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# **PUNCTURING THE MYTH OF THE MORAL INTRACTABILITY OF LAW STUDENTS: THE SUGGESTIVENESS OF THE WORK OF PSYCHOLOGIST LAWRENCE KOHLBERG FOR ETHICAL TRAINING IN LEGAL EDUCATION**

ELLIOTT M. ABRAMSON\*

## **INTRODUCTION**

Question: What's 500 lawyers at the bottom of the ocean?

Answer: A good start.<sup>1</sup>

All too frequently legal educators have denied responsibility for training or sensitizing their students' moral faculties on the ground that the typical law student has already firmly adopted her moral code and principles and is no longer suggestible, not to mention educable, in this respect. It is argued that a typical law student, in her early twenties, has decided what she believes and feels morally, and is basically impervious to "educative" efforts to get her to adopt or believe in moral precepts, principles or considerations which vary from those already internalized.

However, the theorization and field research of Harvard University Psychologist Lawrence Kohlberg, (1927-1987), suggests that such a position is a "cop-out" and amounts to legal education malingering with respect to one of its most important responsibilities. Kohlberg's work tends to demonstrate that there is an objective and universal dimension to moral structures and moral reasoning, that an individual's moral sensibilities continue evolving through middle age, and that certain types of (direct) teaching can promote and accelerate this development in a quite productive fashion.<sup>2</sup>

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1. *THE WAR OF THE ROSES* (Twentieth Century-Fox Film Corp. 1989).

2. LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981) [hereinafter KOHLBERG, *PHILOSOPHY OF MORAL DEVELOPMENT*]; LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984) [hereinafter KOHLBERG, *PSYCHOLOGY OF MORAL DEVELOPMENT*].

Kohlberg postulates six stages of moral reasoning which he claims to be rather universal principles, more or less applicable in all societies.<sup>3</sup> He asserts that these levels, as far as the great mass of individuals are concerned, develop in an invariant sequence; in any person the second level evolves after the first, the third after the second, etc.<sup>4</sup> (No one, for example, jumps from stage two to stage five without passing through the intermediate stages.) Additionally, and most crucially for the notions of this paper, the development and adoption of higher stage principles can be instigated and accelerated by certain types of education and training. Initial research by Kohlberg suggested that law students in their early twenties are at the outer limits of, (or just beyond) those individuals still having capacity for moral development and growth;<sup>5</sup> but subsequent research in this vein indicates that such progress continues well into a person's thirties.<sup>6</sup>

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3. KOHLBERG, *PSYCHOLOGY OF MORAL DEVELOPMENT*, *supra* note 2, at 122. The six stages of moral development are schematized at Appendix A. A longitudinal and cross-sectional study of moral judgment development in Turkey supported the claim for structural universality in moral judgment. See Mordecai Nissan & Lawrence Kohlberg, *Universality and Variation in Moral Judgment: A Longitudinal and Cross-Sectional Study in Turkey*, 53 *CHILD DEV.* 865 (1982). In this article the authors state, "features of the development of moral judgment lead to a culturally invariant sequence of stages . . . each more differentiated and integrated, and thus more equilibrated, than its predecessor . . . [C]ross-sectional studies in Kenya . . ., Honduras . . . the Bahamas, . . . India . . . and New Zealand . . . provide support for the universality claim . . ." *Id.* at 865.

4. KOHLBERG, *PHILOSOPHY OF MORAL DEVELOPMENT*, *supra* note 2, at 20; KOHLBERG, *PSYCHOLOGY OF MORAL DEVELOPMENT*, *supra* note 2, at 170. In the Nissan and Kohlberg longitudinal and cross-sectional study of moral judgment development in Turkey, there was no individual case in which a stage was found to have been skipped. Nissan & Kohlberg, *supra* note 3, at 869.

5. Lawrence Kohlberg & Richard Kramer, *Continuities and Discontinuities in Children and Adult Moral Development*, 12 *HUMAN DEV.* 93, 105 (1969).

6. JOSEPH REIMER ET AL., *PROMOTING MORAL GROWTH: FROM PIAGET TO KOHLBERG* (1983). The authors report that a longitudinal study showed that most subjects continued to progress along the stage sequence after their adolescent years and that moral development is continuous through age 36. It also showed that in college years, ages 20-22 stage 3/4 is predominant with stages 1/2 and 2 dropping out, stage 2/3 continuing to fall off, stage 3 falling off slightly, and stage 4 emerging; in early adulthood, ages 24-30, stage 3/4 remains predominant, with stage 2/3 dropping out, stage 3 falling rapidly, stage 4 holding at a minority position, and stage 4/5 first emerging. *Id.* at 100. "The invariant sequence hypothesis can be examined more adequately and for more mature subjects. . . . [R]esults from the United States . . . show that *moral* development continues into the third decade of life." (emphasis added). Nissan & Kohlberg, *supra* note 3, at 866. The authors also point out that the findings of the cross-sectional study were consistent with those of the

Such a schema implies that law school education could profitably involve examination of, focus on, training in and indeed "teaching" of moral and ethical issues. It intimates that most law students are open to change and growth respecting the "morality" with which they entered law school. They can be sensitized to wider ethical and social responsibilities. They can learn that their responsibilities as professionals extend beyond zealous advancement of their clients' interests, and the possibilities for self-aggrandizement, to consideration of the role their professional conduct and actions play in communal, social and national life. Good reason seems to exist for believing that lawyers can be taught to be "better" people and, therefore, more compassionate, responsible and with a wider perspective.

### KOHLBERG'S THEORETICAL SYSTEM

Kohlberg's structure of morality postulates more or less universal principles of moral reasoning which are more or less applicable in all societies at all times. These principles are "objective" in the sense that one would expect them to be adopted by rational moral agents operating from an impartial, non-selfish, perspective.<sup>7</sup> Additionally, Kohlberg claims that individuals come to adopt the principles in a predictable invari-

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longitudinal one since both demonstrated a sequential advance with age, through the Kohlberg specified stages of moral development: "The data show that the development of moral judgment continues after the age of 18 in both village and city subjects. This result is similar to findings in the United States which show that moral development continues at least into the third decade of life." *Id.* at 869.

7. See William Y. Penn, Jr., *Teaching Ethics — A Direct Approach*, 19 J. MORAL EDUC. 124 (1990). Penn states that:

[C]laims . . . not widely accepted in our institutions of higher learning [are]:

1. There is a capability present within human consciousness which, when it is developed and exercised, significantly increases the probability of rational consensus on the just resolution of value conflicts. This is the capability Kohlberg and other cognitive developmentalists have identified as principled or post conventional moral reasoning.
2. The capacity for principled moral reasoning . . . can and must be developed by means of focused, systematic and long term educational effort.

*Id.* Or, as Kohlberg and his associates state:

[H]ard structural stage theories rely on an abstraction from the concrete, unitary self or ego, to the perspective of . . . a rational moral subject . . . This distinction allows a hard structural stage model to define stages solely in terms of cognitive or socio-moral operations

ant sequence; that is all individuals, although rates of progress will vary, will embrace principle 3, after principle 2, and principle 3 before principle 4. Everyone will start at the first stage and proceed stage by stage to the highest stage which he is capable of attaining. No one will be capable of effectuating a "quantum leap," for example from the third stage to the fifth stage, thereby bypassing the fourth (intermediate) stage.

As Kohlberg puts it in his *The Philosophy of Moral Development*:

In contrast to both extreme and sociological relativism, I have first pointed out that there are universal moral concepts, values, or principles, that there is less variation between individuals and cultures than has usually been maintained in the sense that (1) almost all individuals in all cultures use the same twenty-nine basic moral categories, concepts or principles . . . ; and (2) all individuals in all cultures go through the same order or sequences of gross stages of development, though varying in rate and terminal point of development.<sup>8</sup>

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rather than in terms of reflections upon the self, morality, or nature. . . .

. . . . Theoretically hard structural stage models follow Piaget [1970] in asserting that to construct a mode of hierarchically integrated stages is to construct a normative model of development. A normative model establishes a standard as a developmental endpoint . . . each stage in the hierarchy represents an increase in correspondence with the endpoint or highest stage. The normative model assumed by both Piaget [1970] and Kohlberg [1973] relies on a conception of human rationality in that it presumes an endpoint upon which all rational agents could agree. . . .

LAWRENCE KOHLBERG ET AL., *MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS* 36, 38 (1983). In this same volume the authors state the point in more accented terms:

The focus of Piaget and Kohlberg on morality as deontological justice springs . . . from a concern with moral and ethical *universality in moral judgment*. The search for moral universality implies the search for some *minimal value conception(s) on which all persons could agree*, regardless of differences in detailed aims or goals.

*Id.* at 40.

8. KOHLBERG, *PHILOSOPHY OF MORAL DEVELOPMENT*, *supra* note 2, at 126. Kohlberg sets out his conception of the nature of the actual stages of the hierarchy of moral development *id.* at 17-20. This schema is presented for informational purposes but the actual "content" or sequence of the stages is not strictly significant or important for the argument of this paper that law students may appreciably be influenced and benefit by "moral" instruction.

