Codes of Ethics in a Post-Truth World

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Ethical codes are often violated, but they still have value. They were never meant to be prescriptive.

Codes of ethics systematize ideals that purport to clarify avowed core principles of organizations, corporations, governments, groups, and so on. The weasel words (purport, clarify, avowed, and core) in the previous sentence are intended and necessary to appreciate the importance of these codes. Codes of ethics are rarely enforced in the absence of litigation, personnel issues, or management crises, and even then, they're invoked primarily for public relations purposes. For example, sexual harassment and assault were understood to be prohibited by codes of conduct in the entertainment industry long before the Harvey Weinstein and Bill Cosby exposés. Similarly, the intent of the *Congressional Accountability Act* of 1995[1] was clearly to extend laws that applied to federal government employees to the U.S. Congress as well, including those that applied to sexual harassment and assault. However, for decades, lawmakers used taxpayer money to pay settlements to quiet claims of impropriety without repercussion.[2] What prompted the most recent changes in congressional rules was not the deficiency of law or code, or ignorance of the same but, rather, an internal political culture that tolerated the behavior. A diachronic study of political prosecutions and convictions clearly reveals that politicians are rarely remorseful for their crimes but only for their detection, exposure, and embarrassment.

A parallel situation may be drawn from the abuse of gymnasts by a Michigan State University (MSU) team physician. Both the American Medical Association and MSU's code of ethics prohibited sexual abuse of anyone by their members and employees, including patients and student athletes. The fiasco that surrounded the prosecution of MSU gymnastics team doctor Lawrence Nassar for molesting girls under the rubric of medical treatment[3] was not a product of code neglect or ignorance of the rules. No one connected with this case thought that Nassar's behavior complied with any acceptable ethical standard. We would do well to remember that much of the fallout that resulted had nothing to do with Nassar's behavior but rather with the subsequent exposure and cover-up by people who neglected their oversight responsibilities.[4] The problem was not that organizations failed to address immoral conduct in their codes, policies, rules, and laws, nor was the problem that the perpetrators failed to understand that what they were doing was wrong. The problem was, once again, a culture of tolerance for improper behavior. It is common for perpetrators and overseers to bind their self-interests together through willful detachment if not outright collective defenses. In the end, the codes

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of ethics of all institutions did what they were supposed to do: they denied moral cover to violators.

It is a mistake to associate codes of conduct with prescriptive behavior. Ethical codes, like laws, do not preempt bad behavior; rather, they contextualize behavior once exposed. In the case of laws, the consequences are fines, incarceration, and the like. In the case of professional codes, the consequences are professional rebuke, revocation of licensure, and so on. In both cases, the observable effect is, post facto, punitive and not preemptive. This is not necessarily a bad thing.

THE APA TORTURE SCANDAL

The importance of downstream effects of codes of ethics was made most poignantly by the recent purging of administrative leadership of the American Psychological Association (APA) after the membership discovered that their leadership had changed their code of ethics to accommodate the George W. Bush administration's "torture program."[5,6] This should be seen as a paradigmatic case of the role of professional codes of ethics in an organization, if for no other reason than it led to one of the most complete studies of the corruption of professional codes of ethics ever undertaken. A brief review is in order.

A report commissioned by the APA in 2014, the so-called Hoffman Report,[7] investigated whether allegations made by *The New York Times* reporter James Risen that APA ethics policy decisions in 2002 and 2005 were unduly influenced by military and covert agencies of the U.S. government were accurate. To quote the report (p.12):

