's perspective, it can exacerbate the perceived incoherence of her life, widening the gap between her professional role and her understanding of social justice, moral truth, and the common good. The segmentation of a lawyer's personal and professional identities can be profoundly unsettling for the lawyer herself, especially if the lawyer has deeply held beliefs that do not speak only to the non-professional aspects of her existence. To borrow from Camus's thoughts on the feeling of absurdity, such segmentation constitutes a "divorce between man and his life, the actor and his setting," creating an existence in which "man feels an alien, a stranger."[44]

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41. *Id.*

42. *Id.*

43. DAVID HUME, A TREATISE OF HUMAN NATURE, Book III, Part I, sec. 1 (1740).

44. Albert Camus, *An Absurd Reasoning, in* THE MYTH OF SISYPHUS AND OTHER ESSAYS 453 (1991).

The capacity to motivate lawyers turns on our ability to identify their deeply held values—including religious values—and translate those values into professionally relevant language, allowing them to transcend the lowest common denominator approach of a one-size-fits-all ethical regime. Acting as a partner in a moral dialogue with the client might allow the lawyer to bring a deeper sense of responsibility and meaning to her work.

From the client's perspective, the amoral lawyering paradigm may make it more difficult to discern the extralegal significance and implications of her legal choices. Society has an interest in having lawyers flag such issues; as Stephen Pepper urges, the lawyer's ethical responsibility should include "ensuring that the client knows that there is a gap between law and justice, and that it is the client . . . who is primarily responsible for injustice if it occurs."[45] Such conversations, though, are also squarely within the client's interests. In circumstances where the causal relationship between legal decision-making and those implications are not obvious to non-lawyers, the lawyer's introduction of moral considerations may actually enhance client autonomy. Such dialogue is aimed not simply at the protection of interests external to the client, but at the well-being of the client herself. Tom Shaffer, for example, traces the scope of our devotion to individual autonomy, observing that, "[i]n moral discourse, as in political and legal discourse, we don't talk about good people, we talk about rights," and we assume "that what citizens want for one another, or lawyers for their clients, is not goodness but isolation and independence."[46] Joseph Raz reminds us that our devotion to individual autonomy is functional—"to enable people to have a good life"—and that "[p]roviding, preserving or protecting bad options does not enable one to enjoy valuable autonomy."[47] David Luban strikes a similar chord, stating that "[a]utonomy is a precondition for things of great value, but it has no value of its own."[48] Approaching the client's stated objectives as fully formed or fixed precludes the lawyer from having any substantive role in the client's definition or pursuit of the good.[49] A dialogical relationship allows lawyers "to help their clients decide what it is they really want,

45. Stephen Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999).

46. Thomas L. Shaffer, *Ethics After Babel*, 19 CAP. U. L. REV. 989, 997-98 (1990).

47. JOSEPH RAZ, THE MORALITY OF FREEDOM 412 (1986).

48. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman*, 90 COLUM. L. REV. 1004, 1037-38 (1990) ("Free choice . . . has value only to the extent that it promotes responsibility, creativity, or authenticity; thus, when a person's choice would promote none of those, we have no reason whatever to regret the fact that she must refrain from that choice. . . . To believe otherwise is to mistake a means to valuable ends for the ends themselves.").

49. David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics, in* EVERYDAY PRACTICES AND TROUBLE CASES 68, 70-72 (Sarat et al. eds., 1998) (criticizing assumption that clients are "autonomous" in that "they formulate their interests and objectives independent of the lawyer's intervention").

to help them make up their minds as to what their ends should be, a function that differs importantly from the instrumental servicing of preestablished goals."[50]

The explicit moral dialogue may also bring to the surface factors that would otherwise escape the client's notice, but which nevertheless may be shaping the attorney's decision-making. The lawyer's own moral convictions are inexorably part of the attorney-client dialogue, whether acknowledged by the attorney or not.[51] Whenever an attorney makes sense of her client's stated intentions, she utilizes an interpretive judgment that is shaped by the attorney's own moral experience, and this same experience, in turn, helps form whatever response the attorney offers to the client. When the response is pitched in exclusively legal terms the moral component is not erased, but rather is forced into the background, where it is not susceptible to exploration by the client. As such, the lawyer's interpretive morality is neither challenged nor endorsed by the client; it simply holds sway over the course of representation, albeit implicitly. While the amorality of legal advice is a fiction, it is not a harmless fiction, for it facilitates the tendency of clients to equate legality with permissibility.

