

Teaching the Torture Memos: “Making Decisions under Conditions of Uncertainty”¹

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Whether we like it or not schooling is a moral enterprise. Values issues abound in the content and process of teaching.²

I. Introduction

Eleven years ago, on September 11, 2001, attorney John Yoo turned on the television in his office and saw a hijacked plane hit the South Tower of the World Trade Center in lower Manhattan.³ At the time of the attacks, Yoo was a newly appointed deputy assistant attorney general in the Office of Legal

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1. William M. Sullivan, Anne Colby, Judith W. Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law 22* (Jossey-Bass 2007) [hereinafter *The Carnegie Report*].
2. Lawrence Kohlberg & Richard H. Hersh, *Moral Development: A Review of the Theory, 16 Theory Into Practice*, Apr. 1977, at 53, 53.
3. John Yoo, *War By Other Means: An Insider's Account of the War on Terror 1* (Atlantic Monthly Press 2006) [hereinafter *Yoo, War By Other Means*]. John Yoo witnessed the second strike; approximately eighteen minutes earlier, hijackers had struck the North Tower of the World Trade Center. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 7* (2004) [hereinafter *9/11 Commission Report*], available at <http://www.9-11commission.gov/report/911Report.pdf>. Later that morning, a third airliner smashed into the Pentagon and a fourth crashed in a field in southwestern Pennsylvania. *Id.* at 8. Approximately 3,000 people died in those four crashes, including the nineteen hijackers who came from “various groups of Islamist extremists” “driven by” Osama bin Laden. Executive Summary, National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 2-3*, available at http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf.

Counsel of the U.S. Department of Justice.⁴ Yoo writes that in the hours after the 9/11 attacks, as much of “official Washington” evacuated, he and a “skeletal staff” of the OLC stayed behind and were asked to make a judgment—whether the United States was at war.⁵

Although most lawyers are never asked to make judgments of such public magnitude, lawyers make judgments every day, and the Carnegie Report asks law schools to teach students how to make them.⁶ To learn this skill, the report says, students should be schooled in the law, the rules of professional ethics and “the wider matters of morality and character.”⁷

Current discussions among legal scholars about teaching moral judgment making fall into three categories: The first, championed by David Luban, among others, recommends teaching judgment only in the clinical context.⁸ Luban’s model is based on Aristotelian virtue ethics, which instructs students to learn to make judgments through experience and critical reflection. As this article discusses, however, current education theory shows that experiential education is not the best or only way for adult students to learn. In fact, some adult students learn better from abstract conceptualizing or reflective observation, first, rather than immersion into practice.⁹

The second category of discussion about teaching moral judgment is articulated by W. Bradley Wendel, who recommends teaching judgment from a social and legal normative approach. Wendel’s normative approach posits that lawyers’ role as agents to their clients should prevent lawyers from making

4. John Yoo was “the number two” person at the OLC. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 21 (W.W. Norton & Co. 2007).
5. Yoo, *War By Other Means*, *supra* note 3, at 1–10. They concluded that it was. *Id.* at 4. This judgment led to Yoo’s authoring many of the OLC’s legal memoranda on aspects of the Bush administration’s war on terrorism including the two memos that relate to the use of ten physically painful techniques on an alleged al Qaeda operative during interrogation, which are discussed in Section III.B. *See infra* notes 115–128 and accompanying text.
6. As the Carnegie Report notes, skillful practice in the professions “means involvement in situations that are necessarily indeterminate from the point of view of formal knowledge. Professional practice, that is, depends on judgment to yield an outcome that can further the profession’s intended purposes.” The Carnegie Report, *supra* note 1, at 8; *see also* Nathan M. Crystal, *Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility*, 51 *St. Louis. U. L. J.* 1235, 1240 (2007) (noting the “wide range of discretionary decisions” that lawyers will face in their practice); W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 *Wash. U. L. Q.* 113, 117 (2000) (lawyers sometimes need to resort to their “personal ethical identity” in making judgments); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *Geo. J. Legal Ethics* 31, 31 (1995) (“It is a commonplace that good judgment is the most valuable thing a lawyer has to offer clients—more valuable than legal learning or skillful analysis of doctrine.”).
7. The Carnegie Report, *supra* note 1, at 129.
8. *See, e.g.*, Luban & Milleman, *supra* note 6.
9. *See infra* notes 61–64 and accompanying text.

moral judgments that are based on non-legal principles.¹⁰ As this article notes, however, teaching morality from an approach that embraces pre-determined rules and standards¹¹ leaves the student ill-prepared to address conditions of uncertainty that may call for judgment beyond the law and ethics rules.¹²

Finally, critics such as Cass Sunstein question the value of teaching students systems or techniques of addressing moral questions at all, suggesting that in areas of moral judgment making, such heuristics can lead to moral errors.¹³ To this, the article notes current studies that show that, even if law students do not receive formal instruction in metaphysics, young adults learn about moral practice by what they observe in the classroom.¹⁴ Given this, the article suggests, the Carnegie Report's conclusion that law students receive instruction in "the wider matters of morality and character"¹⁵ appears well-founded.

Against this conclusion, this article offers a new way to instruct law students in moral judgment making. It suggests incorporating into the first-semester legal writing course the Torture Memos—two predictive legal memoranda, known as Bybee I¹⁶ and Bybee II,¹⁷ which were written by John Yoo and signed by his boss at OLC, Jay S. Bybee.¹⁸ In particular, this article suggests

10. W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 *St. Louis U. L.J.* 1071, 1073 (2007) [hereinafter Wendel, *Moral Judgment*]; *see also* W. Bradley Wendel, *Ethics and the Separation of Law and Morals*, 91 *Cornell L. Rev.* 67 (2006) [hereinafter Wendel, *Separation of Law and Morals*].
11. *See* William K. Jones, *A Theory of Social Norms*, 1994 *U. Ill L. Rev.* 545, 546 (1994) (defining norms as "rules and standards that impose limits on acceptable behavior").
12. *See infra* notes 70–76 and accompanying text.
13. *See, e.g.*, Cass R. Sunstein, *Moral Heuristics*, 28 *Behav. & Brain Sci.* 531, 532 (2005) [hereinafter Sunstein, *Moral Heuristics*]; *see also* Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 *Minn. L. Rev.* 1556, 1558 (2004) [hereinafter Sunstein, *Moral Framing*].
14. *See infra* notes 82–83 and accompanying text.
15. The Carnegie Report, *supra* note 1, at 129. *See* Memorandum from Patrick F. Philbin and John C. Yoo to William J. Haynes, II, General Counsel, Department of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, Dec. 28, 2001, available in *The Torture Papers: The Road to Abu Ghraib* (Cambridge Univ. Press 2005), at 29 [hereinafter *The Torture Papers*].
16. Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, available at www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf [hereinafter Bybee I].
17. Memorandum from Jay S. Bybee, Assistant Attorney General, for John Rizzo Acting General Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative, available at www.fas.org/irp/agency/doj/olc/zubaydah.pdf [hereinafter Bybee II].
18. Goldsmith, *supra* note 4, at 142 (the two memos were "drafted by" Yoo); *see also* Report, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, Department of Justice, Office of Professional Responsibility, July 29, 2009, at 20 [hereinafter OPR Report], available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>. (Yoo was the "primary author" of the two memos.)

introducing the memos as one model of legal writing,¹⁹ and then using them to consider the underlying moral judgment making inherent in the memos. To frame the moral discussion, the article uses an approach based on the work of philosopher Susan Neiman in which discussions of moral judgment start with tools familiar to law students—reason and sincerity—and then are analyzed with a four-step process that fits the framework.²⁰

To offer the Torture Memos as a model for teaching law students how to make decisions under conditions of uncertainty, the article proceeds in the following way: Part II discusses the current conclusions in legal education scholarship about the role of morality in professional judgment making and the role of law schools in teaching morality. The article shows that current thinking in legal pedagogy about the development of moral identity in law students falls squarely within the conclusions of psychologists.²¹ The article then discusses some approaches to teaching judgment making,²² drawing on current thinkers such as Luban,²³ Wendel,²⁴ and Sunstein, as well as traditional philosophical and contemporary neuroscientific definitions of “reason,” both of which conclude that reason is formed by both emotion and logic.²⁵

In Part III, the article describes Neiman’s reason-based approach to moral judgment making, distinguishing it from those approaches discussed in Part II. Then, after briefly describing the context and background of the Torture

19. As real-life samples of legal memoranda, the Torture Memos employ many aspects of predictive legal memoranda that legal methods instructors attempt to instill in their first-year students. For example, they follow standard format (variously known by acronyms such as IRAC and CREAC); and they draw analogies and distinctions to existing case law. Equally as instructive, however, is that the memos fail in the same way as much beginning law student writing: they misstate important case law, lack analytical depth, and fail to develop a counterargument. *See generally* Kathleen Clark, Ethical Issues Raised by the OLC Torture Memorandum, 1 J. Nat’l Sec. L & Pol. 455, 458–463 (2005) (listing substantive inaccuracies in Bybee I); *see also* Linda Berger, Comments, Scholarship, 61 Mercer L. Rev. 803, 808 (2010) (advocating that instructors of legal writing focus on legal rhetoric as a source of academic scholarship and suggesting that analyzing Bybee I would be a source for such analysis). Other instructors of legal writing have incorporated ethical or moral problems in their first-year writing classes. *See, e.g.*, Philip M. Frost, Using Ethical Problems in First-Year Skills Courses, 14 Perspectives: Teaching Legal Res. & Writing 7 (2005) (describing a first-semester, first-year assignment brief on a motion to disqualify a law firm from representing a party in a lawsuit and noting, “[o]ne advantage [to the assignment] is that it involves an interesting combination of rules, ethical principles, and the realities of practice”).
20. Susan Neiman, *Moral Clarity: A Guide for Grown-Up Idealists* (Harcourt 2008) [hereinafter Neiman]; *see infra* notes 84–113 and accompanying text.
21. *See infra* notes 37–52 and accompanying text.
22. *See infra* notes 55–83 and accompanying text. It is not this article’s purpose to do a comprehensive review of various moral heuristics and offer a critique of each. Rather, I attempt to offer a framework to test moral heuristics and propose Neiman’s approach as one that withstands that test.
23. *See infra* notes 56–66 and accompanying text.
24. *See infra* notes 67–76 and accompanying text.
25. *See infra* notes 77–83 and accompanying text.

Memos, the article shows how Neiman's approach can be used to frame a discussion about moral judgment making in a first-year legal writing class.

In its conclusion, the article suggests that instructors—in introducing concepts of moral philosophy to be used with law and ethics rules to make decisions—ultimately should encourage their students to develop their own moral judgment making criteria, insisting only that they comport with the other pedagogical lesson of law school: that the criteria should be able to withstand reason-based assault.

II. A Role for Law Schools in Teaching Moral Judgment: Directives and Theory

Because so much of legal practice involves making judgments, current legal education scholarship recommends that law schools introduce students to moral judgment making. In discussing this role of law schools, this section reviews current recommendations about teaching morality and discusses how the recommendations comport with the conclusions of philosophers, psychologists and legal ethicists about teaching moral judgment.