Robert E. Carter comments that:

Kohlberg's theory of moral reasoning describes moral development as the movement through six distinct stages of understanding, with the later stages being more "adequate" or "better" than the earlier.

Kohlberg attributes the obvious differences that do exist in individuals' "moral" position, in a given culture, as well as differences in moral approaches between groups or individuals in different cultures, essentially, to differences in the *degree* of moral *development*; some individuals or groups are, simply, at higher stages of the universal moral format or structure than others. As Kohlberg expresses it:

[T]he marked differences between individuals and cultures that exist are differences in stage or development status. . . . [E]ven moderate or sociological relativism is misleading in its interpretation of the facts: not only is there a universal moral form, but the basic content principles of morality are also universal.<sup>9</sup>

Kohlberg also seems to contend that most individuals would progress toward and conclude their moral development at the same advanced stage if such development could take place under optimum conditions:

[Stage 6] principles [the highest], I argue, could logically and consistently be held by all people in all societies; they would in fact be universal to all humankind if the conditions for sociomoral development were optimal for all individuals in all cultures. . . . At lower levels than stage 5 or 6, morality is not held in a fully principled form. . . .<sup>10</sup>

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The sixth or most adequate stage is not reached by all people, or even by most, but serves as the norm by which the earlier stages are judged less adequate.

Robert E. Carter, *Beyond Justice*, 16 J. MORAL EDUC. 83, 84 (1987). Similarly, Robert Enright et al. observe that:

The theoretical foundation of Kohlberg's structuralist approach to moral reasoning involves the assumption that ontogenetic change occurs through an invariant sequence of qualitatively distinct stages, with each successive stage representing an integration and hierarchical organization of previous stages. It is further assumed that there is no regression and that corresponding stages of logical reasoning and role taking are necessary precursors for the emergence of a given moral stage. . . . [I]t [is] fair to say that the preponderance of evidence after 20 years of intensive research still favors the theory

Robert Enright et al., *Moral Development Interventions In Early Adolescence*, 22 THEORY INTO PRACTICE 134, 134-35 (1983).

9. KOHLBERG, PHILOSOPHY OF MORAL DEVELOPMENT, *supra* note 2, at 126.

10. *Id.* at 127. Reimer et al. comment: "By saying that some moral judgments are more "adequate," Kohlberg is arguing that (1) some values ought to take precedence over others, and (2) some ways of weighing rights

Kohlberg feels that the notion of ethical relativism, itself, is part of a lower consciousness in the structure of the objective moral hierarchy; that "*an extreme ethical relativism* [is] characteristic of a transitional phase in the movement from conventional to principled morality."<sup>11</sup>

Kohlberg also suggests that an individual can be "prompted" to advance, stage by stage, by being given awareness of, and being instructed in, "higher" stages. In the immediate sense, instruction should be in the next stage above the one the individual may be situated at currently. "[T]he subjects should most assimilate moral judgments one stage above their own, and assimilate much less those which are two or more stages above, or one or more stages below, their own. These predictions have been clearly and consistently verified in . . . experimental studies."<sup>12</sup>

An individual, according to Kohlberg, progresses in developing her own moral code by, as it were, wrestling with moral dilemmas and the concomitant perceptions they induce. "[S]tages of moral judgment develop through conflict and reorganization . . ." <sup>13</sup> There is a universally objective path from lower to higher in moral consciousness and any individual's development is a product of exposure to and stimulation by, more advanced schematic material. In short, moral learning can and does take place and there is objectivity respecting when one has learned "more," that is "better." As Kohlberg insists:

[T]he more mature stage of moral thought is the more structurally adequate. This greater adequacy of more mature moral judgement rests on structural criteria more general than those of truth value or efficiency. These general criteria are the *formal* criteria that developmental theory holds as defining all mature structures, the criteria of increased differentiation and integration.<sup>14</sup>

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or claims in a moral conflict situation are better than others." REIMER ET AL., *supra* note 6, at 88.

11. KOHLBERG, *PHILOSOPHY OF MORAL DEVELOPMENT*, *supra* note 2, at 129-30 (citation omitted). Kohlberg goes on to assert, in this context, that "extreme relativists eventually moved on to principled stages . . . . Usually they . . . became . . . representatives of the view that there is a rational way of coming to moral agreement . . . ." *Id.* at 130.

12. *Id.* at 132 (citations omitted).

13. *Id.* at 134.

14. *Id.* at 134-35; *see also* REIMER ET AL., *supra* note 6, at 88-89.

Kohlberg goes on to elaborate about what he means by the higher stages reflecting superior differentiation and integration:

These combined criteria, differentiation and integration, are considered by developmental theory to entail a better equilibrium of the structure in question. A more differentiated and integrated moral structure handles more moral problems, conflicts, or points of view in a more stable or self-consistent way. Because conventional morality is not fully universal and prescriptive, it leads to continual self-contradictions, to different definitions of right . . . for Americans and Vietnamese, for fathers and sons. In contrast principled morality is directed to resolving these conflicts in a stable self-consistent fashion.<sup>15</sup>

To illustrate this notion of being able to objectify as morally superior this progression from lower levels to higher ones, Kohlberg discusses progression in the moral valuation of human life.

[T]he moral imperative to value life becomes increasingly independent of the factual properties of the life in question. First, people's furniture becomes irrelevant to their value; next, whether they have loving families; and so on. . . . [I]t is movement toward increased universality of moral valuing of human life. At Stage 1, only important people's lives are valued; at Stage 3, only family members; at stage 6, all life is to be morally valued equally.<sup>16</sup>

This notion of the objectivity of hierarchical moral sentiment also seems intimated by references to the higher stages as more "principled" ones. Kohlberg contends that:

Someone at the postconventional level understands and basically accepts society's rules, but acceptance of society's rules is based on formulating and accepting the general moral principles that underlie these rules. These principles in some cases come into conflict with society's

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15. KOHLBERG, PHILOSOPHY OF MORAL DEVELOPMENT, *supra* note 2, at 135-36.

16. *Id.* at 135. Reimer et al. write:

Kohlberg claims that as a person's moral judgment grows more adequate, he will be able to differentiate the value of life from all other values and see that it should take precedence over them. He will also see that saving a person's life is what *ought* to be done, independent of whether he feels like it or whether other people would be likely to do the same.

REIMER ET AL., *supra* note 6, at 88.



rules, in which case the postconventional individual judges by principle rather than by convention.<sup>17</sup>

An exciting ramification of Kohlberg's efforts, as well as those of professional psychologists who studied with him, was the discovery that individuals could be guided by moral "instruction," as it were, to ascend higher in the Kohlbergian hierarchy sooner than they might have absent such actual pedagogical efforts. Moshe Blatt, one of Kohlberg's students, theorized that if a slight change in childrens' moral judgments could be effected by simply exposing them to moral argumentation representative of the stage immediately above the one at which the children were currently situated, then a curriculum involving constant exposure to such phenomena would have a somewhat significant effect on the childrens' moral development. Blatt ran a program in which he discussed moral dilemmas with sixth graders, once a week, after having tested them to ascertain their current stage of moral development. At the conclusion of the program, he retested these subjects and found that 63 percent of them had risen one full stage in moral reasoning. Reimer, Paolitto and Hersh conclude their description of this project by asserting: "With that discovery, developmental moral education began in earnest."<sup>18</sup> Or, as it was otherwise put: "Kohlberg authors a theory of moral development that Blatt applies to educational practice. Blatt empirically demonstrates that a developmental educational intervention can promote moral stage change, and Kohlberg supplies a philosophic justification for the process Blatt launched."<sup>19</sup> Power, Higgins and Kohlberg generalize Blatt's discovery:

Blatt "launched" . . . a process by which Kohlberg's theory of moral development could be applied practically to educational (classroom) practice. His study demonstrated three points essential to the endeavor of developmental moral education.

1. The development of moral judgment is amenable to educational intervention; . . . .

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17. KOHLBERG, *PSYCHOLOGY OF MORAL DEVELOPMENT*, *supra* note 2, at 173. Reimer et al. state, "[A] principled approach is more adequate because it attempts to view the conflict from the perspective of any human being rather than a member of a particular society or religion." REIMER ET AL., *supra* note 6, at 89.