> *The gist of the allegations was that APA made these ethics policy decisions as a substantial result of influence from and close relationships with the U.S. Department of Defense (DoD), the Central Intelligence Agency (CIA), and other government entities, which purportedly wanted permissive ethical guidelines so that their psychologists could continue to participate in harsh and abusive interrogation techniques being used by these agencies after the September 11 attacks on the United States. Critics pointed to alleged procedural irregularities and suspicious outcomes regarding APA's ethics policy decisions and said they resulted from this improper coordination, collaboration, or collusion. Some said APA's decisions were intentionally made to assist the government in engaging in these "enhanced interrogation techniques." Some said they were intentionally made to help the government commit torture. (p. 1)*
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> *The specific question APA has asked us to consider and answer is whether APA officials colluded with DoD, CIA, or other government officials "to support torture." The allegations we have been asked to address frame the question more broadly at times. As a result of our investigation, we can report what happened and why. And as part of that description, we answer whether there was collusion between APA and government officials, and if so, what its purpose was. (p. 1)*
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> *Our investigation determined that key APA officials, principally the APA Ethics Director joined and supported at times by other APA officials, colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation guidelines. We concluded that APA's principal motive in doing so was to align APA and curry favor with DoD. There were two other important motives: to create a good public-relations response, and to keep the growth of psychology unrestrained in this area. (p. 9)*
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> *APA remained deliberately ignorant even in light of obvious countervailing concerns that counseled in favor of crafting clear policies: Strict ethics rules that clearly and specifically constrain undesirable behavior can be critical in preserving the integrity of a profession, especially in situations when other methods of constraining such behavior (e.g., consultation, adjudication) are less feasible, as here. Being involved in the intentional harming of detainees in a manner that would never be justified in the U.S. criminal justice system could do lasting damage to the integrity and reputation of psychology, a profession that purports to "do no harm." And engaging in harsh interrogation techniques is inconsistent with our fundamental values as a nation and harms our national security and influence in the world. These countervailing concerns were simply not considered or were highly subordinated to APA's strategic goals. (p. 11)*
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> *On the most important issue the PENS Task Force was asked to consider—where to draw the line for psychologists between unethical and ethical interrogation practices—the key APA official who drafted the report (the APA Ethics Director) intentionally crafted ethics guidelines that were high-level and non-specific so as to not restrict the flexibility of DoD in this regard, and proposed key language that was either drafted by DoD officials or was carefully constructed not to conflict with DoD policies or policy goals. (p. 12)*
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> *The leading ethical constraint in the report was that psychologists could not be involved in any way*

in torture or cruel, inhuman or degrading treatment. But it was well known to APA officials at the time of the report that the Bush Administration had defined "torture" in a very narrow fashion, and was using the word "humane" to describe its treatment of detainees despite the clear indications that abusive interrogation techniques had been approved and used. Thus, APA knew that the mere use of words like "torture," "inhuman," or "degrading" was not sufficient to provide guidance or draw any sort of meaningful line under the circumstances. Although the relatively small number of non-DoD voting members of the task force made some efforts to push for greater specificity and for definitions based on the Geneva Conventions, their efforts were rejected by the DoD members of the task force, the APA Ethics Director, and the other key APA officials who were included in the meeting. And a key passage of an earlier draft that would have created an ethical prohibition on psychologists being involved in interrogation techniques that intentionally caused psychological distress (albeit with a big loophole) was replaced in the final version by language handwritten by the key DoD official on the panel that created no such prohibition whatsoever.

The general finding was that to curry favor with the DoD and CIA, the APA executive leadership (for a variety of reasons) modified the APA code of ethics to weaken the prohibition against doing harm to patients and subjects by inserting a few caveats (e.g., "unless authorized by prevailing legal authority"). Of course, "Do no harm" provisions have been a core principle for health-care professionals since Hippocrates. Even medieval practitioners, who engaged in bloodletting, humorism, trepanning, and sending patients to St. Fiacre's rock, believed that they were helping their patients. Therefore, it was a challenge for the Bush administration to reconcile techniques like waterboarding, walling, hooding, sleep deprivation, and rectal rehydration at black sites with the principle of doing no harm.

By far, the most interesting question for present purposes is why the Bush administration would seek support from a health-care professional society for what they called euphemistically their "enhanced interrogation techniques." After all, they had already received legal cover from the U.S. Department of Justice's Office of Legal Counsel (OLC) (the attorneys in the U.S. Department of Justice who serve as legal advisors to the executive branch). John Yoo and Robert Delahunty had previously opined in their infamous "torture memo" that the laws of armed conflict, such as the War Crimes Act, the Hague Conventions, and the 1949 Geneva Conventions, "do not protect . . . nonState actors."[15]

The general position Yoo and Delahunty[15] took is that the president may or may not choose to extend the notion of "customary international law" (e.g., the Geneva Conventions' prohibitions against torture) to nonstate actors at his/her discretion if such laws were not specifically endorsed by Congress or included as amendments to the Constitution. The torture memo is best seen as another thread of the reaffirmation of American exceptionalism by the George W. Bush administration. It was quickly followed up by the so-called Hague invasion clause, which empowers the president to liberate U.S. citizens by force from any country that seeks to prosecute them for war crimes. This was specifically directed to signatories of the treaty for the International Criminal Court in The Hague (hence the name).