A. Current Legal Education Directives: Professional Judgment and Individual Morality

The Carnegie Report identifies six common tasks of professional education, the third of which is “enabling students to learn to make judgments under conditions of uncertainty.”²⁶ To make judgments, the report continues, students need to be schooled in the law, in legal ethics and in “the wider

26. The Carnegie Report, *supra* note 1, at 22. Sullivan and his coauthors identified a “common goal” of the professional educations found in seminaries and in schools of medicine, nursing, engineering and law: “Professional education aims to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethically) like professionals.” *Id.* Toward those goals of “knowledge, skills and attitude,” professional education involves six tasks:
1. Developing in students the fundamental knowledge and skill, especially an academic knowledge base and research.
 2. Providing students with the capacity to engage in complex practice.
 3. Enabling students to learn to make judgments under conditions of uncertainty.
 4. Teaching students how to learn from experience.
 5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community.
 6. Forming students able and willing to join an enterprise of public service.
- Id.*

matters of morality and character,”²⁷ which would instruct lawyers how to use and apply the laws and ethics rules in their practice.²⁸

The American Bar Association’s Model Rules of Professional Conduct similarly acknowledge that lawyers need to make moral judgments.²⁹ In its preamble, for example, the rules note that professional ethics rules do not anticipate all the judgments practicing attorneys must make: “[M]any difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment.”³⁰ Similarly, the

27. *Id.* at 129. Other commentators have also discussed the need for a “moral pedagogy” in law schools. *See, e.g.*, Maksymilian Del Mar, At the Lectern: Moral Education in Law Schools and Law Firms, 59 *J. Legal Educ.* 298, 299 (2009) (discussing a series of exercises designed by artists and educators in which law professors, practitioners and doctoral students participated and noting that the participants “discussed the limitations of text-based teaching in legal education and the need for a more deliberate moral pedagogy in law schools (one that goes beyond reproducing the professional environment, as in clinical legal education);” Paul Brest & Linda Krieger, On Teaching Professional Judgment, 69 *Wash. L. Rev.* 527 (1994). Some writers have noted that law schools lag behind other professional schools in incorporating the teaching of judgment making into the curriculum. *See, e.g.*, Angela Olivia Burton, Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting, 11 *Clinical L. Rev.* 15, 19 (2004). Other writers note the “number of approaches” used in the professional responsibility literature to assist lawyers in making discretionary decisions. Crystal, *supra* note 6, at 1241.
28. The Carnegie Report, *supra* note 1, at 30–31. Other writers on professional development advocate educating students to make moral choices. *See, e.g.*, Donald A. Schon, Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions xiii (Jossey-Bass 1990) (“[E]ducation for reflective practice, though not a sufficient condition for wise or moral practice, is certainly a necessary one. For how are practitioners to learn wisdom except by reflection on practiced dilemmas that call for it?”); *see also* Christina Harrison, A Crisis in Ethics, *The National Jurist*, Oct. 2009, at 16 (discussing certain law schools that are “bringing morality into the classroom” in the face of the 2009 worldwide financial crisis, one cause of which was “questionable moral decisions made by those involved”); Burton, *supra* note 27; Mark Neal Aaronson, We Ask You to Consider: Learning About Practical Judgment in Lawyering, 4 *Clinical L. Rev.* 247, 262 (1998) (“[W]e need to alert students to a variety of factors and considerations, some information-based and some value-based, that affect legal problem solving.”).
29. The Pennsylvania Rules contain the same language as the Model Rules, and John Yoo is an active member of the Pennsylvania bar. *See* http://www.padisiplinaryboard.org/pa_attorney_info.php?id=69500&pdcount=0. Yoo’s Pennsylvania attorney identification number is 69500; he was admitted to the Pennsylvania bar on December 3, 1993. *See id.* One writer notes, however, that, under the McDade Amendment, Yoo is subject to the ethics rules of the District of Columbia because he practiced there when he worked for OLC. Clark, *supra* note 19, at 464. Similarly, the Department of Justice’s Office of Professional Responsibility (OPR) concluded that under the Ethical Standards for Attorneys for the Government, 28 C.F.R. § 77 (2003), the District of Columbia Rules applied. OPR Report, *supra* note 18, at 20.
30. Model Rules of Prof’l Conduct, pmb. ¶ 9. Notwithstanding this language, David Luban and Michael Millemann argue that the Model Rules of Professional Conduct have rejected the language of morality found in the earlier versions of the guides to professional ethics in favor of the “more technical-sounding ‘professional responsibility.’” Luban & Millemann, *supra* note 6 at 45; *see also* Deborah J. Cantrell, Teaching Practical Wisdom, 55 *S.C. L. Rev.*

ABA's Commission on Professionalism emphasizes that among the "essential characteristics" of the "professional lawyer" is "practical wisdom," which contains elements of the "capacity for self-scrutiny and for moral dialogue with clients and other individuals involved in the justice system."³¹ And Roy Stuckey and others encourage law schools to teach students "how to resolve human problems and to cultivate practical wisdom."³²

In drawing the conclusion that judgment making has a moral component beyond that found in the law and professional ethics rules, the authors of the Carnegie Report and other writers on legal pedagogy follow a long line of philosophers who acknowledge that pre-set laws and rules cannot determine all situations. Kant, for example, talks about judgments as occupying a space beyond laws and rules and says that judgment is needed to determine which rule applies.³³ Aristotle defines judgment, or practical wisdom, as "acting rationally in matters good and bad."³⁴ More recently David Luban and Michael Millemann similarly noted:

391, 407-08 (2003) (noting that in the clinical context the de-moralized rules may limit students' analysis to one of technical compliance rather than encouraging them to ask broader questions about morality). However, at least one commentator believes "common moral norms" are "reflected in the rules of professional conduct just as other aspects of the 'law of lawyering' are strongly rooted in common morality." Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *Geo. J. Legal Ethics* 19, 22-23 (1997) (citations omitted). Professor Green acknowledges, however, that individual moral codes may conflict with professional norms. *Id.*

31. Professionalism Committee, Amer. Bar Ass'n Sec. Legal Educ. & Admissions to Bar, *Teaching and Learning Professionalism* 6-7 (1996) [hereinafter ABA, *Teaching and Learning Professionalism*].
32. Roy Stuckey and Others, *Best Practices for Legal Education: A Vision and a Roadmap* 141 (Clinical Legal Educ. Assoc. 2007). Despite this encouragement from the Carnegie Report and the like, some writers have noted that law schools lag behind other professional schools in incorporating the teaching of judgment making into the curriculum. *See, e.g.,* Burton, *supra* note 27, at 19; *but see* Crystal, *supra* note 6, at 1241 (2007) (noting the "number of approaches" used in the professional responsibility literature to assist lawyers in making discretionary decisions).
33. Immanuel Kant, *Critique of Pure Reason* 155 (trans. J.M. D. Meiklejohn 1900) (1787) ("If understanding in general be defined as the faculty of laws or rules, the faculty of judgment may be termed the faculty of subsumption under these rules; that is, of distinguishing whether this or that does or does not stand under a given rule (*casus datae legis*). General logic contains no directions or precepts for the faculty of judgment, nor can it contain any such.") (italics omitted). As Hannah Arendt observed in discussing Adolf Eichmann's bastardization of Kant's categorical imperative, "Kant's moral philosophy is so closely bound up with man's [sic] faculty of judgment." Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 136 (Penguin 1964); *see also* David Luban, *Epistemology and Moral Education*, 33 *J. Legal Educ.* 636, 639 (1983) (hereinafter Luban, *Epistemology*) ("judgment cannot be taught in the form of rules"). Luban, however, finds flaws in Kant as a model for moral education, and prefers Aristotle. *Id.*; *see infra* notes 56-66 and accompanying text.
34. Aristotle, *Nicomachean Ethics*, 6. 5(c). 1140b4-5. (Martin Ostwald trans., Liberal Arts Press, Inc. 1962) [hereinafter Aristotle, *Nicomachean Ethics*]; *see also* Cantrell, *supra* note 30. Practical wisdom, Cantrell writes, has its roots in Aristotle and is woven into the works of

[M]oral decision making requires more than identifying the appropriate principles and values, and it requires more than analyzing argument. Being smart has little to do with [moral decision making]. Rather, moral decision making involves identifying which principle is more important given the particularities of the situation, and this capacity is precisely what we mean by judgment.³⁵

These disparate sources agree that judgment making is informed by, among other things, an individual's moral sense. Professional judgment is, as Luban elegantly defines, the "intellectual capacity involved in moral matters."³⁶

B. Psychologists—Morality as a Human Need

The conclusions of those professional committees and organizations—that individual morality informs professional judgments—reflect findings of psychologists that morality is fundamental to the human mind and thus essential to humans. Because morality is essential, attempts to curtail moral discussions in law school classes, or to limit them to ethics or clinical courses,³⁷ are likely to be futile and, more importantly, are likely to leave untouched an important area of legal education.

In his classic study on human motivation, psychologist Abraham Maslow notes that humans are driven by moral needs so strong that these needs may be "preconditions" to satisfying the "basic need" of food.³⁸ Maslow emphasizes humans' moral needs for "freedom to speak, freedom to do what one wishes so long as no harm is done to others, freedom to express one's self, freedom to investigate and seek for information, freedom to defend one's self, justice, fairness, honesty [and] orderliness in the group" as examples of "preconditions" to the basic needs for food and the like.³⁹ Similarly, scientists who study human behavior suggest that early forms of morality were part of the human

Immanuel Kant, Hannah Arendt, and Karl Llewellyn. *Id.* n.1. She defines practical wisdom as "the ability to consider the circumstances of a particular situation with empathy and compassion for competing viewpoints, without untempered partisanship, and with concern for questions of ethics and morality." *Id.* at 392.

35. Luban & Millemann, *supra* note 6, at 39.
36. Luban, *Epistemology*, *supra* note 33, at 654; *see also* Aaronson, *supra* note 28 ("The extent to which individuals are likely to have good judgment depends on their cognitive and moral development."); Michael Schleifer, *Moral Education and Indoctrination*, 86 *Ethics* 154, 158 (1976) ("There is in mathematical education or moral education (which is like the mathematical), a process in which the learner must come to see things for himself. The teaching of principles (whether of mathematics or of equality and justice) can never simply be the imparting of a certain amount of content.").
37. *See* ABA, *Teaching and Learning Professionalism*, *supra* note 31, at 14-15 (criticizing law schools for restricting instruction on issues of legal ethics and professional responsibility to a single, one-semester course in legal ethics).
38. A.H. Maslow, *A Theory of Human Motivation*, 50 *Psychol. Review* 370, 383 (1943), *available at* <http://psychclassics.yorku.ca/Maslow/motivation.htm>.
39. *Id.*; *see also* Neiman, *supra* note 20, at 4 (humans have "moral needs" that are sometimes "so strong they can override our instincts for self-preservation").

mind from as long ago as seven million years ago.⁴⁰ Recent developments in neuroscience research also suggest that human moral sense is present even in the first year of life.⁴¹

In discussing morality and moral development in humans, legal scholars such as Neil Duxbury and Cass Sunstein have drawn on the work of psychologist Lawrence Kohlberg,⁴² who theorized that an individual's moral reasoning develops in stages.⁴³ In Kohlberg's view, at early stages of moral development, which he called "pre-conventional" or Stages 1 and 2, concepts of right and wrong are framed in terms of punishment, reward and self-interest. In the middle, or "conventional," level, Stages 3 and 4, moral development focuses on conformity to expectations and social norms and to obeying rules. At the highest levels, Stages 5 and 6, moral reasoning is based on abstract and universal principles, such as justice and equal rights.⁴⁴ Thus, according to Kohlberg, at the highest level of moral development individuals make judgments that permit them to question laws and rules of society, rather

40. Jonathan Haidt, *The New Synthesis in Moral Psychology*, *Science*, May 18, 2007, at 998 [hereinafter Haidt, *The New Synthesis*]; Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 *Trends Cognitive Sci.* 517, 517 (2002) [hereinafter Greene & Haidt].
41. See, e.g., Paul Bloom, *The Moral Life of Babies*, *N.Y. Times Magazine*, May 9, 2010, at 46 ("With the help of well-designed experiments, you can see glimmers of moral thought, moral judgment and moral feeling even in the first year of life."); see also Neiman, *supra* note 20, at 420 ("We are born with a sense of justice the world does not meet."); cf. Sunstein, *Moral Heuristics*, *supra* note 13, at 534 (acknowledging research that some moral heuristics "might well have an evolutionary foundation").
42. Kohlberg, a psychologist who studied Jean Piaget's cognitive approach to psychology, theorized that individuals determine right and wrong, not society. James R. Rest, *Background: Theory and Research*, in *Moral Development in the Professions* (James R. Rest & Darcia Narváez eds., Psychology Press 1994). Kohlberg claimed that humans used six problem-solving strategies, which he phrased in terms of their moral development. *Id.*; see also Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 *Am. U. L. Rev.* 1337 (1997). See generally Lawrence Kohlberg, *The Philosophy of Moral Development* (Harper & Row 1981) and Lawrence Kohlberg, *The Psychology of Moral Development* (Harper Collins Coll. Div. 1994).
43. Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and the Law*, 84 *Notre Dame L. Rev.* 1529, 1540 n.36 (2009) (referring to Kohlberg's work on early stage moral development in children); Cass Sunstein, *Some Effects of Moral Indignation on Law*, 33 *Vt. L. Rev.* 405, 405 n.1 (2009) [hereinafter Sunstein, *Some Effects of Moral Indignation on Law*] (ascribing to Kohlberg a conception of morality as a "system of abstract rules"); see also Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 *Quinnipiac L. Rev.* 643, 666 (2004).
44. Lawrence Kohlberg & Richard H. Hersh, *Moral Development: A Review of the Theory*, 16 *Theory Into Practice*, Apr. 1977, at 53, 54-55. Kohlberg's theory of moral development as emanating from the individual rejected the then-predominant view that society determines right and wrong. Rest, *supra* note 42, at 2. Instead, Kohlberg theorized that the individual determines what is right and wrong, and he encouraged psychologists to focus their research on how individuals arrive at moral judgments. *Id.*

than simply following imposed rules.⁴⁵ To reach these high levels of “moral knowledge and moral judgment,” Kohlberg found, requires “a process of reasoning and reflection.”⁴⁶