18. REIMER ET AL., *supra* note 6, at 114.

19. F. CLARK POWER ET AL., *LAWRENCE KOHLBERG'S APPROACH TO MORAL EDUCATION* 26 (1989).

2. The stimulated development is not a temporary effect of learning "right answers," but, as measured a year later, is as lasting as is 'natural' development and is generalized to new dilemmas not covered in the classroom.
3. The stimulated development occurs when the intervention sets up the conditions which promote stage progression. These involve providing opportunities for cognitive conflict, moral awareness, role-taking, and exposure to moral reasoning above one's own stage of reasoning.<sup>20</sup>

Particularly interesting for the purposes of this paper is the information produced by one study to the effect that a college education and level of educational attainment, in general, were extremely significant factors in allowing individuals entry to the higher stages of moral judgment. "Educational level was in fact the variable most highly correlated with moral judgment stage."<sup>21</sup> Another study also tended to show that increases in moral judgment scores, on a well accepted psychological testing scale, were attributable to experience in college. In fact, it is there stated that "the more years a person goes to college, the higher the moral judgment score."<sup>22</sup> The study concludes as follows: "[W]e think . . . evidence suggests that academic orientation, continued intellectual stimulation and . . . other

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20. *Id.* at 12. Reimer et al. comment:

Kohlberg has concluded that moral change is most likely to occur when discussions succeed in arousing *cognitive conflict* among participants. When a participant is exposed to other views based on moral reasoning higher than his own, he may become unsure of the adequacy of his original position and begin to consider the merits of the other positions. He does not then simply switch positions; rather, he begins the process of restructuring his own way of reasoning about moral issues. The change that the posttest picks up (which is usually one third to one half a stage change) reflects the process of reorganization.

REIMER ET AL., *supra* note 6, at 114.

21. *Id.* at 101; see also James R. Rest, *Why Does College Promote Development in Moral Judgment?*, 17 J. MORAL EDUC. 183 (1988). The point is also illustrated more technically:

In the 20-year longitudinal study using Kohlberg's MJI [Moral Judgment Index] . . . correlations of moral judgement with education for adult subjects were between 0.53 and 0.60. In over a dozen longitudinal studies of the DIT [Defining Issues Test], increases in education are associated with gains in moral judgment scores. . . . [T]he trend is clear for upward change in moral judgement over the college years.

*Id.* at 185.

22. Rest, *supra* note 21, at 183.

factors . . . are the actual causal agents behind the finding that time in college is associated with gains in moral judgment."<sup>23</sup>

This suggests that it is exactly university educated individuals in their early 20's, a category into which most law students fall, who are most susceptible to, in effect, being taught to refine and sharpen moral sensibilities into superior perspectives. The intimation is that under the influence of direct instruction in law schools, young attorneys can be made to reflect more intense moral sensitivity than they otherwise might. Reimer, Paolitto and Hersh refer to a study showing that its subjects continued to move upward along the sequence of moral stages well past their adolescent years. This study in fact demonstrated that moral development continues, at least, through age 36.<sup>24</sup> (Which implies that even as entering law school classes might tend to increase in average age, the suggestions for moral instruction outlined here may well be no less applicable.)

Additionally, although a certain amount of instruction may be necessary to impel an individual's level of moral judgment upward, once a higher stage has been achieved through such instruction, the individual retains it without the need for continuing or further instructional input.

[Blatt's] follow-up testing a year later . . . show[ed] that the gains achieved remained constant without any reinforcement from the intervention. [Thus] he could rebut potential criticism that what accounted for the change was students' learning from the teacher the content of the higher-stage arguments. Were the change due to content learning, rather than structural transformation, it is more likely that it would have been reversed in a year's time.<sup>25</sup>

#### EMPIRICAL VERIFICATION OF KOHLBERG'S THEORIZATION

Actual experiments designed to determine whether purposeful instruction toward raising individuals' moral consciousness would in fact result in enhanced moral posture seem to confirm quite decisively the prediction of Kohlberg's theories.

In 1978, Alan Lockwood, critically and analytically reviewed various studies in which increases in the moral stage development of students were sought to be effectuated by vari-

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23. *Id.* at 192.

24. REIMER ET AL., *supra* note 6, at 100.

25. POWER ET AL., *supra* note 19, at 13.

ous direct teaching approaches: for example, one approach used teacher-led discussions of moral dilemmas in which the instructor applied moral reasoning located at a stage just above the one then occupied by the subject participants.<sup>26</sup> Lockwood concluded, from this review, with a high degree of confidence, that the Blatt-Kohlberg experimental interventions, in fact, led to, on a permanent basis, the apparent effects of the treatment. In other words, he found strong evidence of validation of the Blatt-Kohlberg theoretical hypothesis.<sup>27</sup> Interestingly, in addition to finding the hypothesis substantially confirmed in a significant number of studies, Lockwood also concluded that those studies which failed to provide corroboration tended to be flawed:

After a critical review of research I believe it is defensible to make the following claims about treatments designed to stimulate moral reasoning:

The direct discussion approach generally produces significant development in moral reasoning. The best designed studies employing this genre . . . obtained mean increases of almost one half a stage of reasoning. *Those studies showing little or no significant developmental increases as a result of direct discussion . . . generally were not adequate tests of the treatment.*<sup>28</sup>

Another resume of research efforts designed to test the Blatt-Kohlberg hypothesis that moral instruction intervention will induce moral growth similarly confirms their theory. James Leming, in fact, considered only research that dealt with the classroom as the area for such instruction.<sup>29</sup> Thus, the experimental studies reviewed related to schools and classroom settings involving teachers and students in group contexts. Additionally, only empirical research which utilized similar types of treatment applications were studied.<sup>30</sup> A further specification was that replicable tests of statistical significance must have been performed on the data of an empirical study so that the reporting of claims which may have occurred by chance would have been avoided.<sup>31</sup>

26. Alan L. Lockwood, *The Effects of Values Clarification and Moral Development Curricula on School-Age Subjects: A Critical Review of Recent Research*, 48 REV. EDUC. RESEARCH 325 (1978).

27. *Id.* at 355-56.

28. *Id.* at 358 (emphasis added).

29. James S. Leming, *Curricular Effectiveness in Moral/Values Education: A Review of Research*, 10 J. MORAL EDUC. 147, 148 (1981).

30. *Id.*

31. *Id.*

Leming addresses Kohlberg's contention that moral reasoning can be immediately influenced by educational intervention and resumes Kohlberg's statement of the factors pertinent to impelling moral stage growth:

1. exposure to the next higher stage of reasoning;
2. exposure to situations posing problems and contradictions for the child's current moral structure leading to dissatisfaction with his current level;
3. an atmosphere of interchange and dialogue combining the first two conditions in which conflicting moral views are compared in an open manner.<sup>32</sup>

Leming's review found that of the 27 studies analyzed which adhered to the above procedure in an effort to instigate moral development, 81 percent showed significant differences for the groups treated by the procedure.<sup>33</sup> Specifically, at the secondary level more than two-thirds of the studies reported a statistically significant difference for the treatment group.<sup>34</sup>

Leming summarizes his review findings as follows:

In those studies where significant findings were reported the length of treatment time ranged from 7 to 54 hours with an average of 26 hours of class time devoted to the intervention. The average statistically significant growth in stages of moral reasoning was . . . about one-third of a stage. . . . It was also found that these increases were persisting as indicated in the studies using delayed post-tests. . . .

. . . . However, the research indicates that . . . mean change is due to a movement in only a little over half the subjects. Between 30 per cent and 50 per cent of the students will be unaffected by the treatment.<sup>35</sup>

This last finding, that almost one-half of the subjects in a group being treated are resistant to any upward movement — that they won't budge from already formed moral reasoning patterns, is discouraging from the perspective of the suggestions and aspirations of this paper (more fully elaborated in the next section.) This finding suggests that a great many law students may indeed be impervious to pedagogical interventions aimed at enhancing their moral sensibilities and principles. The good news is that a more substantial number of law stu-

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32. *Id.* at 156.

33. *Id.* at 160.

34. *Id.*

35. *Id.*

dents, based on such evidence, may well be susceptible to having their personal moral structures upgraded through direct instruction. Actualizing this potential would not be an unworthy achievement. Additionally, those individuals who do respond to the pedagogical intervention go up on the average almost twice as much in their moral stage development, as the mean average increase indicates (as a concomitant of no rise by almost one-half the subjects). Further, it may be that those subjects who showed no movement in moral stage development as a result of the treatment interventions which were brought to bear in the reviewed studies, would respond to instruction over a longer period of time, or more hourly intensive, than was true of the instruction actually accorded them. Such persons might also be responsive to intervention techniques other than the ones which were actually employed respecting them.

A very recent experiment suggests that there may be an even more effective way of stimulating individuals' moral growth than the Blatt-Kohlberg methodology discussed above<sup>36</sup> (i.e. bringing subjects into contact with moral development stages immediately above the one at which they are currently located by discussion of moral dilemmas led by instructors seeking to stimulate moral development progress). This 1990 study suggests that principled moral reasoning is more effectively learned by the direct teaching; in conjunction with each other, of certain elements apparently connected with effective moral reasoning, such as logic-skills, role-taking and justice operations, than by discussion of moral dilemmas.<sup>37</sup>

For the purpose of this paper the important consideration is that moral growth is directly instigatable by *some* sort of direct pedagogical intervention; the *specific* methodology which will be most successful in promoting the growth, so long as it is generally compatible with legal education techniques, is not *conceptually* vital. Once it is agreed that the desired type of growth can be achieved, the most suitable means for feasibly germinating it is just that — a question, only, of means. What law schools must take note of, and conjure with, is that many young law students can, apparently, be improved in their moral consciousness and sensibilities by appropriately effective means.