Take, for example, the infamous August 2002 "torture memo" authored by John Yoo and signed by Jay Bybee on behalf of the Office of Legal Counsel. In a memo setting forth the OLC's "views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment," Yoo advised the White House that "[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[52] The statement, on its face, carries a good deal of shock value, but its legal basis only heightens the shock value. The torture statute provides that pain or suffering must be "severe" to constitute torture, but does not define the term.[53] The dictionary defines "severe" as "inflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as severe pain, anguish, torture."[54] Based on the dictionary definition, Yoo concluded that "the adjective 'severe' conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure."[55] The linking of torture with the ability to endure, however, potentially encompasses any interrogation technique premised on physical pain, so Yoo then looked to the use of the term "severe pain" in statutes "defining

50. ANTHONY KRONMAN, THE LOST LAWYER 27.

51. The following discussion of the moral perspectives evidenced by the torture memo, Enron, and priest sex abuse scandals is set forth more fully in Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225 (2006).

52. Memorandum from Jay S. Bybee, Assistant Attorney General, to White House Counsel Judge Alberto Gonzales (Aug. 1, 2002), available at http:news.findlaw.com/wp/docs/doj/bybee 80102ltr.html.

53. Mem. at 5.

54. *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY).

55. *Id.*

an emergency medical condition for the purposes of providing health benefits."[56] Without explaining the relevance of legislation directed at health benefits, he nevertheless extracted from those statutes the examples of organ failure, impairment of bodily function, and death.

In the memorandum's concluding section, Yoo offered a partial glimpse into the utilitarian morality that appears to have driven his purportedly legal analysis. On the assumption that the torture statute could apply constitutionally to the interrogation of suspected al Qaeda members, Yoo explored the availability of the necessity defense, noting that it "can justify the intentional killing of one person to save two others."[57] In perhaps the most morally laden statement of the memorandum, he asserted: "Clearly, any harm that might occur during an interrogation would pale to *insignificance* compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives."[58] Exploring the legal defense of necessity and its potential applicability to a situation is one thing; labeling as insignificant any possible harm that might be inflicted on an individual in order to extract information that would avert a terrorist attack is quite another. Note that even this statement is framed as the straightforward application of black-letter legal standards.

Whether or not a different memo would have made a difference in the Bush administration's ultimate policy decision, the more important point is that Yoo and his colleagues neglected an opportunity to engage the administration deliberately and explicitly in moral terms on an undeniably moral issue.[59] Even assuming that Yoo and administration officials agreed on the need for expanded discretion in conducting prisoner interrogations, raising the moral dimensions of that expanded discretion would still have enriched the process by which the ultimate policy decisions were made. The administration would have been led to view the issue, at least in passing, through moral terms, not just through the narrowing lens of purportedly strict legal analysis. And Yoo might have been led to couch his advice with less legal certainty once he took stock of the defining role played by his own underlying moral convictions. As it stood, Yoo's moral understanding of the war against terrorism pervaded the exchange, impacting the course of representation without ever being acknowledged and engaged on its terms. Instead, the language of law drove the inquiry, as evidenced by Gonzales's later testimony before the Senate. On the subject of the torture memorandum, Gonzales remarked that he did not "have a disagreement with the conclusions reached" in the memorandum at the time it was written, as it is ultimately "the responsibility of the [OLC] to tell us what the

56. *Id.*

57. *Id.* at 40.

58. *Id.* at 41 (emphasis added).

59. Indeed, the torture prohibition at issue is itself a moral claim. Where the statutory definition of torture is satisfied, any sort of utilitarian balancing of individual harm versus collective good is necessarily foreclosed.

law means."[60] In cases where the law is indeterminate, the attorney's interpretive judgment will often be shaped by her own moral claims. To come to grips with the impact of her own claims, the attorney cannot pretend that they do not exist.