As a group, law students have not reached the highest level of moral development. In fact, as Susan Daicoff has noted, researchers employing Kohlberg’s stages classify law students at Stages 4 to early Stage 5, on par with the general population and other professionals.⁴⁷ Researchers using non-Kohlberg methods have similarly found that law student morality was “more conventional” and “focused on maintaining social order and conformity,”⁴⁸ consistent with Kohlberg’s Stage 4. Traditional legal education, Daicoff found, tends to have little or a slightly deleterious effect on law students’ moral development and moral decision making.⁴⁹

But education designed to teach moral judgment making can be successful for law school-aged students. In a review of fifty-five studies of education interventions “designed to stimulate development in moral judgment,” researchers found that such programs had “significant effects.”⁵⁰

Even skeptics, such as psychologist Jonathan Haidt, agree that there is enough evidence that moral reasoning can be honed and that it does affect

45. Kohlberg & Hersh, *supra* note 44, at 55. Similarly, Luban and Millemann emphasize, at times “individual conscience must take the place of traditional norms.” Luban & Millemann, *supra* note 6, at 36 (citing Hannah Arendt, *Men in Dark Times* 11 (Harcourt 1968)); *see also* Luban, *Epistemology*, *supra* note 33, at 639 (“[W]e must admit that at some point, we move beyond rule application to some non-rule-governed activity of *judgment*.” (italics in the original)).
46. Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *Psychol. Rev.* 814 (2001) [hereinafter Haidt, *Emotional Dog*] (citing, among others, Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in *Handbook of Socialization Theory and Research* (D.A. Goslin ed., Rand McNally 1969)). In *Emotional Dog*, Haidt defines (and disagrees with) Kohlberg’s rationalist model, in which “moral emotions such as sympathy may sometimes be inputs to the reasoning process, but moral emotions are not the direct causes of moral judgments. In rationalist models, one briefly becomes a judge, weighing issues of harm, rights, justice and fairness, before passing judgment.” *Id.* Haidt argues that humans’ moral judgments are a product of “intuition.” *Id.* at 814.
47. Daicoff, *supra* note 42, at 1396–97 (citations omitted) (1997). Kohlberg’s Stage 4 is the “law and order orientation.” Kohlberg & Hersh, *supra* note 44, at 55. At Stage 4, “[t]here is orientation toward authority, fixed rules, and the maintenance of the social order. Right behavior consists of doing one’s duty, showing respect for authority, and maintaining the given social order for its own sake.” *Id.* At Stage 5, there is a “social-contract, legalistic orientation, general with utilitarian overtones The result is an emphasis on the ‘legal point of view.’” *Id.*
48. Daicoff, *supra* note 42, at 1397 (citations and internal quotations omitted).
49. *Id.* (citations omitted).
50. *See* Andre Schlaefli, James R. Rest & Stephen J. Thoma, *Does Moral Education Improve Moral Judgment? A Meta-Analysis of Intervention Studies Using the Defining Issues Test*, 55 *Rev. Educ. Res.* 319 (1985).

practice choices to warrant teaching it from a reason-based approach.⁵¹ As Mark Neal Aaronson writes: “In any particular set of circumstances, exercises in judgment presume a mastery of certain relevant knowledge Judgment is not the same thing as intuition.”⁵²

*C. Current Approaches to Teaching Moral Judgment to Law Students:
Luban, Wendel, and Sunstein*

Given the directives that law schools introduce judgment making into the curriculum⁵³ and the conclusions of scientists that moral judgment making can be taught, or at least honed, in law school-aged students,⁵⁴ this article addresses some approaches to teaching moral judgment making. Theories of teaching morality date back at least to Socrates in his dialogue with Meno,⁵⁵ but this article limits its discussion to three contemporary approaches.

I. The Aristotelian-Influenced Clinical Approach
to Teaching Judgment Making

Some leading legal ethicists suggest that morality, as a component of judgment, can “only” be learned through applied or clinical work, or in, at most, a course that combines clinical practice with in-class instruction on ethics and morals.⁵⁶ In describing a “hybrid clinical-classroom method of ethics teaching,” David Luban and Michael Millemann assert: “[T]he best way to teach legal ethics—the only way to teach legal ethics that incorporates the all-important element of moral judgment—is clinically.”⁵⁷

In championing clinical experiences to teach moral judgment, Luban and Millemann “defend the Aristotelian idea that judgment is cultivated through immersion in practice combined with critical reflection on practical

51. “Moral reasoning can correct and override moral intuition.” Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 *Science* 998, 1001 (2007).

52. Aaronson, *supra* note 28, at 264.

53. See *supra* notes 23–33 and accompanying text.

54. See *supra* notes 47–48 and accompanying text.

55. “Can you tell me, Socrates, whether virtue is acquired by teaching or by practice; or if neither by teaching nor by practice, then whether it comes to man [sic] by nature, or in what other way?” Plato, *Meno*, in *Five Great Dialogues of Plato* 57 (Benjamin Jowett trans., Coyote Canyon Press 2009) (380 BCE).

56. See, e.g., Luban & Millemann, *supra* note 6, at 32.

57. *Id.* at 40 (emphasis in the original); see also Patrick E. Longan, *Teaching Professionalism*, 60 *Mercer L. Rev.* 659 (2009) (describing one law school’s efforts to teach “professionalism” through two classes: a first-year classroom course and a third-year course that combines lecture, small-group discussion and student reflection; Cantrell, *supra* note 30 (discussing the Lawyering Ethics Clinic at Yale Law School and considering whether the clinic was effective in teaching students “practical wisdom.”); Aaronson, *supra* note 28 (describing approaches used to encourage students to develop “good lawyering judgment” in the context of a civil justice clinic).

experiences.”⁵⁸ This idea of learning from experience with opportunity for reflection also has a sound basis in contemporary adult learning theory. “Experiential learning,” as distinguished from cognitive and behavioral learning, is the process of creating knowledge through the transformation of experience and it is a successful way for some learners to perceive new information.⁵⁹

However, experiential learning is not the only way for law students to learn.⁶⁰ Education scholars note that some adult students learn new information through “abstract conceptualization—thinking about, analyzing, or systematically planning” rather than using experience as a guide.⁶¹ Still other adult learners are “watchers” who favor “reflective observation.”⁶² The latter students learn by “carefully watch[ing] others who are involved in the experience and reflect[ing] on what happens.”⁶³ Both types of learners—abstract conceptualizers and watchers—would be unlikely to learn moral judgment making best in a clinical context. Instead, these learners may do better by being exposed to moral philosophy in the classroom, discussing situations in which moral judgment is needed and reflecting on choices others made.⁶⁴

Aside from considerations of students’ learning aptitudes, few law professors have the luxury of interpolating into their classrooms a clinic in which students can practice the substance of the law or skills being taught while confronting and reflecting on the ethical and moral judgment lessons such a clinic might

58. Luban & Millemann, *supra* note 6, at 32; *see also* Luban, Epistemology, *supra* note 33, at 637, 648 (calling Aristotle’s *Ethics* “the greatest work of moral psychology ever composed,” and championing virtue ethics as the framework for “clinical moral education”).
59. *See* David A. Kolb, Richard E. Boyatzis & Charalampos Mainemelis, *Experiential Learning Theory: Previous Research and New Directions in Perspectives on Cognitive, Learning, and Thinking Styles* (Robert J. Sternberg & Li-Fang Zhang eds., Routledge 2001).
60. Nathan Crystal believes that clinical courses have “severe limitations” in teaching judgment. Crystal, *supra* note 6, at 1247. His criticisms note that fewer students participate in clinical experiences and that clinical experiences themselves are limited such that the “issues of professional judgment” to which the students are exposed are limited in number.” *Id.* at 1247. Thus, Crystal recommends that “traditional courses on professional responsibility find ways of incorporating development of professional judgment into their fabric.” *Id.* (Crystal’s suggestions include: student papers, problem-based methods, case-based method, teacher demonstrations and panel discussions.).
61. Kolb et al., *supra* note 59. As psychologist Diana Pritchard Paolitto notes, “A cognitive development framework of teaching not only recognizes the potential learning that can result from philosophical inquiry in the classroom, but this approach also encourages an open-ended dialogue about crucial moral questions.” Diana Pritchard Paolitto, *The Role of the Teacher in Moral Education*, 16 *Theory Into Prac.* 73, 73 (1977).
62. Kolb et al., *supra* note 59, at 4.
63. *Id.* at 3-4.
64. David Luban acknowledges “[E]ven in the classroom more is going on than meets the ear. Judgment (of a sort) is being cultivated as well as rules being formulated.” Luban, Epistemology, *supra* note 33, at 640.

present.⁶⁵ Therefore, given the realities of the different ways students learn and the way the law is taught, limiting the teaching of moral judgment to clinical courses seems short-sighted at best. At worst it may bracket moral questions, perhaps allowing non-clinical law instructors to assume that it is not their role to teach moral judgment making.⁶⁶

2. The Norms Approach to Teaching Judgment Making

Some other legal scholars are doubtful that morality should be taught—in clinical courses or at all. These scholars suggest that legal judgment should simply be the application of legal norms, “which may incorporate moral principles . . . but which are analytically distinct from morality.”⁶⁷ W. Bradley Wendel, for example, suggests that lawyers are presumptuous to think

65. Similarly, to the extent professionalism was traditionally learned through apprenticeships, Patrick Longan notes that the profession’s “willingness or ability to provide [instruction in professionalism through apprenticeships] has waned.” Longan, *supra* note 57, at 660–61. Longan suggests that financial pressures on law firms make mentoring too expensive and lawyers who were not mentored tend not to mentor younger attorneys. *Id.* at 661. He concludes that the legal profession has turned to law schools to provide professionalism training. *Id.*
66. See ABA, Teaching and Learning Professionalism, *supra* note 31, at 14 (“Although there has been a great deal written about the pervasive method of teaching legal ethics throughout the entire curriculum, law schools have, for the most part, merely given lip service to this approach.”).
67. Wendel, Moral Judgment, *supra* note 10, at 1071. Wendel disagrees with the views of those legal ethicists who suggest that lawyers, when acting as representatives of their clients, have a personal, moral responsibility for their actions. *Id.* at 1072. He also disagrees with the view that law schools have responsibility for “improving the ethical decision-making capacities of students.” *Id.* Arguing from principles of agency law and his view of the role of lawyers in society, Wendell states, “I believe lawyers in fact should refrain from exercising moral judgment on the basis of non-legal values.” *Id.* at 1072; see also Richard Painter, Tell Me No Lies, 32 Am. Law., Jun. 1, 2010, available at Factiva, Document ALAW000020100603e6610000z (advocating honesty rather than a don’t ask, don’t tell policy on homosexuals in the military, Painter opines, “[Q]uestions of morality are a matter for theologians and religious leaders to debate.”). Nathan Crystal similarly describes a philosophy that is based on social or professional values or norms as a “philosophy of institutional values.” Crystal, *supra* note 6, at 1242. An advantage to this philosophy, he writes, is that norms expressed in “an institutional form” are “likely to be seen as more objective and justified than moral values, which are often viewed as individual, subjective, and controversial); see also Cantrell, *supra* note 30, at 393 (suggesting that the term “practical wisdom” may seem to not need much definition: “The phrase suggests a kind of applied intelligence with an additional normative layer.”); see generally Joseph William Singer, Normative Methods for Lawyers, 56 U.C.L.A. L. Rev. 899 (2009).

that they can make better moral judgments than their clients,⁶⁸ and that an understanding of social and legal norms is sufficient for educating lawyers.⁶⁹

Norms, however, as “rules and standards that impose limits on acceptable behavior,”⁷⁰ by definition do not address conditions of uncertainty that may call for judgment making beyond existing laws and ethics rules. In fact, behavior determined by laws, rules, authority, maintaining the social order and doing one’s duty is moral development only at Kohlberg Stage 4.⁷¹ In raising the specter of moral judgment, however, the Carnegie Report specifically notes that lawyers may need to make judgments in spaces that lie beyond laws and ethics rules.⁷² This is Kohlberg Stage 6 at which, “Right is defined by the decision of conscience in accord with self-chosen ethical principles appealing to logical comprehensiveness, universality and consistency.”⁷³