The above referred to 1990 study, by William Y. Penn, Jr., somewhat takes to task the Blatt-Kohlberg type intervention methodologies, previously described, on the ground that the

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36. See Penn, *supra* note 7, at 124.

37. *Id.* at 136.

progress they promote is inadequate in light of that which might be achieved by alternative treatments:

[M]ost of the efforts [of cognitive developmentalists, such as Blatt and Kohlberg] . . . to design effective interventions are only modestly successful and seldom help individuals move clearly into the domain of principled moral reasoning . . . . [A] principal hypothesis of this study [is] that this lack of success is due to a failure to teach directly what theory and research have shown clearly to be central to development of mature mental reasoning: logic, role-taking . . . , and the intellectual construction of concepts of justice . . . .<sup>38</sup>

Driving Penn's experiment was the hypothesis that direct, concerted instruction in certain intellectual skills would produce superior results in inducing growth in moral judgment levels. The more intensively these skills are targeted, taught and exercised in tandem in a one-semester ethics class the more rapid would be the developmental progression.<sup>39</sup>

Penn finds the Blatt-Kohlberg approach as, basically, insufficiently pedagogically aggressive. He feels that students can learn better, at least for the purposes being discussed here, by having "knowledge" more imparted and reached less by "self-discovery."

The approach most frequently used [growing out of Kohlberg's work] . . . is a moral dilemma discussion model in which the "instructor" facilitates the students' exploration of diverse points of view, but does not attempt directly to teach higher stage operations . . . . This approach is based on the assumption that students can best develop principled moral reasoning if they discover it for themselves through group discussion.

[However,] [t]he assumption of the intervention design [of the Penn study] . . . is . . . that students can best develop skills in principled moral reasoning if those skills are directly modelled and taught as applied to specific social issues.<sup>40</sup>

Penn contends that typical classroom instruction can impart learning and techniques to students which will contribute to enhancing their moral principles and consciousness. In other words, in some tangible, significant sense "better"

38. *Id.* at 125.

39. *Id.* at 130.

40. *Id.* at 126.

morality can be taught to university students. And some of this teaching need not be respecting "morality," as such:

Research . . . supports the thesis that reasoning at Stage Four and higher requires the ability to perform higher level logical operations . . . .

Neither our high school nor university curricula adequately equip students with these skills. Thus it is not surprising that students in ethics classes consistently find it difficult to follow abstract ethical arguments. To help students overcome these difficulties the first third of the ethics text [used in the course involved in the controlled study] concentrated on teaching the basic skills in logic requisite to understand the formal structure present in principled moral reasoning.<sup>41</sup>

According to Penn, instruction in these kinds of skills can be given in most direct, concrete, and practical ways. Typical classroom teaching in a much less than highly rarified, transcendent, fashion can effectively transmit them. Old fashioned "drills" may, apparently, be effectively utilized:

[S]tudents do exercises which develop skill at higher level moral thinking. These exercises develop students' ability to identify and apply abstract moral principles. . . .

. . . As they learn to identify and apply the moral principles which constitute the organizing structure of these arguments students begin to develop both a practical understanding of and preference for the perspectives which are the organizing elements of principled moral thinking.<sup>42</sup>

Actually, in constructing the design of the study it was broadly speculated that the more there was of direct, typical classroom teaching of elements thought to be integral to developing superior moral sensibilities, the greater would be the moral "growth" in the students instructed.<sup>43</sup> More teaching would lead to better results; i.e. enhancement of moral posture. As Penn describes it:

The general hypothesis was that the more intensively one targeted and exercised in tandem skills in logic, role-taking and conceptualizations of justice the more rapid would be the developmental progression. This . . . included the following specific predictions:

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41. *Id.* at 127.

42. *Id.* at 128.

43. *Id.* at 130.



1) Group 1, undergraduate ethics courses which combined all four elements in the design, would show the greatest positive change. . . .

2) Group 2, MBA ethics, which included all the elements except formal logic, and Group 3, undergraduate ethics courses which included all the elements except formal logic, would show the next greatest change.<sup>44</sup>

The empirical results validated these hypotheses to a significant extent. Actually, as Penn observes, results were better than might have been anticipated: "The trend of the results was as expected. . . . *The surprise was the size of the increases in . . . scores [reflecting stages of moral development] and the effect size for all the groups using the ethics intervention design.*"<sup>45</sup>

Penn emphasizes the magnitude of the improvements made by students in their levels of moral development by citing specific comparative statistical information:

The average gain in . . . score for the three variations of the ethics intervention design is [almost 13]. . . . The extent to which a 13 point change . . . is associated with a fundamental restructuring of an individual's social thought is indicated by reviewing the progression in . . . scores from junior high to graduate work. Junior high students normally score in the 20's, high school students in the 30's, college students in the 40's and graduate students in the 50's . . . . Thirteen points is a very large change which normally represents four to six years of formal education. Personal comments from many students who have taken the course indicate that it does have a profound impact on how they think about moral issues.<sup>46</sup>

There are other studies which also firmly suggest that teaching and instruction can contribute to moral growth.<sup>47</sup> For

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44. *Id.* at 130. Also, the comparative changes in the mentioned Groups 1, 2 and 3 were as predicted:

The achievement of . . . Group 1 was especially striking. . . . The mean post-test for Group 1 moved from below the average for college students to the range normally achieved by graduate students. Group[s] 2 . . . and 3 . . . moved from below the national norm for college students to a range above that norm.

. . . [T]he changes within Groups 1, 2, 3 . . . [were] statistically significant.

*Id.* at 131-32.

45. *Id.* at 131 (emphasis added).

46. *Id.* at 133-34.

47. See, e.g., Djilali Bouhmama, *Assessment of Kohlberg's Stages of Moral Development in Two Cultures*, 13 J. MORAL EDUC. 124 (1984).

example, in one study subjects from the United Kingdom, on the one hand, and Algeria, on the other, who were matched respecting age and sex differed in mean scores of moral maturity.<sup>48</sup> "This difference seemed attributable to cultural differences in matters such as religious values."<sup>49</sup> As the author of the study stated: "[T]he responses of the Algerian subjects reflected the cultural background and the moral values of their own culture. They think in terms of a system of rules (characteristic of the shift from pre-conventional to conventional morality in Kohlberg's scheme) based on religious values."<sup>50</sup> Also, in this same study, Bouhmama refers to a prior study which also suggested that training can influence moral development.

In a recent comparative study, Hilfer (1980) found that children attending Hasdic Yeshivas (Jewish day school), where intensive religious training was given, scored higher on the Kohlberg Moral Judgment Interviews than public school students at the 11- and 14-year-old levels. Hilfer attributed these findings to the cumulative effects of the study of Jewish law and the vigorous education the students received. Thus, among the Yeshiva students there appeared to be an earlier acquisition of moral stages than with their public school counterparts. Hilfer's research shows clearly the impact of religious training on moral development.<sup>51</sup>

Yet another study indicated that direct teaching is a powerful tool in instilling elevated moral judgment.<sup>52</sup> This study, which involved a controlled experiment with children in grades 1-3, found that there was significant growth in justice reasoning and perspective-taking skills, occasioned by both role-playing and structured discussion interventions.<sup>53</sup> For purposes of the study "positive justice" was defined as concerned with "who in society should get what proportion of the available resources, praise and other rewards,"<sup>54</sup> while "perspective taking" was related to "ability to understand another's thinking and feel-

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48. *Id.* at 124.

49. *Id.*

50. *Id.* at 130.

51. *Id.* at 130.

52. See Suzanne L. Krough, *Encouraging Positive Justice Reasoning and Perspective-taking Skills: Two Educational Interventions*, 14 J. MORAL EDUC. 102 (1985).

53. *Id.* at 102.

54. *Id.* at 103.

ings about a situation, essentially, to put oneself in another's shoes."<sup>55</sup>

In this study the classroom interventions consisted of 30-40 minute sessions, once a week for eight weeks.<sup>56</sup> Krogh concluded:

[A] significant treatment effect occurred using either role-play or discussion when both positive justice and perspective-taking were tested. These results were, in one respect, unexpected. It had been postulated that children in the lower grades would respond more positively to role-play than to structured discussion, and that the opposite would be true at the higher levels. This did not prove to be the case *and it may be argued that concreteness of the materials in the structured discussion provided subjects of all ages with the direct focus they needed.*<sup>57</sup>

Bearing in mind that this study was conducted with children at the beginning of their primary education, nevertheless, the underscored language is suggestive of the teaching power of directly structured discussion as far as impacting moral values. Such an approach, of course, would seem eminently suitable in the legal education environment, as we know it.