In other cases, the attorney's legal counsel may be shaped, to varying degrees, by her adoption of the client's moral perspective or the profession's moral perspective. An attorney's *reflective* moral perspective adopts what the attorney perceives to be her client's relevant moral claims—a perception that might not be accurate, and which often includes an unspoken concession that those claims are not amenable to engagement through moral dialogue. Absent any clarifying moral dialogue, the reflective moral perspective foregoes any opportunity by the client to correct the lawyer's misperception of the client's operative moral claims, and it tends to allow clients to avoid coming to terms with the moral content of any arguably legal course of conduct. Even in contexts where the client may not have deliberately embraced the moral claims embodied therein or where the client would have benefited from being pressed on the wisdom of those claims, the attorney can become a tool for the facilitation of morally problematic ends. The demise of Enron is one example. Vinson & Elkins lawyers appear to have been so enmeshed in Enron's management culture that their legal advice became tailored to supporting the maximization of share price, to the exclusion of other considerations more in keeping with the company's long-term interests.[61] The moral content of this legal strategy remained beneath the surface—there is no indication that Enron's managers were made to face the moral implications of the lawyers' manipulation of governing law. Whether or not management strategy would have changed, management should have faced the full import of the legal strategy through a meaningful moral dialogue with their attorneys.

An attorney's *professional* moral perspective adopts the moral claims embedded in the legal profession's adversarial tradition, regardless of whether such claims serve a client's best interests, which are themselves shaped by the client's own moral framework. In such cases, the lawyer speaks from a professional identity that emphasizes qualities like secrecy, defensiveness, and rights-maximization, and minimizes qualities like compassion, vulnerability, and risk-taking. The Catholic Church's legal response to the priest sex abuse scandal is one example of the professional moral perspective. Lawyers contributed to the church's utter failure to exercise its duties of pastoral care toward the victims, opting instead for secrecy, discovery stonewalling, hard-ball litigation tactics, and prohibitions on apologies

60. *See* Eric Lichtblau, *Gonzales Speaks Against Torture During Hearing*, N.Y. TIMES, Jan. 7, 2005.

61. *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 25 (2002) (noting, for example, that at the time of Enron's collapse, Enron's general counsel and deputy general counsel were former Vinson & Elkins partners, and another twenty lawyers from the firm had joined Enron since 1991); John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 293 (2004) ("[I]f we assume that euphoric investors will largely ignore the auditor, the rational gatekeeper's best competitive strategy, at least for the short term, is to become as acquiescent and low cost as possible.").

or other conciliatory acts that could be construed as admissions.[62] Instead of building a legal strategy around the particular functions and responsibilities of the client, too often the church's lawyers built a legal strategy around the presumptions of the legal profession. As Oklahoma governor Frank Keating explained when resigning from the review board established to investigate the scandal, "[t]o resist grand jury subpoenas, to suppress the names of offending clerics, to deny, to obfuscate, to explain away; that is the model of a criminal organization, not my church."[63] Members of the board put some of the blame on "the influence of lawyers preoccupied with the possibility that cooperation would make information more accessible to prosecutors and plaintiffs' lawyers."[64] Basing the church's defense on the profession's adversarial mindset should only have been undertaken after a frank and inescapably moral conversation regarding the implications of that mindset.

There is a potential downside to this moral engagement, of course. Few will dispute the appeal of a morally engaged client, unless that engagement requires empowering the attorney to hijack the representation to further her own conception of the good, perhaps even in a way that goes undetected by the client.[65] This compels a clear limitation on the attorney-client moral dialogue, which should be obvious from the above examples: the client-directed quality of legal representation must be honored. The amoral lawyering paradigm is not to be replaced by the trump of the lawyer's morality, but by a counseling relationship in which both the lawyer and client treat each other as agents capable of meaningful moral thought and reflection. Lawyers must be vigilant against overreaching or subtle coercion when it comes to any contact with the client, and morality-driven conversations are no exception.

More broadly, encouraging attorneys to connect with the moral dimension of their practices need not create conflict with the values that lie at the heart of professionalism; in most cases, it will support and strengthen the realization of professional norms by allowing the attorney to internalize the underlying ideals. We do not all speak the same moral language, and we can not pretend that we do if we want the internalization to occur. Attorneys' moral convictions will obviously

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62. *See, e.g.*, Michael Powell & Lois Romano, *Roman Catholic Church Shifts Legal Strategy*, WASH. POST, May 13, 2002, at A1 (reporting that Church's lawyers filed countersuits accusing victims' parents of negligence for entrusting their children to priests); Michael Rezendes & Walter V. Robinson, *Church Tries to Block Public Access to Files*, BOSTON GLOBE, Nov. 23, 2002, at A1; Kathleen Burge, *Judge Rebukes Law's Lawyer for Bid to Delay Deposition*, BOSTON GLOBE, Jan. 22, 2003, at A10.