Similarly, Hannah Arendt recommended developing an individual moral philosophy because there are times when the Western philosophic traditions of studying customs, norms, laws and character would not be sufficient to handle extreme times of moral collapse.⁷⁴ There are times, too, when leaders, to whom Aristotle would have one look as models of moral decision making,⁷⁵ are not wise and good. For these times, too, lawyers have to develop a way of

68. Wendel, *Moral Judgment*, *supra* note 10, at 1073 (“Other than the clergy, no profession in modern society makes the claim to be better at making moral decisions than its clients.”). Similarly, William H. Simon suggests a norms approach that promotes “legal merit.” William H. Simon, *The Practice of Justice* 9 (Harvard Univ. Press 1999), as discussed in Crystal, *supra* note 6, at 1243.
69. *See generally* Wendel, *Moral Judgment*, *supra* note 10, at 1078–1086.
70. Jones, *supra* note 11, at 546.
71. *See supra* notes 43–46 and accompanying text.
72. The Carnegie Report, *supra* note 1, at 129.
73. Kohlberg & Hersh, *supra* note 44, at 55. Kohlberg continues that the ethical principles at Stage 6 are “abstract and ethical (like the Golden Rule, the categorical imperative); they are not concrete moral rules like the Ten Commandments. At heart, these are universal principles of justice, of the reciprocity and equality of human rights, and of respect for the dignity of human beings as individual persons.” *Id.* Kohlberg, however, at the time of his death had not fully defined the distinctions between Stages 5 and 6. *See Rest*, *supra* note 42, at 7.
74. *See generally* Elisabeth Young-Bruehl, *Why Arendt Matters* (Yale Univ. Press 2006).
75. As David Luban restates Aristotle, “We know that virtuous actions are good and noble because good men say they are. That good men say an action is good is itself a reason for believing, or evidence, that that is the case.” Luban, *Epistemology*, *supra* note 33, at 651 (emphasis omitted) (citing Aristotle, *Nicomachean Ethics* 1. 8. 1099a20–23); *see also* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 *Notre Dame L. Rev.* 635, 642 (2006) (noting that an Aristotelian-inspired “focus on character” is the preferred way to address ethical problems).

making moral judgments that may be beyond the norms with which Wendel suggests all lawyers' decisions can and should be made.⁷⁶

3. Teaching Judgment Making Without Reference to Morality

Finally, some writers on teaching judgment to law students suggest that judgment can be taught without any reference to morality. Angela Olivia Burton, for example, proposes that "good judgment" can be taught in law schools by honing a suite of "intelligences," including "linguistic, categorizing, logical-mathematical, narrative, interpersonal, intrapersonal and strategizing" intelligences, which are not normally the focus of law teaching.⁷⁷ However, even though she does not advocate instruction in metaphysics, Burton does acknowledge that law is inseparable from the "practical, moral and ethical concerns inherent in the realities of human conflict situations."⁷⁸

Other writers on teaching morality base their concerns on doubts about the value of moral judgment making systems, or "heuristics." Cass Sunstein, who considers moral heuristics simplistic "rules of thumb" or "mental short cuts,"⁷⁹ acknowledges that heuristics may be beneficial and accurate in some areas, but in the area of morality, especially in unusual cases, heuristics can lead to moral errors.⁸⁰ Sunstein's criticism is based on the work of psychologists who de-emphasize the role of moral reasoning in judgment making and, instead, theorize the importance of social and cultural influences on moral judgment making. This "intuitionist" model states that moral judgment is caused by "quick moral intuitions and is followed (when needed) by slow, ex post facto moral reasoning."⁸¹

Despite Sunstein's doubts about the efficacy of morals education in law school, the research suggests that, like it or not, law students learn about the moral choices of lawyers through what is said and not said in the classroom.

76. See Wendel, *Moral Judgment*, *supra* note 10 and text accompanying notes 67-70. Wendel suggests a moral Chinese wall, of sorts, in which legal norms and ethics rules, which may have "analogues in ordinary moral life," are separated from moral judgments made outside the practice: "Of course lawyers remain moral agents even when acting in a professional capacity, but their non-legal moral beliefs should not be permitted to influence their interpretation and application of legal norms." *Id.* at 1074.

77. Burton, *supra* note 27, at 22. Burton argues that law school pedagogy focuses "almost exclusively" on linguistic, categorization and de-contextualized logical reasoning, capacities used in the adversarial aspect of lawyers' work. *Id.*

78. *Id.* at 16.

79. Sunstein, *Moral Heuristics*, *supra* note 13, at 532 (suggesting that heuristics do not perform well when applied to unusual situations); see also Sunstein, *Moral Framing*, *supra* note 13, at 1558 (suggesting that moral heuristics "play a pervasive role in moral, political, and legal judgments, and they produce serious mistakes").

80. Sunstein, *Moral Heuristics*, *supra* note 13, at 541-42.

81. Haidt, *Emotional Dog*, *supra* note 46, at 817; see also Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, *supra* note 43, at 405-06 (describing "new work" in the psychological analysis of morality as a "view that emphasizes moral emotions and moral intuitions that are not anchored in reasons") (citations omitted).

As the Carnegie Report says, “the law school years constitute a powerful moral apprenticeship.”⁸² The observation finds support in the psychology literature, which concludes that “dramatic gains in moral judgment development” can happen to young adults when they are exposed to “specific classroom and non-classroom contexts that are conducive to growth in moral reasoning.”⁸³ Given the evidence that students are learning about morality during their law school years, coupled with the evidence that education designed to “stimulate development in moral judgment” can be effective, incorporating lessons in moral judgment making into law classes appears likely to be effective.

4. A Reason-Based Approach for Teaching Moral Judgment Making

If morals are being learned in law school despite their absence from official course offerings, and if law school-aged students can be taught to develop moral judgment, how should law schools teach?⁸⁴ Schools should focus and shape class discussions on judgment making by, first, grounding the discussions in accurate knowledge of the law and professional ethics⁸⁵ and then by introducing to the students a law school-appropriate framework for discussing moral reasoning.⁸⁶ From there, instructors can proffer a moral philosophy that fits within the framework. Finally, they can model applying the proffered philosophy to a situation that requires moral judgment—such as that faced by John Yoo. Presenting a moral philosophy in this way does

82. The Carnegie Report, *supra* note 1, at 139. Similarly, researchers at the Harvard Business School concluded that MBA students are at a “stage of great exploration and are fully able, if not at the most able, to reflect on issues of right and wrong, moral absolutism and relativism, and moral courage.” Jennifer M. Mitchell & Eric D. Yordy, COVER It: A Comprehensive Framework for Guiding Students Through Ethical Dilemmas, 27 *J. Legal Stud. Educ.* 35, 37 (2010).
83. Patricia M. King & Matthew J. Mayhew, Moral Judgement [sic] Development in Higher Education: Insights From The Defining Issues Test, 31 *J. Moral Educ.* 247 (2002) (reviewing 172 studies of college undergraduates and finding that “significant growth in the use of post-conventional moral reasoning [as measured by the Defining Issues Test] does occur in college, and this growth is not attributable to general maturation” but to specific classroom and non-classroom contexts that are conducive to growth in moral reasoning); *see also* Kohlberg & Hersh, *supra* note 44, at 53 (1977) (“Whether we like it or not schooling is a moral enterprise. Values issues abound in the content and process of teaching.”); *see generally* Gabriel Lerner, How Teaching Political and Ethical Theory Could Help Solve Two of the Legal Profession’s Biggest Problems, 19 *Geo. J. Legal Ethics* 781 (2006) (proposing to solve the “shortcomings in the legal ethics curriculum” and “unhappiness of lawyers” by “systematically teaching political and ethical theory” which would allow the students to learn “sophisticated moral judgment”).
84. *See* Cantrell, *supra* note 30, at 397–98 (“If practical wisdom is something law students should learn, which teaching method works best to instill it?”). Cantrell recommends an ethics clinic to teach students “practical wisdom.” *Id.*
85. As Neiman says, “simple information is never enough,” but it is “always the first place to start.” Neiman, *supra* note 20, at 188.
86. *See* Singer, *supra* note 67, at 904 (“students need to be able to make arguments that can express and defend claims of rights and justice”).

not mean imposing the instructor's moral values on the students.⁸⁷ Instead, it involves introducing the students to the vocabulary of moral reasoning by providing them with a framework and demonstrating judgment making using a philosophy.

As members of a reason-based profession, legal educators should teach their students to develop a sincerely held and reason-based moral philosophy. With these two standards framing the discussion (along with knowledge of law and professional ethics) students will be able to articulate their moral philosophies with the same intellectual rigor with which they defend a client's position in a lawsuit, negotiation or transaction.

Grounding moral philosophy in reason comports with philosophers' and neuroscientists' descriptions of the human mind. Humans strive to understand the world, as western philosophers have articulated, with "sufficient reason."⁸⁸ Sufficient reason incorporates both emotion and logic, acknowledging that neither pure logic nor pure emotion drives moral action.⁸⁹ Current theories in neuroscience confirm that morality is founded in reason—that judgments come from the different parts of the brain that control logic and emotion.⁹⁰ A reason-based philosophy, therefore, could not be grounded in pure reactive emotion, superstition or fanaticism.⁹¹ Nor, however, could it be limited to cool, calculating rationalism.⁹² Under a definition that combines logic and emotion,

87. See Stanley Fish, *Conspiracy Theories* 101, N.Y. Times, July 23, 2006, available at Factiva, Doc. No. NYTF000020060723e27n0007z (arguing that academic freedom "is the freedom of academics to study anything they like; the freedom, that is, to subject any body of material, however unpromising it might seem, to academic interrogation and analysis" but "there should be an absolute restriction on appropriating the scene of teaching for partisan political ideals").
88. See generally Lloyd Strickland, *Leibniz Re-Interpreted* (Continuum Int'l Publ'g Group 2006); Béatrice Longuenesse, *Kant on the Human Standpoint* (Cambridge Univ. Press 2005); Arthur Schopenhauer, *On the Fourfold Root of the Principle of Sufficient Reason* (Mme. Karl Hillebrand trans., Julius Frauenstädt ed., 1907) (1813) (Open Court Publ. 2003); Neiman, *supra* note 20, at 190-92.
89. See Neiman, *supra* note 20, at 181 ("In fact, much like contemporary work from philosophy to neuroscience, Enlightenment thinkers rejected simplistic psychologies that pitted reason against emotion, emphasizing instead that we're generally moved by both.").
90. See, e.g., Antonio Damasio, *Neuroscience and Ethics: Intersections*, 7 *Amer. J. Bioethics* 3, 6 (2007) ("[E]thics is human-made yet grounded in a hodgepodge of neural devices connected with the origins of emotions."); Haidt, *The New Synthesis*, *supra* note 40 (In parsing out the roles of emotion and cognition in moral decision making, Haidt notes that moral judgment takes place in those areas of the brain that integrate intuition into decisions and plans.); see also Greene & Haidt, *supra* note 40.
91. Neiman, *supra* note 20, at 192. According to Neiman, Enlightenment philosophers' use of reason first began as opposition to authority that had been "inherited or imposed but never justified." *Id.* at 184. The Enlightenment's first efforts "were devoted to undermining superstition by exposing contradictions in its scripture and using science to give natural explanations to things that looked like miracles." *Id.*
92. See, e.g., Neiman, *supra* note 20, at 180 (describing Kant's refinement of David Hume's critique of rationalism: "Reasoning cannot, and should not, be a matter of knowing."); see also Singer,

reason looks very much like legal analysis: a blend of hard rules and supple policies, customs and principles.⁹³

The second prong of the framework of law school discussions of moral reasoning is sincerity—that in addition to being based in reason, the students’ approaches to moral judgment making should be sincerely held.⁹⁴ Sincerity is necessary because, as law students introduced to classical rhetoric learn,⁹⁵ speakers and writers who espouse ideas that are undercut by their actions are not credible.⁹⁶ As Aristotle notes in his *Rhetoric*, “We believe fair-minded people to a greater extent and more quickly than we do others.”⁹⁷ Sincerity alone, however, is insufficient for moral judgment making, for there are many ideas that may be sincerely held, but are not informed by information and reason.⁹⁸ Therefore, any moral philosophy employed in law school discussions should first have to withstand challenges to its reason and its proponent’s sincerity.

supra note 67, at 906 (recommending that lawyers look beyond economic approaches when theorizing a just society and look, instead, to moral and political philosophies that are grounded in “practical reason”).