Another recent study also produced results to the effect that after dental students had completed a professional ethics course the proportion of students who were able to integrate in their moral reasoning "care" and "justice" issues was significantly greater than prior to the course.<sup>58</sup> Additionally, and perhaps most salient for our purposes, the testing showed that the number of students who no longer ignored care and justice issues, respecting ethical dilemmas, was greatly increased.<sup>59</sup>

#### CONSIDERING SOME CRITIQUES OF KOHLBERG'S SYSTEM

It must be acknowledged that while an individual's moral "consciousness" might elevate to a given state, that does not necessarily imply that *action in accordance with* such consciousness will ensue. Moral judgment is not the same as moral choice in an active sense; that is, it is not the same as acting morally. A person might believe that she should do something, such as

55. *Id.*

56. *Id.* at 105.

57. *Id.* at 109 (emphasis added).

58. See Muriel J. Bebeau & Mary M. Brabeck, *Integrating Care and Justice Issues in Professional Moral Education: A Gender Perspective*, 16 J. MORAL EDUC. 189 (1987).

59. *Id.*

report a client who is plotting illegal activities, yet she might not do it, deciding instead to remain silent and "not make waves."

Kohlberg and his associates themselves express some qualms on this point: "The current state of theory and research shows Kohlberg trying to enlarge the theory of development in justice reasoning to more effectively account for moral action."<sup>60</sup> There is a sense of struggling to equate the moral judgment stage, Kohlberg's sixth stage of moral development, with corresponding social action.

A first elaboration of the theory comes through relating justice stage to the content of deontic choices . . . in real and hypothetical situations. The fact that on some dilemmas Stage 5 subjects consensually agree on one choice of action allows us to relate structure to content as one way of accounting for observed relations between justice stage and action.<sup>61</sup>

Be that as it may, it is undeniably clear that once a certain judgment stage has been reached, there is at least a *chance*, (there seems no reason to believe that it isn't, indeed, quite a good chance), for correspondingly admirable moral action. Without such enhancement of moral judgment level there is virtually no chance for correspondingly high moral action; adventitiousness would seem the only possibility for its occurrence.

Thus, instructional effort to elevate stages of moral judgment amongst law students seems decidedly warranted — notwithstanding it is not *ipso facto* a guarantor of more noble professional conduct.

Criticism has also been directed against the work of Kohlberg and his followers from the point of view that their moral hierarchy structure omits significant elements of moral consciousness. Kohlberg and his associates acknowledge such criticism in their own words:

Critics point out that Kohlberg's notion of moral maturity, emphasizing the ideas of justice and regard for individual rights, ignores the concept of ideal community (i.e. of human caring and responsibility for others) and is therefore lacking. . . .

. . . Critics have argued that Kohlberg [] . . . is applying a normative system to individuals whose own norma-

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60. KOHLBERG ET AL., *supra* note 7, at 7.

61. *Id.*

tive values may be different from those central to Kohlberg's perspective, and hence whose own perspective is poorly represented by his theory. In addition . . . is a charge of incompleteness; i.e. the claim that the theory leaves out psychologically critical components of the moral judgment process such as imagination, affect and a sense of responsibility in specific relationships.<sup>62</sup>

In that vein, Carol Gilligan introduced the notion that the elements of the Kohlbergian moral structure were, in effect, gender biased; they were oriented to masculine personalities and reactions while oblivious to factors endemic to moral analysis and consideration as conducted by women.<sup>63</sup> One commentator summarizing Gilligan's objections writes:

Gilligan claims that Kohlberg's (1969) theory omits the moral concern of females, the ethic of care, at the highest level of his model. She argues that women who have a greater concern with maintaining relationships are more likely to be scored at stage three, the stage of mutual interpersonal expectations, relationships and conformity; males concern with issues of justice would lead them to score at stage four, the social system and conscience maintenance stage. Further, Gilligan asserts that hypothetical dilemmas that assess logic and abstract reason-

62. *Id.* at 3.

63. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). Kohlberg has also been charged, by Ernest Wallwork, with giving insufficient weight to moral postures stemming from other-regarding, affective, action which may not, necessarily, be reducible to universalizable or reciprocally structured principles. See Ernest Wallwork, *Sentiment and Structure: A Durkheimian Critique of Kohlberg's Moral Theory*, 19 J. MORAL EDUC. 87 (1985). Wallwork writes:

Durkheim recognizes, as Kohlberg does not, that direct other regarding acts are fully moral, even though they may not be universalizable. . . . The issue is whether being motivated by affection for others is, in addition to being a necessary condition of morality, sometimes sufficient for the ensuing conduct to count as moral. For Kohlberg, in order for benevolent conduct to be properly moral, it must be justified by a universalizable principle. [Kohlberg writes]: "truly moral reasoning involves features such as impartiality, universalizability, reversibility, and prescriptivity." . . . Durkheim's argument, [contrarily] is that the conduct of a soldier who risks his life for a buddy . . . is moral, regardless of whether he or anyone else would see his conduct as implying that anyone else under similar circumstances ought to act similarly. For Durkheim it is sufficient for the soldier to say "I acted for my buddy's sake. . . ."

*Id.* at 96.

ing, areas in which males excel, would exclude females from the highest stages of the model.<sup>64</sup>

However, there is empirical evidence which at least seems to render Gilligan's claims questionable. Bebeau and Brabeck put it very boldly: "[T]he literature examining gender differences in moral reasoning as defined by Kohlberg's theory do not support her claim."<sup>65</sup> They refer to a series of studies conducted by one investigator in 1984, 1985 and 1986 which showed only small differences between genders respecting a particular moral judgment test.<sup>66</sup> The investigator concluded that males did not score significantly higher than females and that "gender accounted for [only] one-twentieth of one per cent of the variance in moral reasoning."<sup>67</sup> Another investigator "reported that when the effects of education are controlled, findings of gender differences in [moral reasoning] scores are eliminated."<sup>68</sup> Yet another investigator reported that less than one half of one per cent of variance, between males and females, on another standard test of moral reasoning could be ascribed to gender and, additionally, that "education was 500 times more powerful in predicting moral judgement [sic] level than gender."<sup>69</sup> As Bebeau and Brobeck comment: "These results indicate that females use concepts of justice in making moral judgments as often as their male counterparts. Educators will find female students as likely as males to resolve moral issues in which individuals have competing claims, by appealing to abstract principles of justice."<sup>70</sup>

A few years earlier Kohlberg and some associates responded to Gilligan's claim. This response was formulated in theoretical, speculative terms:

We believe that Gilligan's distinction between a morality of care and a morality of justice is a distinction held in the mind of all human beings. . . . In our view, however, these two senses of the word moral do not represent different moral orientations existing at the same level of generality and validity. We see justice as both rational and implying an attitude of empathy. It is for this reason that we make the following proposal: i.e. that there is a dimension along which various moral dilemmas and ori-

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64. Bebeau & Brabeck, *supra* note 58, at 191.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 191-92.

entations can be placed. Personal moral dilemmas and orientations of special obligation . . . represent one end of this dimension and the standard hypothetical justice dilemmas and justice orientations represent the other end.<sup>71</sup>

Even if Gilligan were correct in her description of gender based differences respecting moral reasoning, that would not necessarily subvert the assertion of this paper that moral consciousness can be elevated by instruction and training. If gender based differences in this realm are eventually substantiated as truly significant, educational efforts could take them into account in fashioning appropriate programs. Additionally, training might be addressed to making more uniform, in a morally superior vein, responses of both males and females. There is no reason to believe that both sexes cannot profit in moral growth from direct attempts to produce such advance, whatever may turn out to be the necessary means for achieving the desired objectives.

#### BRINGING ETHICAL SENSITIZATION TO LEGAL EDUCATION

Just in case there might be any question, whatsoever, about ethical infirmities in the characters of some (many?) of those who practice law a bit of anecdotal evidence might be interesting, if not amusing. Steven Kumble a graduate of Yale College and, in 1959, Harvard Law School went on to become one of the driving forces and principal partners in what, at one time, seemed to be the second largest law firm in the country. (Not too many years later it was forced to go out of business). But here is a characterization of him as written by Kim Isaac Eisler:

Just as Kumble had little patience for lawyers who told clients unpleasant things, he also had little patience for lawyers on his staff who found reasons not to approve proposed deals. Tax lawyers, Kumble felt, did that a lot, and for that reason Kumble often ignored the one tax lawyer he had brought into the firm, Stanley L. Golden. Golden's concerns about some of the tax shelter deals just slowed up the works. Kumble didn't want that. He wanted to close the deal and get the fee. After Golden died of cancer in August 1971, Kumble rode back from the funeral with a group of partners, and they began dis-

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71. KOHLBERG ET AL., *supra* note 7, at 24.

cussing business. One of them began expressing doubt about a particular deal on which the firm was working.