63. Michael Paulson & Michael Rezendes, *Openness of Bishops Still at Issue*, BOSTON GLOBE, June 17, 2003, at A1.

64. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 168 (2004).

65. *See* Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 678 (2001) (worrying that, if a faith-informed conciliation approach is followed by all lawyers, there would be "so truncated a range of lawyering styles for a client who seeks to vindicate a right, not reconcile with an opponent, or whose sense of violation would be compounded, not assisted, by efforts to seek reconciliation," and about "the lawyer who is so intent on conciliation that he or she does not explore with the client all the litigation options.").

shape many of their professional choices such as practice area, client selection, and work-life balance, but the interplay between the attorney's moral convictions and professional norms become thornier in the context of an existing client relationship. If the attorney enters the moral dialogue with an eye toward honoring the client's human dignity, not imposing a particular agenda on them, the attorney's own moral compass will rarely preclude representation. In some cases, however, even after a rich moral dialogue, the client will ultimately decide that what is best for her is a course that is irreconcilable with the attorney's own convictions; in those cases, withdrawal may prove to be an unavoidable option.[66] Even those difficult dilemmas can be approached most helpfully by the attorney in the language of her own moral worldview. To be clear, we should not presume that the attorney's own particularized moral language creates tension with the relevant professional norms; on the contrary, the attorney may be better able to take ownership of the relevant professional norms through the language of their own moral convictions.

The "cultural cognition" project helps explain this point. Building on previous work linking culture and risk perception, Dan Kahan has developed and explored the concept of "cultural cognition" as a cognitive challenge to liberalism's premise that the state can remain neutral on ultimate questions of the good so that individuals are free to pursue their own visions of the good. The state's capacity for neutrality presumes the citizenry's capacity for neutrality, and that presumption is highly problematic. In Kahan's view, "we lack the psychological capacity . . . to make, interpret, and administer law without indulging sensibilities pervaded by our attachments to highly contested visions of the good."[67]

When applied to public policy debates, these moral sensibilities lead us to "instinctively trust those who share our values" even if they are biased in a certain direction by emotion or dissonance avoidance.[68] Because the "people we are most inclined to associate with are those who share our cultural outlooks," there are "highly uniform views of societal harms among persons of shared cultural persuasions."[69] When behavior violates our own moral norms, we are likely to view that behavior "as endangering public health, undermining civil order, and impeding the accumulation of societal wealth."[70] This insight undercuts the utility of John Stuart Mill's famous "harm principle," which holds that individual liberty should be restricted only as necessary to prevent harm to others.[71] The principle is rendered essentially meaningless with the realization that individuals tend to perceive as harmful any threat to their own moral convictions.[72]

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66. *See* MODEL RULES OF PROF'L COND. R. 1.16(b)(4) (permitting withdrawal where attorney finds client's chosen means or ends to be "repugnant").

67. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 116-117 (2007).

68. *Id.* at 117.

69. *Id.* at 121.

70. *Id.* at 117.

71. JOHN STUART MILL, ON LIBERTY.

72. Kahan, *supra* note 67, at 117.

Because our moral convictions color our beliefs about facts, we tend to "perceive the State's adoption of instrumental policies, no less than its adoption of symbolic ones, as adjudicating the competence and virtue of those who adhere to competing cultural outlooks."[73] For example, individuals who oppose drug criminalization and anti-sodomy laws tend to support gun control even though all three types of laws pose significant restrictions on personal liberty and target behavior that defies certain cultural norms. But gun possession, unlike drug use and sodomy, defies egalitarian and communitarian norms, "the holders of which despise guns as symbols of patriarchy and racism, indifference and distrust."[74] Even though lawful activities such as backyard pool ownership and alcohol consumption are each much more deadly than guns, Kahan concludes that gun control advocates "selectively accept evidence of the need and feasibility of gun control because gun ownership, unlike swimming in backyard pools and drinking beer, offends their values."[75]