93. See, e.g., Linda H. Edwards, *Legal Writing and Analysis* 55 (Aspen 2007) (describing the “forms of legal reasoning” as “rule-based,” “analogical,” “policy-based,” “custom-based,” “principle-based,” and “narrative”).
94. See generally Neiman, *supra* note 20, at 72.
95. First-year legal writing courses often discuss the rhetorical tools of *logos* (appeals to logic), *pathos* (appeals to emotions), and *ethos* (appeals based on the character of the speaker). See, e.g., Kristen Kinrad Robbins-Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* (West 2009); Michael R. Fontham, Michael Vitiello & David W. Miller, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* 26–27 (Aspen 2007) (discussing the use of reason and the character of the audience); James A. Gardner, Joseph W. Belluck & Laura L. Aswad, *Legal Argument: The Structure and Language of Effective Advocacy* 38, 146 (LexisNexis 2007) (discussing the use of reason and a “hook,” or an appeal to emotion); Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 180 (Aspen 2006) (discussing the advocate’s credibility); Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 311 (LexisNexis 2006) (discussing the advocate’s credibility).
96. As Neiman says, “harmony between words and deeds” is needed to withstand logical assault. Neiman, *supra* note 20, at 72.
97. Aristotle, *On Rhetoric: A Theory of Civic Discourse*, bk. 1, ch. 2 1356[A] (George A. Kennedy trans., Oxford Univ. Press 1991); see also Robbins-Tiscione, *supra* note 95, at 203 (discussing Quintilian’s view of “ethos,” that to be effective, an orator must, among other things be a “sincere believer in his cause”) (citing Quintilian, *Institution Oratorio*, bk. 12, ch. 1 ¶¶ 3–10).
98. Neiman also notes that present day observers can be distracted by too much speculating on others’ sincerity. Neiman, *supra* note 20, at 26. Focusing on the theory underlying the sincerely held belief is far more important. “[Q]uestions about individual sincerity [. . .] are less important than they seem. Cynicism and fanaticism can be equally ruthless.” *Id.*

III. Susan Neiman's Moral Clarity: A Reason-Based Approach for Moral Judgment Making.

The judgment-making approach of moral and political philosopher Susan Neiman fits within the two-part framework (reason-based, sincerely held) proposed above as suitable for a law school-based approach for moral judgment making.⁹⁹ Neiman's approach is informed by the Western philosophical tradition, particularly the Enlightenment philosophers. In making judgments, she suggests keeping in mind four principles, which are adapted here for law school teaching.

A. Four Principles of Moral Judgment Making

First, students should be cautioned that making moral judgments is difficult. The interplay of law, ethics rules and personal morals involves understanding nuances and implications in fact, policy and regulation. As Neiman writes: "Moral judgment is not a matter of decisions made once and for all, but of keeping your eyes on distinctions. Numbers matter. Gradations matter Moral judgments are slow, specific and seldom absolute."¹⁰⁰ Simplistic one-size-fits-all dogmas, she says, will not solve difficult moral questions. In this, political thinkers across the spectrum¹⁰¹ and legal ethicists¹⁰² would seem to agree—moral decisions need to be grounded in specific, actual questions.¹⁰³

99. Moral and political philosopher Susan Neiman was born in Atlanta, Georgia and educated at Harvard. She is currently director of the Einstein Forum in Potsdam in Brandenburg, Germany. A student of John Rawls at Harvard, Neiman received her Ph.D. in Philosophy in 1986 and has taught at Yale and Tel Aviv Universities. She is the author of, among other works, *The Unity of Reason: Rereading Kant* (Oxford Univ. Press 1994); *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton Univ. Press 2004) [hereinafter Neiman, *Evil in Modern Thought*], and *Moral Clarity: A Guide for Grown-Up Idealists*, *supra* note 20, as well as numerous articles and book chapters, and is the recipient of a number of awards and honors, including a fellowship at the Institute of Advanced Study. See Curriculum Vitae, Susan Neiman, available at <http://www.susan-neiman.de/docs/cv.html>.

100. Neiman, *supra* note 20, at 3.

101. See, e.g., Eric Posner & Adrian Vermeule, Should Coercive Interrogation Be Legal?, 104 Mich. L. Rev. 671, 692 (2006) (noting that a "typical philosopher's mistake" is to attempt[] to derive concrete conclusions from premises that are too general or abstract to cut between policy choices on the ground") [hereinafter Posner & Vermeule, *Coercive Interrogation*]; William Bennett, Why We Fight: Moral Clarity and the War on Terrorism 10 (Regnary 2002), quoted in Neiman, *supra* note 20, at 424 ("[M]oments of moral clarity are rare in life, and they are exceedingly precious. They usually follow upon hours-years of moral confusion; they seldom arrive all at once or definitively; and they are never accompanied by a lifetime guarantee.").

102. See, e.g., Aaronson, *supra* note 28, at 261–262 (noting that "classical virtue ethics and judgment-based approaches to legal ethics emphasize the importance of focusing on particularities"); Luban & Millemann, *supra* note 6, at 39 ("Moral decision making involves identifying which principle is most important given the particularities of the situation.").

103. See Aristotle, *Nicomachean Ethics*, *supra* note 34, at 6. 7, 1141b12–14 ("Nor does practical wisdom deal only with universals. It must also be familiar with particulars, since it is concerned with action and action has to do with particulars.").

Acknowledging this suggests that conversations grounded in supposition or hypotheticals are likely to be ineffectual for serious discussions of moral judgment making.¹⁰⁴

Second, recognize that in the situation requiring moral judgment there likely will be a difference between what “ought” to be and what “is.”¹⁰⁵ The ability to reason, Neiman says, allows humans to imagine places (the “ought”) beyond the actual (the “is”).¹⁰⁶ However, a mature moral philosophy acknowledges that sometimes the choices available only permit distinguishing between levels of evil and choosing between or among them.¹⁰⁷

The third step of Neiman’s approach is to focus on the character of the action, not the character of the actor.¹⁰⁸ Since intent is an element in public and private law, this step may be difficult for some law students to parse.¹⁰⁹ But, as Neiman writes, intent is not at the core of acting morally.¹¹⁰ In fact, most evil deeds are done by people who do not believe they are motivated by evil.¹¹¹ And the reverse is just as true. People who do good deeds tend to discount

104. See *infra* notes 142–143 and accompanying text.

105. Neiman, *supra* note 20, at 423. The is/ought distinction is generally first ascribed to David Hume:

In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning [. . .] when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, ‘tis necessary that I shou’d be observ’d and explain’d; and at the same time that a reason should be given.

David Hume, *A Treatise of Human Nature* 469 (Clarendon Press 1896) (1739).

106. See Neiman, *supra* note 20, at 190–191; see also *id.* at 192 (“The gap between is and ought is the space where questions begin.”).

107. In praising certain aspects of the approach of Anatol Lieven and John Hulsman to U.S. foreign policy, Neiman writes, “They [Lieven and Hulsman] are also right to insist on a ‘capacity to distinguish clearly between different grades of evil, and to choose firmly between them.’ We must pick our battles, and cannot do everything at once.” Neiman, *supra* note 20, at 73 (citing Anatol Lieven & John Hulsman, *Ethical Realism* at 112 (Pantheon Books 2006)).

108. Neiman, *supra* note 20, at 426–27.

109. For example, criminal law focuses on mens rea, or “criminal intent,” Black’s Law Dictionary 1075 (9th ed. 2009); some torts look to the tortfeasor’s intent, see generally Restatement (Second) of Torts § 8A; and some current contract scholarship describes the use of virtue jurisprudence to examine parties’ intent in assessing damages in contract actions. See, e.g., Chapin Cimino, *Virtue and Contract Law*, 88 Or. L. Rev. 703 (2010). Teasing apart the spaces in moral judgment making in which intent should matter—if there are any such spaces at all—is an intriguing question beyond the scope of this article.

110. Neiman, *supra* note 20, at 426–27.

111. *Id.*; see also Hannah Arendt, *The Life of the Mind* 180 (Harcourt 1978) (“Most evil is done by people who never made their minds up to be or do evil at all.”).

them when their motives are not pure. But, good deeds and bad come from a mixture of motives and desires.¹¹²

The fourth and final step of Neiman's moral philosophy, which this article proposes as fitting within the frame of law school education, is this: Stand ready to call anyone into question.¹¹³ If an action does not stand up to sincerely felt, reason-based scrutiny, then no matter who is doing it—a family member, a teacher, a judge, a well-educated legal scholar or a president—a reason-and-sincerity-based moral philosophy requires us to call him or her into question.

B. Application of the Four Principles to the Torture Memos

As 9/11, Abu Ghraib and revelations about the role of lawyers in Bush-era war policy grow more distant, the law school instructor may have to place the Torture Memos into historical context before moving on to a discussion of the moral judgment making inherent in their writing. In this section, this article briefly recalls some historical context and then addresses the memos using Neiman's moral reasoning.

1. The Torture Memos' Background and Context: A "Condition of Uncertainty."¹¹⁴

Several dozen legal documents together lay out the authority for the George W. Bush Administration's handling of prisoners captured in the wars in Afghanistan and Iraq, which were begun in the aftermath of the 9/11 attacks.¹¹⁵ The documents include presidential directives relating to

112. Neiman, *supra* note 20, at 427. An unnamed friend of Jay Bybee noted Bybee's good intentions in signing the two Torture Memos, but said it was Bybee's commitment to a certain interpretive theory of the law that led him to sign them:

[A]ny lawyer, when he or she is writing about something very complicated, very layered, sometimes you can get it all out there and if you're not careful, you end up in a place you never intended to go. I think for someone like Jay, who's a formalist and a textualist, that's a particular danger.

Karl Vick, *Amid Outcry on Memo, Signer's Private Regret; Friends Say Judge Wasn't Proud of Outcome*, Wash. Post, Apr. 25, 2009, at A1.

113. Neiman, *supra* note 20, at 429.

114. See the Carnegie Report, *supra* note 1, at 22 ("Making judgments under conditions of uncertainty" is a hallmark of the professional.).

115. As subjects of various Freedom of Information Act (FOIA) requests and leaks, the memos have been posted in a number of publicly available places and collated and edited in others. In 2005, Karen J. Greenberg, then of New York University Law School, and Joshua L. Dratel, lead counsel to David Hicks, a detainee at Guantanamo, edited a collection of documents. The Torture Papers, *supra* note 15. The American Civil Liberties Union maintains a searchable database of documents turned over to it in its FOIA action against the government, available at www.thetorturereport.org. In addition, in its National Security Archive, which publishes a range of declassified documents obtained through FOIA requests, George Washington University also maintains a searchable database called The Torture Archive, available at http://www.gwu.edu/~nsarchiv/torture_archive/index.htm. More recently, John Ehrenberg and others collected and edited documents relating to

establishing CIA-run secret prisons;¹¹⁶ advisory opinions from lawyers in the Office of Legal Counsel on “extraordinary renditions”;¹¹⁷ the limitations on federal courts’ jurisdiction to hear habeas corpus petitions from prisoners held in Guantanamo Bay, Cuba;¹¹⁸ the status of prisoners under the Geneva Conventions;¹¹⁹ and the “plenary” authority of the president in matters having

George W. Bush’s decision to invade and occupy Iraq. John Ehrenberg, J. Patrice McSherry, Jose Ramon Sanchez & Caroleen Marji Sayej, *The Iraq Papers* (Oxford Univ. Press 2010).