Kumble cast a seering [sic] glance into the back seat. "You say anything like that again, and I'll throw you in that coffin with Golden," he barked.<sup>72</sup>

In case one does not get the idea about the depth of Kumble's ethical sensibilities Eisler quickly provides another example. It relates to Arlan's Department Stores which had been one of Finley Kumble's biggest and most profitable clients. Business turned bad for Arlan's in the recession of 1971 and things increasingly worsened until it was poised, and none too gracefully, on the verge of bankruptcy. Eisler writes as follows:

On April 12, 1971, Kumble already recognized that the future of Arlan's was dubious at best. Barring something extraordinary, bankruptcy was on the horizon. So Kumble did what seemed most natural. He concocted a plainly unethical deal with another law firm designed to squeeze as much in legal fees out of the corpse of Arlan's as possible. On that day Kumble wrote a letter to bankruptcy specialist Ronald Itzler of Ballon Stoll and Itzler, retaining that firm as special bankruptcy attorneys. In exchange for this referral, Kumble demanded and received a promise that one-third of all Ballon Stoll and Itzler fees from Arlan's would be turned over to Finley Kumble. In less genteel professions, such an arrangement might be called a kickback; it was totally contrary to the most rudimentary code of legal ethics. In addition, Ballon Stoll promised that if, during the bankruptcy proceedings, a nonbankruptcy special counsel was needed, Finley Kumble would be appointed. Needless to say Kumble wouldn't be splitting the fees from such an appointment. Not only was the bankruptcy court not informed of the agreement, but it later found it "highly unlikely that Arlan's was privy to the agreement." The deal put Finley Kumble in the potentially conflicted situation of profiting from their client's misfortune.<sup>73</sup>

If doubts still linger the remarks of a trial judge, Bertram Harnett, may be of interest:

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72. KIM ISAAC EISLER, SHARK TANK: GREED, POLITICS AND THE COLLAPSE OF FINLEY KUMBLE, ONE OF AMERICA'S LARGEST LAW FIRMS 31-32 (1990).

73. *Id.* at 33.



By the book, it is improper to harass the opposition by undue delay, by frivolous argumentation, or by abusive discovery devices. This is a proper ideal which founders in practice. In the profession, such practices lumped together may be known as "grinding down" . . . in order to overburden the other side with cost, effort, and delay. Sometimes there is a deliberate calculation to delay to earn monetary interest, or simply to defer the payment of a loan the client cannot then repay conveniently. Litigation can be a way of buying time. These are undeniably tactics of many lawyers, particularly when backed by deep pocketbooks and when the opposing parties are undermanned or lacking in resources, which mostly means litigating money for fees and expenses. Yet grinding down to an offensive degree is rarely sufficiently identifiable for disciplinary action, although occasionally a court will fine or reprimand a lawyer for particularly abusive conduct. Delay is difficult to evaluate because of the differences in lawyer and court schedules, methods, style, pace, and temperament. Frivolity of legal argument is hard to pin down, since it is too easy for an experienced lawyer to fashion something from nothing.<sup>74</sup>

All of this is enough to put one in mind of Thorstein Veblen's acerbity respecting lawyers. As quoted by Martin Mayer, Veblen once asserted: "The lawyer is exclusively occupied with the details of predatory fraud, either in achieving or in check-mating chicanery."<sup>75</sup>

In his book about great Washington law firms, Joseph Goulden expressed the following conclusion:

Some Washington Lawyers constantly violate the public interest, without violating public statutes. These lawyers pervert the Federal government for the financial benefit of private corporate clients. Through legalistic maneuvering, they helped their clients keep on the marketplace a host of consumer products — ranging from pharmaceuticals to pesticides and automobiles — which are gravely dangerous to the American citizen. Through what is euphemistically called "effective representation," some of them wheedle billions of dollars of tax breaks and public subsidies from a pliant Congress and Federal bureaucracy. When criticized for emasculating laws

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74. BERTRAM HARNETT, *LAW, LAWYERS AND LAYMEN: MAKING SENSE OF THE AMERICAN LEGAL SYSTEM* 95 (1984).

75. MARTIN MAYER, *THE LAWYERS* 339-40 (1967).

designed to protect the public, they lapse into well-rehearsed speeches about “everyone has a right to a lawyer, whether he’s a corporation or an indigent criminal defendant.” . . . But some Washington Lawyers frequently go beyond the advocate’s role in representing industries and become an extension of management. . . . Covington and Burling is among the more self-consciously dignified firms . . . prideful of its sweet scent of probity. [But] two of its senior partners . . . are the legal technicians who helped manufacturers keep on the market a vast variety of pharmaceutical and foodstuffs for years after the Food and Drug Administration challenged their value.<sup>76</sup>

Goulden also describes the efforts and ethos of Thomas Austern, a major partner in Covington and Burling, at the time of writing, respecting a particular Food and Drug Administration matter designed to promote the public interest.

Rexford Tugwell who was in charge of FDA [Food and Drug Administration] . . . in the early New Deal . . . proposed . . . that all food products be labeled [by grade] so that consumers could buy on the basis of quality, rather than by brand name. . . . The brand label that goes on a can, not the food that goes inside it, determines the price. If the quality was clearly marked, the housewife could ignore the brand names and buy on the basis of quality.

Austern rallied opposition when Tugwell’s proposal went before Congress. At one meeting of the National Canners Association Austern declaimed:

“Every canner should leave this meeting ready to sell the idea to other canners and to his representative in Congress that this bill should not be permitted to pass. . . .”

The canners succeeded in beating Tugwell’s bill. The President’s Commission on Food Marketing estimated in 1966 that lack of quality labeling adds twenty percent to what the housewife pays for canned foods at the supermarket — the difference between what she pays for brand-name products and what she *could* pay for the same food marketed under a private non-brand label.<sup>77</sup>

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76. JOSEPH C. GOULDEN, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* 13 (1972).

77. *Id.* at 182-83.

Based on the empirical verification of Kohlberg's theories that the moral consciousness of an individual can be "raised" by purposeful training and discussion, it seems sensible to make such efforts a part of legal education. Perhaps a significant number of law students can be "taught" that their ethical responsibilities extend to wider dimensions than their own and their clients' selfishly narrow materialistic interests. Perhaps in addition to sharply honed technical skills, students can be infused with some modest sense that their work has social and collective impact as well as personal and individual impacts and that, accordingly, they must look outward, and comprehensively, as well as inwardly to the personal selfish nucleus of that work.

It will be recalled that a methodology employed by followers of Kohlberg in seeking to raise the moral judgment level of student subjects was one which could be referred to as cognitive conflict: a particular moral dilemma or problem was discussed on a level above the one at which the students sought to be instructed were currently located. This is an approach which seems to lend itself peculiarly well to the typical fora of legal education.

One situation used by Kohlberg and his followers to promote the type of cognitive conflict designed to fertilize moral growth is the so-called Heinz dilemma. This conundrum postulates a man's wife dying of a disease which can be successfully treated by a drug in the sole possession of a particular pharmacist. The pharmacist is unwilling to provide the drug for treatment of this woman unless the latter's husband pays a specified amount for it. The man cannot come up with this much money. The question becomes: is the man justified in stealing the drug in order to save his wife's life? By discussion of such a situation, it is thought that the supremacy of values relating to life and its preservation, in preference to those enshrining private property rights, might be elicited. The hope is to nurture in those who might currently be at a moral judgment stage which sharply focuses on formalistic rules about private ownership of things a respect for the value of human life, itself, over any institutions connected with facilitating it; respect to the extent of appreciating the need to transgress a particular formal rule in behalf of the absolutely highest value of all.

I would like to propose some legal problems which, similarly, seem to lend themselves to the type of discussion which might elevate many law students' moral conceptions about the profession and their roles in it.

Assume that a client, X, comes to his attorney with the following story. A month ago he verbally agreed to sell 100 widgets to B for \$10,000 (\$100 per widget), delivery due a week from now. In the interval between the making of the contract and the present, due to an unanticipated development, the fair market value of a widget has risen to \$200. Thus, X could today sell the widgets he orally agreed to deliver to B, in a week, for \$10,000 more than the total sale price agreed upon with B. X consults the attorney as to whether he can "get out of" the deal with B; X would rather get \$20,000 for his widgets, instead of only \$10,000. (Assuming it cost X \$5,000 to manufacture the widgets, X would rather profit by \$15,000 instead of \$5,000). But X unequivocally acknowledges that X, in fact, orally agreed to sell B the widgets for \$10,000.

The attorney, quite immediately, recognizes that, (assuming, as we may, for purposes of this example, that the widgets are "goods") there is a direct doctrinal "way out." Section 2-201 "Formal Requirements; Statute of Frauds" of the Uniform Commercial Code, (which we may further assume is in force in the jurisdiction in question) states:

[A] contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . .<sup>78</sup>

Since the parties' agreement was in no respect reduced to a writing signed by X, this section, by its sheer words, establishes a complete defense as far as enforcing against X, the oral agreement that transpired between X and B.

Nevertheless, should the attorney proceed to advise X on this basis? X does not deny that the agreement was made; indeed, he unmistakably acknowledges it. X wants to defend against B's claim not because he asserts it is a fraudulent (or unfair) one, but because he wants to make 300% profit instead of only 100% profit. But, as its title implies, section 2-201 of the Uniform Commercial Code was designed only to help innocent defendants fend off mendacious or ill-remembering plaintiffs. It's purpose was to prevent the commission of fraud, not render itself an instrument by which fraud might be committed.