Kahan does not mine cultural cognition to mourn the impossibility of liberalism; he uses it to chart a course beyond the "culture war" tenor of much of our public discourse. In particular, Kahan faults the modern insistence—popularized by John Rawls and others—on conducting our political life exclusively through "public reason," using secular terms accessible across the spectrum of cultural and moral identities. Kahan believes that this amounts to "a form of false consciousness that compounds the impulse to enforce a moral orthodoxy by enabling its agents to deny (to themselves even more than to others) that this is exactly what they are doing."[76] For example, in *Roe v. Wade*, the Supreme Court trumpeted its own above-the-fray agnosticism on the question of personhood and unborn life, as though the result could somehow be portrayed in morally neutral terms. Judging by the response to *Roe* that has unfolded over the past three decades, the Court's claim to neutrality only embittered those who were already inclined to oppose the holding on moral grounds. It is no answer to the problem of moral disagreement "to think that denuding the law of cultural resonances is the best way to assure citizens that the law respects their identities."[77]

In the place of public reason, Kahan offers "expressive overdetermination" to bring cultural values into the center of our legal and political discourse, and, in fact, to "self-consciously [multiply] the cultural meanings that laws are susceptible of bearing."[78] Proponents of public reason are correct to focus on discourse norms, but they reach the wrong conclusion. If we are serious about mitigating "the problem of cognitive illiberalism," we should encourage citizens to "strive to infuse law with as many diverse and competing cultural meanings as it can possibly bear."[79]

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73. *Id.* at 130.
74. *Id.* at 134.
75. *Id.* at 136.
76. *Id.* at 118.
77. *Id.* at 142.
78. *Id.* at 118.
79. *Id.* at 142.

"Expressive overdetermination" is a strategy that bears promise for the legal profession's ongoing effort to inculcate foundational norms and values among a wildly divergent group of practitioners. Take, for instance, the attorney's need to rein in her own self-interest in service of the client's interests, or the desirability of representing unpopular clients. The Model Rules, standing alone, will not penetrate the moral compasses of all attorneys with the message that these counter-cultural practices are goods to be pursued and defended. But the impetus of these practices can be powerfully and persuasively expressed in moral language from a variety of perspectives. For many religious lawyers, the Imago Dei—the belief that each human being is created in the image of God—may be an effective vehicle for that message because, once a lawyer takes human dignity seriously, it is a small step to embrace altruism and the prospect of providing a voice to the voiceless. To take another example, attorneys are unlikely to view pro bono work as a professional obligation unless they view it as a moral obligation, a notion that finds support in virtually every major religious tradition and most mainstream political traditions. In a similar vein, confidentiality is not just an instrumental professional tool that makes good business sense; it is an inescapably moral principle rooted in trust and the importance of keeping one's word. For a robust ethical discourse to take root within the American legal profession, the best path may be to harness the natural motivational resources of our vast range of moral frameworks.

Moral Engagement and Attorney Competence

Encouraging lawyers to internalize professional norms through their own moral frameworks may not seem especially threatening, but extending the lawyer's moral engagement to include the attorney-client dialogue may prove decidedly more jolting to professional sensibilities. If we are serious about bringing the moral dimension of legal advice to the surface, we have to be serious about equipping lawyers for this heady task. Nicolson and Webb note that "[m]oral agents still need to recognize that situations are morally problematic in the first place," which requires "the ability to identify the salient features, to be sensitive to psychological aspects, such as the feelings, attitudes or life plans of others, as well as their own, and, perhaps most importantly, to care about all these features of moral situations."[80] Gerald Postema reminds us that true moral agency requires "not only that the agent come to recognize and to love right and noble actions for what they are in themselves, but also to understand more fully *why* they are right and noble," which requires in turn "that one be reasonably able to relate particular cases of virtuous or right action to a general account of virtue, right, and the good"—in other words, an "articulation of a coherent and relatively comprehensive view of morality and the good life."[81]

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80. D. NICOLSON AND J. WEBB, PROFESSIONAL LEGAL ETHICS: CRITICAL INTERROGATIONS 31 (1999).

81. Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS at 286, 306-07 (1984).

If the profession aims to encourage attorneys to bring relevant moral considerations to the surface of the attorney-client dialogue, that project would be furthered considerably if attorneys were equipped with the tools by which to articulate those considerations and their relationship to the subject matter of the representation. This has implications, most obviously, for legal education.