116. President Bush’s directive, signed September 17, 2001, remains classified. However, in a reply to ACLU’s FOIA request for, among other things, a “Directive signed by President Bush that grants CIA the authority to set up detention facilities outside the United States,” the CIA acknowledged the existence of a presidential memorandum to the director of the CIA. Letter from John L. McPherson, Associate General Counsel, Central Intelligence Agency to Melanca D. Clark, Nov. 10, 2006, *available at* www.aclu.org/files/images/torture/asset_upload_file825_27365.pdf.
117. *Id.*
118. *See* Memorandum from Patrick F. Philbin and John C. Yoo to William J. Haynes, II, General Counsel, Department of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, Dec. 28, 2001, *available in* *The Torture Papers*, *supra* note 110, at 29. In pertinent part, the memo concludes, “the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay, Cuba],” *id.*, but that “[A] detainee could make a non-frivolous argument” that such jurisdiction does exist. *Id.* The basis of this conclusion was a 1950 Supreme Court decision that held that federal courts had no jurisdiction to hear habeas petitions filed by an enemy alien who had been seized and held at all relevant times outside the territory of the United States. *Id.* (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). Thus, the analysis in the Bush-era memo turned on the extent to which Guantanamo Bay, Cuba was a “territory of the United States.” *Id.*
119. *See* Memorandum from John Yoo and Robert J. Delahunty to William J. Haynes, II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees,” Jan. 9, 2002, *available in* *The Torture Papers*, *supra* note 15, at 38. The Geneva Conventions provide, *inter alia*, for the humane treatment of prisoners taken in conflicts and they set forth rules for “competent tribunals” to determine the status of prisoners. Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. This memo garnered very strong objection from certain members of the Bush administration. For example, Secretary of State Colin Powell urged the President to apply the Geneva standards, noting that since the Geneva Conventions were concluded, the U.S. has never denied their applicability even if there could be arguments made that they did not technically apply. Memorandum from Colin L. Powell to Counsel to the President and Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, Jan. 25, 2002, *available in* *The Torture Papers*, *supra* note 110, at 122. General Powell’s concerns were echoed by the Memorandum to Counsel to the President from William H. Taft, IV, Comments on Your Paper on the Geneva Conventions, Feb. 2, 2002, *available in* *The Torture Papers*, *supra* note 15, at 129. As Jameel Jaffer and Amrit Singh note, by taking away the protections of the Geneva Conventions, a new era of prisoner interrogation began, and because of the earlier memo’s conclusions that prisoners held at Guantanamo did not have access to habeas corpus review, the prisoners could not object. Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* 4 (Columbia Univ. Press 2007).

to do with war, including “capturing, detaining and interrogating members of the enemy.”¹²⁰

Of the dozens of memoranda generated by the OLC, two memos in particular are helpful for introducing law students to discussions of moral judgment making. The first, “Bybee I,” concludes that acts that do not cause a “sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily function,” are not “torture” under the federal anti-torture act and thus may be used by government agents during interrogations.¹²¹ The second memo, “Bybee II,” applies the definition of torture developed in Bybee I to ten specific techniques: “(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed

120. See, e.g., Memorandum from John Yoo for William J. Haynes, II, General Counsel, Department of Defense on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf>. The memo concluded that the president has “plenary control over diplomatic relations,” *id.* at 12; that one of the “core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy.” *Id.* at 6. In a memorandum written in the weeks following the 9/11 attacks, Yoo concluded:

In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President’s authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.

Memorandum from John Yoo to Deputy Counsel to the President on The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nationals Supporting Them 19 (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm>. By the time Yoo authored the two August 2002 Torture Memos considered here, this assertion of sole and omnipotent presidential authority evolved to claims that a “core function” of the president’s constitutional authority is “capturing, detaining, and interrogating members of the enemy.” Bybee I, *supra* note 16, at 38; see generally Peter J. Spiro, The New Sovereignists: American Exceptionalism and Its False Prophets, Foreign Affairs, Nov./Dec. 2000, at 9; see also Goldsmith, *supra* note 4, at 21 (“Yoo and I were part of a group of conservative intellectuals—dubbed ‘new sovereignists’ as was the Pentagon’s top lawyer, William J. Haynes II.”).

121. Bybee I, *supra* note 16. The 50-page Bybee I was written by John Yoo for President Bush’s legal counsel, Alberto Gonzales, and is signed by the then head of the Office of Legal Counsel, Jay S. Bybee. See Goldsmith, *supra* note 4, at 142. Bybee I was obtained by the Washington Post, which wrote about it on June 8, 2004. Dana Priest & R. Jeffrey Smith, Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002, Wash. Post, June 8, 2004, at A1. This memo was later withdrawn by Jack Goldsmith when he replaced Jay Bybee as head of the OLC. A new memo, dated December 30, 2004, replaces it. See Memorandum Opinion for the Deputy Attorney General on Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004). As John Yoo notes, the withdrawal of the first memo and the issuing of the superseding memo happened “just a few days” before Alberto Gonzales’s confirmation hearings to become attorney general. Yoo, War By Other Means, *supra* note 3, at 170–71.

in confinement box, and (10) the waterboard.”¹²² The memo concludes that using the ten techniques on al Qaeda “associate” Abu Zubaydah would not violate the anti-torture statute.¹²³

The memos’ contents do little to reveal the historical context in which they were written. Yoo, who wrote the memos, which were signed by his boss Jay S. Bybee,¹²⁴ acknowledges that he relied on the CIA for much of the factual information he used in reaching his legal conclusions that the ten techniques did not amount to torture.¹²⁵ In reaching his legal conclusions, Yoo also relied on the CIA’s description of the techniques, its assurance that the “procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm,”¹²⁶ its reports about the long-term effects of the techniques,¹²⁷ and its psychological assessment of Zubaydah.¹²⁸

Even though the memos do not discuss the wider political and social concerns of the time, most American lawyers, law scholars, and law students likely have an understanding of the broader context of the memos—a recollection of or some reading about the 9/11 attacks and their aftermath—and likely know it as a time of great uncertainty, one in which there was limited knowledge and many

122. Bybee II, *supra* note 17, at 2. Bybee II is an 18-page legal memo addressed to the acting general counsel for the CIA and is signed by Jay Bybee, although it, too, was written by John Yoo. Goldsmith, *supra* note 4, at 142. Bybee II was released on April 16, 2009 by the Obama Administration in response to the ACLU’s ongoing Freedom of Information Act litigation. See Press Release, Department of Justice, 4/16/2009, available at <http://www.justice.gov/opa/pr/2009/April/09ag-356.html>.

123. Bybee II, *supra* note 17, at 18. “Longtime [Osama bin Laden] ally and “Al Qaeda associate” Abu Zubaydah “helped operate a popular terrorist training camp near the border with Pakistan.” The 9/11 Commission Report, *supra* note 3, at 174, 150, 59. He played a “key role” “in facilitating travel for Al Qaeda operatives” and in planning various attacks in the U.S. *Id.* at 169, 255. He was “not believed to be directly linked” to the 9/11 attacks; see <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>, but was captured by the U.S. and held in a secret CIA prison, questioned by “military personnel,” and then moved to Guantanamo. George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006). Transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

124. See *supra* notes 16–17 and 121–122 and accompanying text.

125. The memos reveal that Yoo relied on the CIA representations to him that: The CIA interrogation team was “certain” that Zubaydah had “additional information”; the techniques would only be applied on an “as-needed basis”; repetition of the techniques would not be “substantial because the techniques generally lose their effectiveness after several repetitions.” Bybee II, *supra* note 17, at 1–2. CIA interrogators waterboarded Abu Zubaydah “at least 83 times” in August 2002. In March 2003, Khalid Sheikh Mohammad, the “self-described planner” of the 9/11 attacks, was waterboarded 183 times. Scott Shane, 2 Suspects Waterboarded 266 Times, *N.Y. Times*, April 20, 2009. According to the OPR Report, by 2005 approximately 30 prisoners had been subject to painful interrogation techniques. OPR Report, *supra* note 18, at 245. A third detainee, Al-Nashari, was also waterboarded. *Id.*

126. Bybee II, *supra* note 17, at 2.

127. *Id.* at 2–7.

128. *Id.* at 7–9.

possible outcomes of decisions to be made.¹²⁹ In a 2006 book discussing the immediate post-9/11 time, Yoo describes a government unprepared to handle the attacks: The criminal legal system had failed to address terrorism,¹³⁰ the enemies operated in an “unconventional” and “asymmetric” manner,¹³¹ and the administration had, before the attacks, focused only on “domestic issues,”¹³² he says. Similarly, Jack Goldsmith, Jay Bybee’s successor as the head of OLC, noted the constant tension faced by attorneys in the OLC between a “duty to define the legal limits of executive power” and “finding a way, if possible, to approve presidential actions.”¹³³ These obligations were made even more difficult after the 9/11 attacks because the Bush Administration perceived itself as facing a new kind of war, one with “no apparent end.”¹³⁴ Goldsmith also describes a Bush White House besieged by “incessant waves of threat reports” without any “actionable intelligence” to assess the threats.¹³⁵

However, these historical conditions were by no means viewed uniformly by writers at the time. Some inside the government tried to ban the torture of detainees,¹³⁶ cultural critics warned against overheated rhetoric,¹³⁷ and historians suggested the United States’ checkered record on international affairs may have invited the attacks.¹³⁸

129. The Carnegie Report does not define “conditions of uncertainty,” but it notes that practice in the professions necessarily “means involvement in situations that are indeterminate from the point of view of formal knowledge.” The Carnegie Report, *supra* note 1, at 8. Similarly, the business literature defines “uncertainty” as a state of having limited knowledge and in which there exists more than one possibility. “The ‘true’ outcome/state/result/value is not known.” Douglas W. Hubbard, *How To Measure Anything: Finding the Value of Intangibles in Business* 50 (Wiley 2010).
130. John Yoo, *War By Other Means*, *supra* note 3.
131. *Id.* at 7.
132. *Id.* at 20.
133. Goldsmith, *supra* note 4, at 38–39.
134. *Id.* at 116.
135. *Id.* at 72–73.
136. *See, e.g.*, Jane Mayer, *The Memo*, *New Yorker*, Feb. 27, 2006 (describing the efforts of Alberto J. Moro, general counsel of the U.S. Navy, to ban the torture of detainees).
137. *See, e.g.*, Susan Faludi, *The Terror Dream: Fear and Fantasy in Post-9/11 America* 4 (Metro Books 2007) (quoting President Bush’s statements in his first post 9/11 press conference that “We’ll smoke him out” and “Wanted: dead or alive”).
138. *See, e.g.*, Tony Judt, *America and the War*, *N.Y. Review of Books*, Nov. 15, 2001, at 4 (quoting historian Mary Beard, “however tactfully you dress it up, the United States had it coming”). Further reading on the background and context of the Torture Memos might include, in addition to the works cited in this article: Don M. Snider, Paul Oh & Kevin Toner, *The Army’s Professional Military Ethic in an Era of Persistent Conflict*, Strategic Study Institute (Army War Coll. 2009), *available at*: <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=895>; Robin Wagner-Pacifici, *Torture, War, and Capital Punishment: Linkages and Missed Connections*, in *The Road to Abolition: The Future of Capital Punishment in the United States* (Charles J. Ogletree, Jr. & Austin Sarat eds., NYU Press 2009); Kevin M. Carlsmith & Avani Mehta Sood, *The Fine Line Between Interrogation and Retribution*, 45

Given this historical context, this article posits that Yoo made judgments in writing the Torture Memos under conditions of uncertainty.¹³⁹ Yoo had limited knowledge of the situation in that much of the critical information about the torture techniques and the context in which they would be used came from the CIA. Further, he did not know the “true” state of threats; intelligence information was unreliable; and he did not consider, at least in the Torture Memos, whether there would be any value to intelligence gleaned via torture.¹⁴⁰ Moreover, the possible outcomes—in advising that the ten techniques were not torture—were numerous.

2. Applying Neiman’s Approach to the Torture Memos

Once law students are introduced to Neiman’s four principles and the background and context of the Torture Memos, the law instructor can use the memos to springboard a discussion of judgment making by focusing the discussion on the situation faced by John Yoo. This approach to discussing

J. Exper. Soc. Psych. 191, 195 (2009) (noting that although most Americans cite utilitarian motives for supporting torture, in fact “their endorsement of harsh interrogation techniques may be fuelled, at least in part, by retributive motives”); Jeannine Bell, *One Thousand Shades of Gray: The Effectiveness of Torture*, Indiana Univ. School of Law-Bloomington Legal Studies Research Paper Series (2005), available at <http://ssrn.com/abstract=820467>; Office of Inspector General Central Intelligence Agency, *Special Review, Counterterrorism Detention and Interrogation Activities from September 2001–October 2003* (2004), available at http://media.luxmedia.com/aclu/IG_Report.pdf; Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 Harv. Hum. Rts. J. 87 (2001).

139. See Hubbard, *supra*, note 129, and accompanying text; Carnegie Report, *supra* note 1, at 22.
140. Yoo has since written that the post-9/11 decisions of the Bush administration “have been successful in preventing another 9/11-type attack” on the United States. Yoo, *War By Other Means*, *supra* note 3, at viii. However, claims that the torture of Zubaydah yielded actionable information have since been proved wrong. See OPR Report, *supra* note 18, at 243–48; Press Release, Senate Intelligence Committee Chairman Dianne Feinstein and Senate Armed Services Committee Chairman Carl Levin, *CIA’s Coercive Interrogation Techniques* (Apr. 30, 2012), available at <http://www.feinstein.senate.gov/public/index.cfm/2012/4/feinstein-levin-statement-on-cia-s-coercive-interrogation-techniques> (reporting on a review by the Senate Select Committee on Intelligence of the CIA’s Detention and Interrogation Program and calling statements by former Bush administration officials that torture was effective “misguided and misinformed”). Similarly, writers since at least Aristotle’s time have questioned whether any information learned via torture is reliable:

We may say what is true of torture of every kind alike, that people under its compulsion tell lies quite as often as they tell the truth, sometimes persistently refusing to tell the truth, sometimes recklessly making a false charge in order to be let off sooner.