Doesn't the lawyer have an obligation to "counsel" a client like X to such effect, instead of limiting his advice to asserting that X can indeed get out of the now onerous contract simply

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78. U.C.C. § 2-201 (1977).

because it was not reduced to the requisite writing? Notwithstanding the narrow doctrinal "correctness" of doing the latter doesn't the attorney have a socio-moral obligation, as it were, to discourage the client from using formalistic technicalities to effect insidious treachery against the spirit of the law? In fact, isn't the attorney's obligation to so discourage the client sufficiently strong to require the attorney to make the point by example — to clearly indicate that he or she will not represent the client in the matter for the purpose of prosecuting the doctrinal "out?"

It would seem that many law students would not think so when first presented with the contours of such a problem. Their initial responses might well be along the lines that it is the lawyer's role to represent the client's interest zealously within the bounds of the law and not to make moral judgments on the client's objectives in seeking to enforce her legal rights. But after exploration and "instruction" regarding such an issue, perhaps a considerable number of such students might at least start to think that it may also be part of the lawyering role to make moral judgments on social actors — even if the latter are their clients or prospective ones.

Let us speculate on another situation. Suppose an elderly, wealthy, client comes in to consult an attorney about making substantial monetary gifts to close relatives prior to his death. He intimates to the attorney that he wants to undertake such a course of action because he believes that he is soon going to die and he wants to see the relatives enjoy the use of the gifts rather than, in effect, receiving them through his estate after his death. The client indicates that he is also interested in, of course, minimizing his taxes in general, and those on his estate, and associated matters, in particular. Suppose further that the lawyer is fully aware that if the gifts are indeed made "in contemplation of death," they will be taxed as though the funds were in the estate at the time of the client's death and that such a rate of taxation is higher than that of the gift tax which would pertain to a genuine gift, made by the client, during his lifetime, not in contemplation of death. The question is should the lawyer advise the client that the gifts which the client has acknowledged are in contemplation of death should be effectuated under appropriately drafted instruments, so as to strongly suggest that they are, in fact, made distinctly other than in contemplation of death?<sup>79</sup>

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79. From 1916, the inception of the federal estate tax, to 1977, property transferred by a decedent "in contemplation of death" was included

As a practical matter it is not difficult to imagine many attorneys, in such a situation, "advising" the client along the

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in the decedent's gross estate for tax purposes. The purpose of the "in contemplation of death" provisions was to prevent the evasion of estate taxes through deathbed inter vivos transfers. See, e.g., *U.S. v. Wells*, 283 U.S. 102, 116-17 (1931); see also STAFF OF JOINT COMM. ON TAXATION, 97th Cong., 1st Sess., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 261 (1981) [hereinafter GENERAL EXPLANATION OF TAX ACT].

Section 2035 of the Internal Revenue Code of 1954 is most illustrative of the "in contemplation of death" provisions, and, in fact, was the first such section to combine into a single section the provisions in existing law. 1954 U.S.C.A.N. (68A Stat.) 4457, 5112.

Section 2035 of the Internal Revenue Code of 1954, "Transactions in contemplation of death," reads:

- (a) General Rule - The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration) . . . in contemplation of his death.
- (b) Application of General Rule - If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration . . .) transferred an interest in property . . . such transfer . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . ; but no such transfer, . . . made before such 3-year period shall be treated as having been made in contemplation of death.

The attorneys's suggestion about appropriately drafted instruments would be an effort to satisfy the "unless shown to the contrary" language, in a situation where the donor does die within three years of making the gift.

Under such circumstances the "economically" rational, "prudent" lawyer might always suggest that accompanying the gift there be documentation asserting the donor's non-morbid motives for making the gift at the time in question. But to advise such documentation in a case where the client has acknowledged that the reason she is making the gift is because of her contemplation of death amounts to the attorney falsifying a fact on which legal consequences are contingent. The acceptance, in the profession, of the *spirit* of making a fact on which legal consequences depend seem other than it actually is, is reflected in an informal ethical opinion issued, in October 1965, by the American Bar Association:

The attorney for a plaintiff in a divorce action is not obligated to advise the court of his client's admission that she has become pregnant by another man; he should advise his client that such adultery constitutes a defense if raised by the other party and that she must be truthful if questioned under oath . . . .

GOULDEN, *supra* note 76, at 46. The truth, in other words, becomes operative only if it can be extracted — until then, apparently, it does not exist; that which is, nevertheless, is not.

The following is interesting regarding the influence that an attorney's actions and advice may have:

While the inclusion in the gross estate of transfers in contemplation of death has long been regarded as necessary to prevent

following lines: a gift in contemplation of death is taxed at the same rate as if it were left to the intended donee in the estate of the client; after all, the client is not *sure* that he is soon going to die; it is possible to draft, for example, a letter to go along with the gift which emphasizes that the client-donor is making the gift now out of strong feelings of love and affection for the donee and a tranquil desire to derive satisfaction from observing the donee enjoying the freedom, options, opportunities, etc. accorded her by the gift.

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avoidance of the estate tax, the administration of this feature of the estate tax law has always proved difficult. Principally this is due to the fact that *contemplation of death deals with the intent of the transfer. Intent is extremely difficult to establish in any case and becomes increasingly so with the passage of time. Undoubtedly many gifts in contemplation of death have escaped the estate tax because of the difficulty which the government encounters in reconstructing the motives of the deceased.* . . .

Boris Bittker, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 949 (2d ed. 1958) (emphasis added). Whether she will make it even more difficult to establish that her client's gift was, in fact, in contemplation of death is precisely the matter with which the ethical sensibilities of the attorney must grope.

Section 2035 as amended by the Tax Reform Act of 1976 eliminated the "contemplation of death" rule and brought into a decedent's gross estate all transfers of property which were made within the 3 year period ending on the decedent's death. I.R.C. § 2035(a) (1976); *see also* Christopher G. Stoneman, *Section 2035 Transfers*, [Estates, Gifts, and Trusts] Tax Mgmt. (BNA) No. 182-3d, at A-1 (June 18, 1990). The only exceptions to this 3-year rule were for transfers that were for a "bona fide sale for an adequate and full consideration in money or money's worth", I.R.C. § 2035(b)(1), and for "any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee." *Id.*

In 1981, Congress again amended § 2035 with the Economic Recovery Tax Act (ERTA) by adding subsection (d). Act of Aug. 13, 1981, Pub. L. No. 97-34, 95 Stat. 317. In general, § 2035 as amended by ERTA, provides that the 3-year rule of § 2035(a) is not applicable to the estates of decedent's dying after December 31, 1981. I.R.C. § 2035(d)(1) (1981). Thus, any transfers of property made by a decedent who died after that date will not be included in the decedent's gross estate. The ERTA amendment to § 2035 contains exceptions which continue the application of the 3-year rule of § 2035(a) to certain interests in property included in the value of the gross estate. I.R.C. § 2035(d)(2) (1981); *see also*, GENERAL EXPLANATION OF TAX ACT, at 262. Also, the 3-year rule of § 2035(a) applies for the limited purpose of determining the estate's eligibility for special redemption, valuation, and installment payment purposes and for determining which property is subject to estate tax liens. I.R.C. § 2035(d)(3)(A),(B),(C) (1981); *see also*, GENERAL EXPLANATION OF TAX ACT, at 262.

Section 2035 as amended by ERTA is effective for decedents dying after December 31, 1981 and is the current law on the subject of so-called transfers made "in contemplation of death."

Actually, the ethical dilemma could be presented even more starkly for a lawyer who finds herself in such a situation. The client might take the attorney into her confidence and reveal that while she is, in fact, making the gift in contemplation of death, she realizes that such a gift would be taxed at a higher rate than a gift not motivated by contemplation of death. Therefore, she is consulting the attorney for the express purpose of being advised as to how to make a gift which, indeed, is in contemplation of death, appear that it, distinctly, is not, in the face of any possible IRS inquiries, etc.

In either case the lawyer is confronted with the problem of whether she should advise and assist the client to dilute the possibility of suspicion that a gift which in fact was instigated by a contemplation of death, was actually such a gift. Bluntly put, this comes down to the lawyer having to decide whether she should assist and participate in the (slight?) distortion of facts for the purpose of changing in part the legal consequences of an event.

Again, based on personal experience in the classroom it decidedly seems that many law students have few qualms in such a situation, about having the attorney act complicitly with the client in attempting to color the surrounding incidents of a gift in fact made in contemplation of death so as to make it seem that such gift in no way originated from the client's active belief that she was soon going to die. But shouldn't the attorney counsel against making a worse cause seem the better, just for the purpose of maximizing client satisfaction and, therefore, decisively demur from participation in any scheme which seeks to evade the impact of the law (of the taxation of gifts) as it should operate on the true, the actual facts of a given situation? And shouldn't it be possible to educate many initially skeptical law students to an appreciation of the principle that all things being equal (for example, there is no question of a grave injustice occurring through the blind application of a hyper-technical rule or regulation), it is the attorney's professional responsibility, as well as a wider socio-moral one, to participate in the just enforcement of the spirit of the law(s), not in its unjust evasion (perversion)?