The torture memo is but one of the legal opinions produced for the Bush administration by the "Bush Six" that came under widespread criticism.[8] It was repealed by a subsequent head of the OLC, Jack Goldsmith, only to be reinstated and then re-repealed by his successor Steven Bradbury, and finally repudiated by President Obama. This checkered history has been widely reported by investigative journalists[9] and need not be repeated here. Instead, we focus on one single issue: with the legal cover accorded by the OLC, why was the Bush administration looking for moral cover for the torture program as well?

The answer is that ethical cover was demanded by the DoD and CIA—the agencies who would have to implement this program and conduct the "enhanced interrogation." Both agencies had internal codes of conduct (e.g., Uniform Code of Military Justice, CIA Core Values, and so on) that prohibited torture (or at least demanded cover through plausible deniability). Leaders of these agencies have historically opposed the use of torture for three reasons. First, because torture has not proven to be an effective interrogation technique[10]; second, because it has the potential of producing massive blowback[11]; and third, and most importantly, because it encourages retaliation from adversaries. (The fear of subsequent prosecution for war crimes was already covered by the OLC as discussed and, hence, was irrelevant to the APA initiative.) Military and agency leaders do not want to expose the rank and file to reciprocal torture. Therefore, they demanded a higher threshold for justification than mere legal cover—cover that would also insulate them from the court of public opinion once the public found out what they had done. This tactic was designed to overcome the deficiencies of "Nuremberg defenses." That's how the APA got involved in the torture program. The Bush administration had already solicited approval from the American Medical Association and the American Psychiatric Association without effect (actually, "rebuke" might be a more appropriate term). The APA was the professional association of last resort. This directly speaks to the perceived value of codes of ethics in a post-truth era. It was considered so important to their defense that the Bush administration's apologists sought to corrupt the APA's code to explicitly endorse their

own special brand of torture. None of this effort would have been considered necessary if it were obvious to all concerned that a reasonable person would not consider their techniques to be torture in the first place.

Codes of ethics are widely accepted as statements of professional guidelines that any reasonable, impartial moral agent would find acceptable. If behavior can be found to be consistent with the codes, there is presumptive evidence that the behavior must be acceptable. This provides an unequalled legitimacy to compliant behavior—a legitimacy that seems to transcend capricious or ephemeral laws. The further a behavior deviates from acceptable norms, the more blowback it produces. This was what happened during CIA Director Gina Haspel's 2018 Senate confirmation hearings. The biggest criticism was not over her involvement in the torture programs but the discovery that she had ordered the destruction of evidence at a CIA torture site to prevent possible disclosure and prosecution. Destruction of evidence to avoid prosecution is not authorized by any U.S. government law, rule, or code of conduct. This is the sort of problem that the Bush administration sought to avoid with the help of the APA. Codes of ethics are effective at legitimizing conduct.

The APA case is one of code corruption. The staff leadership, at the behest of a small minority of members principally associated with the aforementioned federal three-letter agencies, changed the code without transparency. The members were, for the most part, unaware of the change. That was the primary source of the conflict that led to the 2015 insurrection. The fact that the leadership sought to undermine a free and open discussion of the proposed changes by the membership reinforces just how important the Bush administration thought the code changes were—this was far too important for transparency. If the members knew what was happening, they would object. This could not stand.

MORAL OPACITY

I'm writing in support of the value of ethical codes. To justify my thesis, I need to deal with two orthogonal questions: When and why are ethical codes frequently ignored? My claim is that the fact that they are ignored does not negate their overall importance.