1 Aristotle, *Rhetoric* 39 (W. Rhys Roberts trans., Oxford: Clarendon Press 1924) (Dover Pub. 2004); see also Michel Foucault, *Discipline & Punish: The Birth of the Prison* 32–69 (Alan Sheridan trans. 1977) (Vintage 1995) (discussing the history of torture used in interrogations as serving several purposes, but that obtaining the truth was not a primary one); Chris Mackey & Greg Miller, *The Interrogators: Inside the Secret War Against Al Qaeda* 31–32 (Little, Brown & Co. 2004) (noting that military instructors of interrogation techniques “hammered home the idea that prisoners being tortured or mentally coerced will say anything, absolutely anything, to stop the pain”).

the memos comports with Neiman's first principle that judgment making should be grounded in specific, actual questions.¹⁴¹ Moral hypotheticals, such as popular discussions of torture in the context of the former Fox Television series *24*¹⁴² or ticking time bomb scenarios, reduces real life moral questions to "jejune" and "simplistic" examples.¹⁴³ Grounding a discussion of moral judgment making in actual situations—by analyzing the context and the writing of the Torture Memos, for instance—provides a more realistic model for discussion.

The real life context of the Torture Memos demonstrates the second principle, that moral decisions will often present a tension between what ought to be and what is.¹⁴⁴ The OLC attorneys were asked by their clients¹⁴⁵ whether they could use ten painful techniques in interrogating Abu Zubaydah. An attorney in that position might believe that we "ought" to live in a world where disputes are settled without war so treatment of prisoners captured in a war never becomes an issue, but that was not the world the OLC inhabited. It was not the "is."¹⁴⁶ Attorneys need to reach conclusions.¹⁴⁷ Given prisoners captured in a war, then, the attorney must address how they should be treated.¹⁴⁸

141. See *supra* notes 100–104 and accompanying text.

142. See Juliette N. Kayyem, *The Other Students: Teaching the "War on Terror" to Nonlawyers*, 55 *J. Legal Educ.* 57, 58, 62 (2005) (Although Prof. Kayyem's public policy students discussed the TV show *24* "every Tuesday," their class discussion was often grounded by her students' real life experiences in special operations, the military, ambassadorial postings and the FBI.). But see Yoo, *War By Other Means*, *supra* note 3, at 172 (discussing an episode of *24*).

143. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *Va. L. Rev.* 1425, 1440, 1441–43 (pointing out a fatal fallacy of the ticking time bomb scenario is that it posits that the bomb is actual while in any real-life scenario a potential torturer would have no such certitude) [hereinafter Luban, *Liberalism*]; see also Wendel, *Separation of Law and Morals*, *supra* note 10, at 74 (referring to "implausible hypotheticals like the ticking time bomb case"); OPR Report, *supra* note 18, at n.168 (discussing differing points of view of the value of the ticking time bomb scenario).

144. See *supra* notes 105–107 and accompanying text.

145. The Torture Memos were addressed to the counsel of the president and the CIA, respectively. See *supra* notes 16–17 and 121–122 and accompanying text. Each entity is permitted to seek advice from the OLC. See 28 C.F.R. § 0.25 (2010).

146. See Neiman, *supra* note 20, at 190–194.

147. In teaching law students that they have to state their predictions in legal memoranda without "waffling," eminent legal writing teacher and author Richard K. Neumann, Jr. notes, "Historians have spent half a century trying to figure out whether it was necessary to drop a nuclear bomb on Hiroshima, and they will probably continue arguing about it forever. But if the issue were tried in court, the jury would have to decide it now." Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 90 (Aspen, 5th ed. 2005).

148. John Yoo's approach was to first reject categorizing Abu Zubaydah as a "prisoner of war." See Memorandum from John Yoo to Robert J. Delahunty on Application of Treaties and Laws to al Qaeda and Taliban Detainees, Jan. 9, 2002, available in *The Torture Papers*, *supra* note 15, at 38. In this memo, Yoo concludes that the protections of the Geneva Conventions

Yoo's conclusion that the CIA interrogators could use the ten techniques drew speculation from commentators across the political spectrum who ascribed to him a variety of motives, good and bad. For example, critics describe his desire to champion his personal views of the extent of authority of the presidency,¹⁴⁹ his desire to please his bosses by giving them an "immunizing document" so that CIA officers would not be prosecuted,¹⁵⁰ and his ambition.¹⁵¹ But defenders say his motives were good, that his only intent was to "provide[] reasonable legal advice and no more."¹⁵² Yoo, too, suggests that his intentions were to do good legal work in spite of the difficulty of rendering legal advice at that time: "These [new Bush Administration] policies were the result of reasonable decisions, made by thoughtful people in good faith, under one of the most dire challenges our nation has ever faced, he wrote.¹⁵³ Speculation or assertions about motive, however, are not considered under Neiman's approach. Instead, the focus is on the character of the action, not the character

do not extend to al Qaeda and Taliban detainees. *Id.* His conclusion had the effect of eliminating from consideration thousands of years of history, tradition, domestic law, and international treaties addressing prisoners of war. See Gregory P. Noone, et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 *Naval L. Rev.* 1, 7 (2004) (noting that customs and laws regarding prisoners of war goes back to at least the times of Hammurabi, approximately 1750 BCE).

149. See, e.g., Memorandum from William H. Taft, IV to John C. Yoo, Your Draft Memorandum of January 9, at 2 (Jan. 11, 2002), available at <http://www.torturingdemocracy.org/documents/20020111.pdf> (noting Taft's understanding that Yoo has "long been convinced that treaties and customary international law have from time to time been cited inappropriately to circumscribe the President's constitutional authority").
150. Clark, *supra* note 19, at 468. The Office of Professional Responsibility also called this assertion into question. It concluded that the Torture Memos had policy concerns at their root, that they "were drafted to provide the client with a legal justification for an interrogation program that included the use of certain [enhanced interrogation techniques]." OPR Report, *supra* note 18, at 226.
151. Scott Horton, *Quid Pro Quo*, Harper's Magazine online, Feb. 22, 2010, available at <http://harpers.org/archive/2010/02/hbc-90006587>. "Each [key actor in the drafting of Bybee I and Bybee II, including Yoo] sought a specific high office that the recipients of the memos were able to give them." *Id.* John Yoo "clearly aspired" to become the head of the OLC. *Id.*
152. Eric Posner & Adrian Vermeule, A "Torture" Memo and Its Tortuous Critics, *Wall St. Journal*, July 6, 2004, at A22; but see Memorandum from David Margolis on Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists 67 (Jan. 5, 2010), available at <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolisMemo.pdf> [hereinafter Margolis Memo] (while refusing to adopt the OPR's findings of misconduct against Yoo and Bybee, Associate Deputy Attorney General David Margolis did note: "I fear that John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, view of executive power while speaking for an institutional client.").
153. Yoo, *War by Other Means*, *supra* note 3, at vii.

of the actor. Debating whether Yoo is a good man¹⁵⁴ or whether his intentions were good draws attention away from his actions: A lawyer advised his clients that it was lawful for them to use in interrogations ten physical methods, which in other places and at other times had been labeled “torture.”¹⁵⁵

Although Yoo defends his actions,¹⁵⁶ his view of his role is ultimately at odds with Neiman’s final principal–stand ready to call anyone into question. Yoo

154. See Neiman, *supra* note 20, at 329–30 (“Calling actions evil can be polarizing; so be it. Calling people evil is polemical. Worse than that, it presumes a knowledge of the human soul, where I have no such right.”).
155. See generally Darius Rejali, *Torture and Democracy* 281 (Princeton Univ. Press 2007). In his list of “clean torture” methods (techniques that leave “few marks,” *id.* at 553), Rejali lists the techniques that are considered in Bybee II, including the “attention grab” (which Bybee II calls the “attention grasp” and “facial hold”), the “attention slap,” a variety of “positional tortures” (Bybee II discusses “cramped confinement,” “wall standing,” “stress positions”), and “sleep deprivation.” *Id.* at 554–56; see Bybee II, *supra* note 17, at 2. Rejali also describes a number of water-based methods of torture, including a 17th-century Dutch-pioneered method in which, “Torturers shoved soaked cloth into a prisoner’s mouth, ladling water on it until the victim nearly suffocated. They would then remove the cloth for questioning and reapply it as needed.” This method closely resembles Yoo’s description of the “waterboard”:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in [the] carbon dioxide level in the individual’s blood. This increase in carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of “suffocation and incipient panic,” i.e., the perception of drowning.

Bybee II, *supra* note 17, at 3–4; see also OPR Report, *supra* note 18, at 235–36 (“The [United States] government has historically condemned the use of various forms of water torture and has punished those who applied it The general view that waterboarding is torture has also been adopted by in the United States judicial system.”). The OPR Report also concluded that Bybee II’s conclusions about sleep deprivation and stress positions were not “based on a thorough, objective, and candid analysis of the issues,” *id.* at 236, and that sleep deprivation as an interrogation technique was condemned as torture in U.S. jurisprudence. *Id.* at 236–37; International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody 8–9, 24 (describing methods of “ill-treatment” and later defining them to be “torture”) (2007), available at <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

156. Some writers have noted that Yoo violated the lawyer’s ethical obligations of candor toward his client. See, e.g., Clark, *supra* note 19, at 468. The Department of Justice’s Office of Professional Responsibility (OPR) concluded that Yoo had violated the Ethical Standards for Attorneys for the Government, 28 C.F.R. § 77 (2003), “based on a preponderance of the evidence, that Yoo knowingly failed to provide a thorough, objective, and candid interpretation of the law” in authoring Bybee I and indicated its intent to refer its findings to the state bar disciplinary authorities. OPR Report, *supra* note 29, at 251. It made similar findings regarding Jay Bybee. *Id.* at 255. However, David Margolis, the associate deputy attorney general in charge of resolving “challenges to negative OPR findings” did not adopt the OPR’s findings of professional misconduct and therefore refused to allow OPR to refer its findings to state bar disciplinary authorities. Margolis Memo, *supra* note 152. At least one

acknowledges that “critical moral and policy concerns surround interrogation policy,”¹⁵⁷ but that it was not his role to raise policy, ethical or moral questions.¹⁵⁸ Under Neiman’s fourth precept, lawyers would not be able argue that it was not their job to raise moral considerations.

3. Calling Neiman’s Approach Into Question

Once presented with Neiman’s four-step method on making moral judgments, students can challenge her approach or test it by applying it to different real-life scenarios.¹⁵⁹ In either case, they will have the beginnings of a moral vocabulary with which to begin to tackle the issues.

In discussing Neiman’s approach, students may, like Cass Sunstein, question the validity of heuristics in moral judgment making.¹⁶⁰ However, this article does not suggest teaching law students simplistic moral rules of thumb.¹⁶¹ To the contrary, as Kant suggests, making rules for moral judgments would yield a paradox of recursivity, as judgments would always be needed to assess which rules to apply.¹⁶² Therefore, this article recommends encouraging students to develop their own metaphysics. Teachers can also point out that, as lawyers-in-training, students’ moral framework should be based in reason and sincerely held so it can withstand the kind of logical assault all legal arguments must be able to meet. Teachers can also offer Neiman’s approach as one method of making moral decisions. Ultimately, however, students should challenge Neiman’s approach as they develop their own moral decision-making sense.

ethics complaint has been filed against Yoo in Pennsylvania. See Complaint against John Choon Yoo, filed by Velvet Underground to the Disciplinary Board of the Supreme Court of Pennsylvania, May 18, 2009, supplements filed June 10, 2009; both available at http://velvetrevolution.us/torture_lawyers/index.php.