Thirty years ago, Roger Cramton, the former dean of Cornell Law School, observed that law schools reflect a "systematic neglect of values," due in significant part to the law professor's desire to avoid "indoctrination" or "preaching," and a conviction that her own values are irrelevant to class discussion.[82] The void is still noteworthy, judging by last year's report on legal education issued by the Carnegie Foundation for Advancement of Teaching.[83] The Carnegie researchers, in visiting law schools across the country, came away "with the strong impression that in most law schools, the apprenticeship of professionalism and purpose is subordinated to the cognitive, academic apprenticeship," and 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."[84] In fact, the view that "it is indoctrination even to ask students to articulate their own normative positions was surprisingly prevalent" in law school.[85]

This mindset leads to the neglect of a potentially powerful law school experience of professional moral formation, which could "influence the place of moral values such as integrity and social contributions in students' sense of self."[86] As a student at a highly selective private law school told the researchers, "law schools create people who are smart without a purpose."[87] The traditional amoral approach to legal education is not the only pedagogical option. The report's authors observe that:

> When law students bring to their first-year courses confusions about moral and legal obligations, as many of them do, the instructor can tell them that their concerns about fairness or other moral issues are not relevant to legal analysis and ask them to set aside those concerns. We know from our discussions with students that this happens frequently and that many students find it bewildering rather than clarifying, besides providing a distorted understanding of the nature of law itself. If, instead, the instructor, by introducing a careful discussion of the distinction and relationship between the moral and the legal, illustrates something of the breadth of law's concerns, this is likely to deepen students' understanding

82. Roger Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEG. ED. 247, 256 (1978).

83. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Foundation for Advancement of Teaching 2007).

84. *Id.* at 133.

85. *Id.* at 136.

86. *Id.* at 135.

87. *Id.* at 142.

> of the law, both the particular legal issues in the case under consideration and the law as a social institution.[88]

In the traditional law school paradigm, morality is equated with personal preference and deemed either insufficiently rigorous or too divisive to warrant class discussion. A primary motivation for the University of St. Thomas to reopen its law school six years ago after a seven-decade hiatus was to provide a venue where students and faculty are encouraged and equipped to explore the connections between law, morality, and social justice. Much of this exploration, but not all of it, is conducted through the lenses offered by various faith traditions, particularly Catholic social thought. I have been involved in creating and teaching a course through which we endeavor to equip students with the tools with which to discern and articulate the moral considerations in legal representation without jeopardizing its client-centered nature.

Foundations of Justice is 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 the course with *Buck v. Bell*, the 1927 case in which the Supreme Court upheld a state statute permitting involuntary sterilizations of institutionalized persons. Oliver Wendell Holmes, writing for the majority, issued his famous pronouncement that "three generations of imbeciles are enough."[89] The case gets to the heart of the course: virtually every student recoils from the Court's holding—and the utilitarian reasoning on which it rests—but they have a difficult time expressing their misgivings in legal terms. The ensuing conversation is inescapably moral, and so in conjunction with *Buck*, we read excerpts on human dignity from Pope John Paul II, the Talmud, John Stuart Mill, the United Nations, a leading Lutheran bioethicist, and Friedrich Nietzsche. The wide-ranging classroom conversation does not privilege or coddle any particular perspective; the marketplace of ideas is in full operation, with the hope that students will be able to articulate their criticism of Justice Holmes' reasoning in language that resonates with their own moral frameworks and through concepts that are accessible to others. The class employs a similar format—coupling case law and statutory readings with relevant religious or philosophical readings—in other areas such as the social order, economic justice, the role of the state, the international community, and truth and pluralism.

We also spend time in the class exploring the relevance of these considerations to the attorney-client dialogue. For example, Enron provides a wonderful entry point for discussing the relationship between rights and responsibilities. Expecting first-year students to master the intricacies of the Enron collapse is fanciful, but Enron's lessons can be engaged much more simply. In addition to media

88. *Id.* at 144.
89. 274 U.S. 200 (1927).

coverage of the collapse and its aftermath, I provide the students with this quote from a former Enron employee:

> Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to our accountants, "This is a duck! Don't you agree that it's a duck?" And the accountants say, "Yes, according to the rules, this is a duck." Everybody knows that it's a dog, not a duck, but that doesn't matter, because you've met the rule for calling it a duck.[90]

From this succinct portrayal, the questions emerge: what are the lawyer's responsibilities when faced with such an organizational culture? Can the lawyer defer to managers' representations that the dog is actually a duck, or does the lawyer need to adopt a skeptical stance toward the client? Do the lawyer's responsibilities extend only to the client or do they extend to the broader society? Does a robust vision of the lawyer's social responsibilities erode the client's rights, or must the client's rights also be viewed against a background of responsibilities? It is important to note that the conversation sparked by these questions is shaped by our previous discussions of substantive moral principles.