Compliance with prevailing professional and organizational rules may be undercut by several factors, including a perceived normative ambiguity of a rule, member ambivalence over the importance or relevance of a rule, a member's fundamental moral disagreement with core values, duress in forced agreement with the rules (as in being forced to sign employment contracts, nondisclosure agreements, and so on), moral opacity that obscures the implications of rules, ethical ambivalence and amorality, deeper commitment to contravening principles, and the realities of right-wing authoritarianism and social-dominance theory. Each of these frequently produces behavior inconsistent with prevailing codes of conduct.

For example, it is common for persons of conscience and whistleblowers to defend abridgment of nondisclosure agreements and secrecy oaths in terms of contravening moral principles, such as the public's right to know what the power elite is doing in their name. Daniel Ellsberg, Edward Snowden, and Chelsea Manning would fall into this category. Contravening moral principles and fundamental moral disagreement were used by Major Nidal Hasan, an army psychiatrist who killed 13 and injured more than 30 others at Fort Hood in 2009 to justify betrayal of his military and Hippocratic oaths. His claim was that "defending my religion" trumped any ethical considerations he might have as a psychiatrist and military officer.[12]

It would appear that fundamental moral disagreement, duress, and moral opacity are behind the rabbinate's rejection the tenets of the Israel proclamation of independence that commit to "complete equality of social and political rights to all … inhabitants [or Israel], irrespective of religion, race or sex."[16] Here, religious orthodoxy is held to supersede the proclamation with respect to matters of personal status, such as marriage, gender equality, and civil liberties (recognized in Israel as the status quo agreement). Much the same might be said of the apparent conflict between charismatic/Pentecostal prosperity theology and the discussion of material wealth in the New Testament (e.g., allegories about camels and eyes of needles). Other well-known examples of religious-secular conflict include the Spanish Inquisition, Salem witch trials, solemn Papal bulls, and so on. We add to this list interdenominational conflict (e.g., Martin Luther's 95 theses) and the Sunni–Shia divide in Islam.

Other ideological conflicts may be political and pragmatic (e.g., the use of the contested "nuclear option" in judicial appointments in the U.S. Senate). Some conflicts may not be ideological at all and the product of avarice and sundry other sins, deadly or otherwise. Social scientists, such as Stanley Milgram, emphasize the enormous effect of authority figures on some people when it comes to the circumvention of normative ethical ideals.[13] I presume that this contributes some explanation of the recent Volkswagen diesel-gate fiasco, where programmers modified the engine management modules specifically to circumvent U.S. Environmental Protection Agency (EPA) tests and the persistent disinformation produced by White House press secretaries who knowingly promote falsehoods in service to a president. The point that I'm making is twofold. First, ethical codes, rules, covenants, and so on are and always have been frequently violated. Second, the fact that there are all sorts of reasons why people don't follow moral codes in service to parochial self-interest, broadly defined, does not diminish the importance of these codes.

When one evaluates the importance of codes of ethics, one is wise to look beyond prescriptivism. The importance is subtle and usually ex post

facto. To relate this to the field of computer science and engineering, one recent study "found no evidence that the ACM code of ethics influences ethical decision making" by software developers.[14] That should not diminish our perceived value of the ACM code at all, because we now recognize that such codes should not be based on the efficacy of prescription. Rather, they should be based on their clarity and appropriateness.

Analogously, it would be unreasonable to expect that relevant statutes influenced the decision making of lawbreakers, that the Ten Commandments influenced the decision making of philanderers, that the perpetrators of the Volkswagen diesel-gate emissions cheating scandal were influenced by the company's shareholder agreement or the wording of the corporate EPA compliance certificate, or that the U.S. Constitution influenced the decisions of politicians convicted of treason, bribery, or other high crimes and misdemeanors. No code, rule of law, or covenant will ever prevent the willful self-indulgent egoist from pursuing his or her self-interest. Unfortunate as this may be, that's just the way it is. As with the case of the APA code discussed, the ACM Code of Ethics and Professional Conduct expresses the "conscience of the profession and serves as a basis for remediation when violations occur."[17] The clarity of the code and its widespread acknowledgment as the sense of the profession is more than enough justification to have it.

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