157. Yoo, *War By Other Means*, *supra* note 3, at 173.
158. *Id.* at xii (“Sometimes people look to the law as if it were a religion or fully articulated ethical code that will make these decisions for us, relieving us of the difficult job of making a choice. The law sets the rules of the playing field, but it does not set policy within that field.”). In declining to adopt OPR’s recommendations that Yoo and Bybee be referred to state bar disciplinary authorities, David Margolis acknowledged that citation to examples of water torture “may have provided useful historical context” but that such context “would largely relate to the policy decision rather than to the legal question,” and therefore was not required under the applicable rules of conduct. Margolis Memo, *supra* note 152, at 61.
159. See Singer, *supra* note 67, at 902 (“If we are thoughtful, we are aware of objections that can be made to our own claims.”).
160. See *supra* notes 79–81 and accompanying text. On his discussion of heuristics, Sunstein has his detractors. See, e.g., Elizabeth Anderson, *Moral Heuristics: Rigid Rules or Flexible Inputs in Moral Deliberation?*, 28 *Behav. & Brain Sci.* 544 (2005) (suggesting that reflection accompanies moral intuition to render correct moral judgments).
161. See Young-Bruehl, *supra* note 74, at n.43 (noting Arendt’s concern that her Ideal Types would be used as “formulas for making propaganda” rather than as “criteria for guiding judgment”).
162. See Kant, *supra* note 33.

To some critics, Neiman's approach may not withstand logical assault. That is, there may be logical vulnerabilities to a philosophical approach that asserts, for example, "Look at the character of the action rather than the character of the actor."¹⁶³ A virtue ethicist, who focuses on intent and the character of the actor, likely would challenge this approach.¹⁶⁴ In response, an instructor may point out that judgment making that relies on Aristotle's notion that "we know that virtuous actions are good and noble because good men say they are"¹⁶⁵ begs for a cautionary note such as that raised by Hannah Arendt in the aftermath of the Nazi and Stalin eras: "We—at least the older ones among us—have witnessed the total collapse of all established moral standards in public and private life."¹⁶⁶ Although students may look to heroes for inspiration,¹⁶⁷ moral judgment making stands ready to call anyone into question.¹⁶⁸

In contrast to the virtue ethicists, a deontologist might argue that using Neiman's approach to consider the Torture Memos—in its lack of an absolute prohibition against torture at the outset, for example—focuses too much on consequences.¹⁶⁹ A deontological approach to considering the moral

163. See *supra* notes 108–112 and accompanying text.

164. See generally Stanford Encyclopedia of Philosophy, "Virtue Ethics," available at <http://plato.stanford.edu/entries/ethics-virtue>; see also Cimino, *supra* note 109 ("A person who makes a good decision out of a mere duty has not exhibited virtue."); Chapin F. Cimino, Review Essay: Private Law, Public Consequences, and Virtue Jurisprudence, 71 U. Pitt. L. Rev. 279, 286 (2010) ("[T]he 'right' thing is defined by the right choice by the right person at the right time.").

165. Luban, Epistemology, *supra* note 33, at 651.

166. Hannah Arendt, Some Questions of Moral Philosophy, in *Responsibility and Judgment* (Jerome Kohn ed., 2009) (1966); see also Robert N. Johnson, Virtue and Right, 113 Ethics 810, 810 (2003) ("[T]he claim that right actions are those of a virtuous person is so far from being an uninteresting truism as to be utterly false."). Aristotle's vision of a student learning ethics at the seat of "good men" may have had its place in "centuries past," when learning in the professions happened in an apprenticeship designed to expose the apprentice "to the full dimensions of professional life, not only the intricacies of esoteric knowledge and peculiar skills, but also the values and outlook shared by physicians, lawyers or ministers." The Carnegie Report, *supra* note 1, at 79. However, law students, apart perhaps from well-designed co-op experiences, do not learn that way today. By contrast, today's law students learn the intellectual, practical and ethical skills of being a lawyer separately. *Id.*

167. Neiman, for example, champions the Old Testament Abraham as a hero of moral reason, for he was willing to call God into question over His planned destruction of Sodom and Gomorrah. See Neiman, *supra* note 20, at 1–4, 10. Kierkegaard and Kant dismiss Abraham as one who has left reason behind because, in another Old Testament story, Abraham plans to sacrifice his son Isaac. *Id.* at 10; see Søren Kierkegaard, *Fear and Trembling* (Alastair Hannay, trans., Penguin 1995) (1843); Immanuel Kant, *The Conflict of the Faculties* 115 (Mary J. Gregor, trans., Abaris 1992) (1798).

168. Neiman, *supra* note 20, at 429.

169. See generally Stanford Encyclopedia of Philosophy, Deontological Ethics, available at <http://plato.stanford.edu/entries/ethics-virtue>. A deontological approach is a "rule-based system in which situation contexts are deemphasized. In this theory, ethics is conceptualized mostly as a series of rules or obligations; choices are 'right' if they are done in accordance with these rules." William E. Hudson, Note: The Ethical Spy: Towards Intelligence Community

judgments involved in writing the Torture Memos could encompass a bright-line prohibition against torture. But as Eric Posner and Adrian Vermeule argue, “this position is held by very few moral philosophers, if any,” and that to apply such a rule-based approach at the outset of a torture debate is “fanatical.”¹⁷⁰ While neither of these comments would likely suffice in a reason-based discussion, they do illuminate the importance of articulating one’s position with clarity rather than resorting to labels or name-calling, as there are writers who categorize Neiman’s philosophical forbearer Kant as a deontologist because of his formulation of the categorical imperative.¹⁷¹

Finally, a consequentialist’s¹⁷² examination of the Torture Memos might note, among many consequences, that the memos enabled those responsible to evade responsibility;¹⁷³ that they led to the suffering and humiliation of human beings;¹⁷⁴ that they permitted representatives of our government to conflate investigation with punishment;¹⁷⁵ and that they caused the United States

Rules of Professional Conduct, 98 Geo. L. J. 1415, 1419 (2010). For an argument rejecting the deontological objections to torture, see Posner & Vermeule, *Coercive Interrogation*, *supra* note 101, at 676–78.

170. Posner & Vermeule, *Coercive Interrogation*, *supra* note 101, at 676. In fact, Posner and Vermeule suggest that a moral heuristic that states “never inflict pain on a defenseless person” fails in the face of the issue of coercive interrogation because “inflicting pain on the defenseless through coercive interrogation saves real lives.” *Id.* at 705–06. Among the problems with this argument, however, is that those who have been trained in and studied coercive interrogation conclude that torture is ineffective in garnering truthful information. See *supra* note 140 and accompanying text.
171. The categorical imperative, “Do unto others as you would be done by,” is a “formal version” of the Golden Rule. Neiman, *supra* note 20, at 201, 202, which some writers see as a rule. See, e.g., Sanford Levinson, “Precommitment” and “Postcommitment”: The Ban on Torture in the Wake of September 11, 81 Tex. L. Rev. 2013, 2031–32 (2003) (framing the issue of whether torture is ever justified as one pitting “Kantian deontologists” against consequentialists); Cassidy, *supra* note 71, at 640–41 (“Deontologists such as Immanuel Kant posit that we must look to prior principles in order to decide upon a moral course of action.”). The better analysis is that the categorical imperative is an “abstract and ethical” guideline, rather than a concrete rule. Lawrence Kohlberg, *The Child as a Moral Philosopher*, *Psychology Today*, Sept. 1968, at 24. Similarly, Neiman, who defends Kant’s theory of the “categorical imperative,” see Neiman, *supra* note 20, at 202–14, rejects categorizing Kant as a deontologist. “Reason works not by rules, but by principles.” *Id.* at 204.
172. Consequentialism looks at whether an act is right only in terms of the consequences of the act. Stanford Encyclopedia of Philosophy, *Consequentialism*, available at <http://plato.stanford.edu/entries/consequentialism>.
173. John Yoo and Jay Bybee were absolved of ethical violations. See generally Margolis Memo, *supra* note 152.
174. See Neiman, *supra* note 20, at 354 (In discussing the prisoner abuse at Abu Ghraib prison by members of the U.S. Army and other government agents, Neiman notes Israeli philosopher Avishai Margalit’s belief that humiliation is something “decent societies must avoid” because it “rejects human beings as human.”).
175. See Foucault, *supra* note 140, at 40–41 (noting that torture in interrogations is not aimed at obtaining the truth, but at obtaining a confession and imposing punishment during the pre-trial investigative period when a sense of the prisoner’s guilt begins to mount); see also David

negative effects at home and abroad.¹⁷⁶ Yoo, however, suggests a different perspective on consequences: that his actions helped prevent another attack on the United States.¹⁷⁷ These considerable differences in perspective on the consequences of the Torture Memos point to “how many consequences are determined by chance”¹⁷⁸ and suggests that focusing on consequences may sidetrack the more important question of the nature of the action itself.

Ultimately, a focus on philosophical categories is of little help if the goal is to encourage law students to add moral reasoning to their analysis of legal and ethical questions. To achieve this goal, it may be more profitable to employ any moral heuristic as a jumping-off point for discussion, keeping in mind the fundamental requirements of a law-school based moral education—reason and sincerity.¹⁷⁹

V. Conclusion

Legal educators should encourage their students to develop a moral vocabulary and a reason-based approach to moral judgment making to frame and discuss issues of moral philosophy that may arise in the classroom or in their later practice. As the Carnegie Report concludes, “[H]igher education

Luban, Liberalism, Torture, and the Ticking Bomb, in *The Torture Debate in America* (Karen Greenberg ed., Cambridge Univ. Press, 2005) at 35–83, 42 (an expanded version of Luban, Liberalism, *supra* note 143) (noting the five aims of torture—“victor’s pleasure, terror [in the sense of scaring people into submission], punishment and extracting confessions” and as a “technique for intelligence-gathering from captives who will not talk”).

176. See, e.g., Mehdi Hasan, Comment: A Bonfire of U.S. Vanities: Nine Years After 9/11 the “War on Terror” Still Rages, *Guardian*, Sept. 11, 2010, at 28 (“The ‘war on terror’ has resulted only in more war and more terror.”); David K. Rebhein, Photos That Could Cost Lives, *Wall St. J.*, May 8, 2009, at A11 (quoting Sen. Kit Bond, “I don’t think there’s any question [the release of Abu Ghraib photos] will endanger all of us, because I think it will enhance recruitment for all kinds of terrorists willing to come after us.”); Justine Sharrock, Am I a Torturer?, *Mother Jones*, Mar. 1, 2008, at 42 (“Foreign-policy scholars fear the fallout from Abu Ghraib has already weakened the U.S. military’s anti-terrorism capabilities.”).
177. See Yoo, *War By Other Means*, *supra* note 3, at 172 (“So far we have prevented another successful attack on the United States.”). This conclusion, however, has been called into doubt by the OPR Report, which concluded that CIA assertions about the effectiveness of enhanced interrogation techniques were inaccurate. OPR Report, *supra* note 26, at 245–46 (questioning whether the OLC should have relied on CIA representations about effectiveness of enhanced interrogation techniques given that the CIAs representations “provided inaccurate information”).
178. Neiman, *Evil in Modern Thought*, *supra* note 99, at 89.
179. See *supra* notes 84–98 and accompanying text. In deference to institutional strictures or student sensibilities, some legal educators may be reluctant to define reason in a way that eschews religious revelation or other non-reason based philosophies. In most instances, however, religious restrictions should not prevent incorporating a reason-based approach to moral questions, because, as Neiman notes, most of the major religions have reason-based traditions that permit thoughtful inquiry beyond rules and commandments. Neiman, *supra* note 20, at 10–11. These reason-based traditions may invite inspiration and advice from sources outside human reason, but none of these traditions dictate an ideology or dogma that offers perfect moral judgments all the time. *Id.* at 424.

can promote the development of more mature moral thinking” and that, “for better or for worse,” the “law school years constitute a powerful moral apprenticeship.”¹⁸⁰

There is ample evidence from philosophers, psychologists and neuroscientists that law students can be taught to become more thoughtful, more reason-based and more nuanced in their moral reasoning. Because law students are learning about making moral decisions, law faculty ought to address this aspect of professionalism directly by giving students a framework to discuss making judgments. The framework would acknowledge that judgments need to be well-grounded in law and rules of legal ethics but also that they need to be informed by a moral metaphysics that is sincerely held and reason based.

One such philosophy is that of moral and political philosopher Susan Neiman, whose approach looks at moral questions on the level of the particular and actual, rather than attempting to set grand-scale rules based on hypotheticals. She also notes that judgment making often requires choosing the lesser or least among evils, of accepting that what “ought” to be must sometimes give way to what “is.” Neiman’s approach focuses on the character of the action rather than the character of the actor and it advocates for each person taking responsibility for challenging the judgments of others, no matter what their status or position. In this way, Neiman’s method differs from that of legal educators who focus on virtue ethics and moral norms. Neiman’s method, this article suggests, is helpful for considering the conclusions of the Torture Memos, especially to the extent it draws attention to the character of the actions permitted by the memos—actions that have historically been considered “torture.”

180. The Carnegie Report, *supra* note 1, at 139.