We have placed the Foundations course in the first-year curriculum so that the principles and perspectives covered can be invoked by professors as appropriate through the rest of the curriculum. Constitutional law can include comparisons of the American idea of federalism with related principles of localized authority such as subsidiarity and sphere sovereignty. When our criminal law professor introduces theories of punishment, students can analyze whether deterrence is consistent with Mill's caution against using a person as a means to an end. Whether stewardship is a helpful construct for explaining corporate managers' responsibilities is an accessible question for students in our business law courses. The list goes on.

The real test, though, will come after graduation. Will our students be any better attuned to the moral dimension of legal practice than counterparts from more traditional law schools? The aim is not to produce lawyers more inclined to pursue their own agendas under the guise of legal representation, but lawyers who are sensitized to, and capable of, raising the moral considerations on which the common good, and the client's own exercise of autonomy, may depend. To be clear, our conviction is that those considerations are not *created* by the morally engaged attorney; they are simply *acknowledged* by the morally engaged attorney.

The moral formation of attorneys need not end with law school. Most attorneys, one hopes, experience personal moral growth throughout their careers,

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90. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1171 (2005) (quoting former Enron employee).

though organized or sustained efforts to translate that personal growth into professional relevant terms have been few and far between. Efforts to educate attorneys in political morality can be seen in groups such as the Federalist Society and American Constitution Society. One obvious ongoing venue is the expanding panoply of so-called "religious lawyering" groups: the St. Thomas More Society, Christian Legal Society, the International Association of Jewish Lawyers and Jurists, the National Association of Muslim Lawyers, and the Catholic Lawyers' Guild are examples of voluntary associations designed to facilitate the integration of an attorney's faith tradition with her professional identity. These and other groups may allow attorneys to achieve greater coherence by serving as bridges between their personal and professional lives. They also are well positioned to serve as vehicles through which to transcend the lowest-common-denominator ethical framework of the Model Rules by fostering a deeper moral conversation about professionalism. It is important to note that many such conversations will never get off the ground unless attorneys have the opportunity to consult with others who start from common moral premises. In other words, the presumption that conversations about professionalism must be profession-wide and framed in language that is accessible to every attorney all but guarantees that many of the richest moral resources for attorneys will remain untapped.[91] As Amy Uelmen explains, the ethics rules' grant of discretion to attorneys to consider broader concerns of morality or social justice in the course of their work functions as a "must" for the religious lawyer—their faith tradition does not give them discretion to ignore such concerns:

> Moved by the sense that I must bring concern for the common good to bear on my legal work, I search out and highlight the practical opportunities in which I may incorporate ethical and moral considerations. Thus, the may which is on the books but buried in practice shines out in its full potential to critique unrestrained individualism and recapture the lawyer's duty to serve the public good.[92]

As the cultural cognition project has shown, the foundational ideals and aspirations of the profession will often gain real-world traction in lawyers' lives when they can be translated into terms that resonate within particular moral communities.

Conclusion

Whether or not the 1908 *Canons* reflected a widespread and authentic belief in a professionally relevant "moral law" or a more calculating attempt to dress up the elite bar's traditional practices with a loftier moral status, the profession has wisely moved away from such sweeping portrayals of an attorney's extra-legal

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

92. Amelia J. Uelmen, *Can a Religious Person be a Big Firm Litigator*?, 26 FORDHAM URB. L.J. 1069, 1083 (1999).

accountability. Perhaps the only thing clear about the "moral law" today is the breadth and depth of disagreement about its substance and very existence. The suggestion that an attorney should impose the moral law's dictates on a client, much less that the ethics regime should hold the attorney accountable for failing to do so, is a non-starter.

But dropping morality out of the various paths of professional formation and ongoing conversations about professionalism neglects the possibility of a more natural accountability on the attorney's part. It is not an accountability measured by disciplinary rules or liability exposure, but rather by the simple recognition that, given the nature of law and legal advice, an attorney should conceive of her professional role to include accountability for apprising the client of the moral dimension of the representation, and of the moral considerations that might be shaping the attorney-client dialogue, whether acknowledged by the attorney or not. The ABA was correct to recognize one hundred years ago that morality matters to a lawyer's work, but the *Canons*' portrayal of morality as a ready-made set of norms to be enforced against clients short-circuited the sort of conversations through which the moral dimension of legal practice could be unpacked, articulated, and engaged. In reality, those conversations may just be getting started.