Consider yet another situation. An attorney is consulted by a high ranking officer of a very substantial, highly profitable company about a water pollution problem, stemming from one of its principal manufacturing processes and raised by a piece of recent environmental legislation. Discussion between the lawyer and this officer indicates that compliance with the new legislation, in terms of altering present operations, would be



tremendously more costly than the cost of fines mandated by the new legislation, which would be incurred in consequence of maintaining company operations as currently conducted. The officer concludes, therefore, that as a business matter things should continue as they are but that the company should, through pertinent reporting mechanisms, acknowledge the transgression it will be committing against the new legislation and pay the corresponding fines accordingly. The attorney is asked to handle the "paper-work" incident to carrying out this response to the legislation. To sharpen the problem we can assume that there is a substantial, and, in fact, quite needed, fee "in it" for the lawyer.

I would again submit that a great many law students would not see much problem in the attorney accepting this work. (I might easily be so bold as to contend that many such students would not even see *anything at all* problematical, in the situation, for the attorney.) After all, the attorney would be doing nothing more than executing a client's scrupulously faithful compliance with the letter of the law.<sup>80</sup>

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80. This insouciant attitude, as it were, is reflective of a traditional mentality and ethos of a great many prominent members of the bar. Paul Cravath of the extremely prestigious New York City firm of Cravath, Swaine and Moore, once commented, at a Congressional hearing on railroad securities:

In acting as counsel for gentleman in these transactions, it has been my duty *not to give advice about political economy, but as to the law*; and when I speak of economic facts here, I do it as a citizen, and not as anybody's counsel. I may hold views totally at variance with those of my client's on such matters.

MAYER, *supra* note 75, at 341 (emphasis added). Elihu Root, who served as Secretary of War, and then Secretary of State, for Theodore Roosevelt, observed, after arguing in an appellate case against a piece of legislation he had assisted Roosevelt in shepherding through the New York legislature:

Roosevelt never could see that a lawyer could argue a case under a law which gave his clients rights and not be responsible for the policy of the law. . . . When a lawyer is in a case *he is looking out for his client's rights, and if they rest on statute he is bound to give him the benefit of them and he isn't thinking of the policy of the statute.*

*Id.* (emphasis added). Mayer, himself, goes on to say:

This [type of] argument . . . [is] used by criminal lawyers who will squeeze every procedural teat in the hope of keeping out of jail clients whom they know to be gangsters, by negligence lawyers who will dress up the X-rays to money up the award for accident victims, by poverty program lawyers who will fight to keep a whore in her apartment after she has lured the next door neighbor's daughter into the business — all for the sake of rights and justice. But the argument doesn't do in other contexts . . . .

*Id.* at 342.

But should the analysis of such a situation be allowed to resolve into such glib terms? Is the attorney ethically free to take the money and blithely facilitate continued discharge of pollutants which responsible scientific study, as reflected and encapsulated in the pertinent legislation, has demonstrated as deleterious to human life and/or ecological equilibria which are supportive of a healthy environment for human life? Just because, in the particular circumstances of this company's business, it is much cheaper for the company to bear the fine imposed by the legislation (even if it is an imposing one, envisioned by the legislators as formidable enough to deter any polluter), than to restructure its operations to eliminate the polluting activity, does that mean that the lawyer can ethically serve the company's purposes in this regard? Why is it not the responsibility of the attorney, from the perspective of her obligation to serve the just purposes of the law and the harmonious facilitation of social life, to counsel compliance with the law rather than compliance with the consequences assigned for its (unanticipated) violation? The company's anomalous posture respecting the vastness of the advantage it derives from continued pollution should not relieve the attorney from her responsibility, as an ethical professional, participating in the administration of the legal system, as well as her responsibility as an ethical human being — and there should not be a sharp dichotomy between the two — to urge actual compliance with the pertinent prohibitions against pollution. To urge, in effect, that the company, which will nevertheless still be enormously profitable, engage in the costly revisions necessary to discontinue emitting pollutants which (severely) harm innocent, unsuspecting, human beings.<sup>81</sup>

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81. The view that the lawyer, as a professional concerned with transactions having social dimensions, has responsibilities extending beyond zealous prosecution of her client's solipsistic interests, was forcefully expressed by ex-Secretary of Health, Education and Welfare, Joseph Califano:

Two different conceptions of the lawyer's role face off against each other in ethical duel. The traditional view, imbued with the neatly trimmed whitening hair of experience, perceives the lawyer as an instrument of his clients, a purchased pistol with his hand raised in intentionally uncritical pursuit of his client's interests. Considerations of broad social responsibility and obligations to impose moral judgments on a client's activities fade against the background of the lawyer-advocate's role in the adversary system.

The other, less orthodox view sees the lawyer in a larger social context, imposing upon him or her the moral responsibility to temper representation of the client's interests with an overriding concern for societal morality and objective justice. At its blandest,

It does not seem at all inconceivable that by "directed," informative, spirited discussion of such an issue some (many?) students who initially thought it perfectly appropriate for the attorney to accept the fee (for administering the company's acquiescence to the legislation's financial sanctions for violating its substantive provisions) will change their minds (and sensibilities). Students may feel that the attorney should urge the officer to have his company stop polluting so as to comply with the important substantive spirit of the legislation. An added incentive to such moral recognition by a young lawyer may be a brutally pragmatic consideration: it might be good business, indeed, for the client to have the public's interest (as well as its own narrow profit oriented ones) at heart. For excessive indifference or callousness towards the public's interest might well result in cataclysmic political repercussions for the client. Too much of a "good" thing, having something *too* much one's own way, may lead to bad consequences.<sup>82</sup> Such change of sensibilities may even extend to becoming convinced that if the com-

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this view calls upon the lawyer to render moral judgments in many situations where the traditional view would require such judgments to be put in limbo.

Joseph A. Califano Jr., *The Washington Lawyer: When to Say No*, in VERDICTS ON LAWYERS 187, 187-88 (Ralph Nader & Mark Green eds. 1976).

82. See *id.* at 190. Califano expressed this notion as follows:

When a lawyer does not give his client a down-to-earth appraisal because of an inordinately narrow conception of the client's interest, he does an enormous disservice to his client and to his profession. Too often a lawyer's pocketbook pang — his fear of alienating the client — results in pandering reinforcement of the client's unjustified expectations. But a lawyer may inadvertently mislead a client by being subservient to the client's perceptions . . . and tailoring advice to what he thinks the client wants to hear. A lawyer has an obligation to argue with his client when not to do so would jeopardize the client's interest or put the client in significant conflict with the public interest.

*Id.* at 192. This point is articulated, perhaps even more sharply as follows: [Corporate Counsel] must rise above the cautious role of the lawyer who simply advises that a proposed course of action is legal or illegal and leaves to others the wisdom of corporate policy. The corporate counsel's voice should be insistent in favor of going beyond bare legal minima when to do so will build his company a reservoir of public good will, or minimize or eliminate what would otherwise be a widespread feeling of injury or injustice.

Jay M. Smyser, *In-House Corporate Counsel: The Erosion of Independence*, in VERDICTS ON LAWYERS, *supra* note 81, at 208, 208-09. Judge Harnett states: "It is invariably good lawyering to advise a client of the elements that can hurt his case, no matter how sound it appears technically. Adverse public interest and palpable unfairness are two bad forces to find opposing your client in seeking to win a case." HARNETT, *supra* note 74, at 295.

pany refuses to adhere to such advice, because it would be "bad business" for it to do so, then the lawyer should not accept its business in behalf of filing its reports, etc. which articulate its determination to continue polluting. In other words, may they not come to feel that complicity in what is "good business" for the corporate client, notwithstanding personal practicalities and exigencies, is bad business for an ethical attorney.<sup>83</sup>

Another situation which it may be useful to consider here relates to the criminal area. Suppose that X discloses to an attorney whom he consults that he befriends elderly women, ingratiates himself to the point of an invitation to their home and, then, goes around the home appropriating whatever easily manageable personal property he finds, e.g. jewelry, antiques, cash, etc., etc. X has consulted the attorney respecting possible defense strategies, probable penalties etc., should he be apprehended. The attorney indicates he would not be interested in representing X but not before the latter tells him that in half-an-hour he has an appointment to visit, at her home, an eighty-three year old widow with whom he's been friendly for two weeks and who's confided to him that she keeps her entire life savings of \$27,000 in cash in a bureau in her bedroom. (This cache constitutes all her liquid assets, besides her monthly social security checks.) X has told the attorney the name and address of this woman so that it would, unmistakably be possible for the attorney to alert the woman to the criminal act(s) imminently to be perpetrated on her.

The question for the attorney is should he contact the prospective victim and/or law enforcement authorities to advert the very possible commission of a crime based on the confiden-

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83. Califano suggests that the attorney's professional responsibility to take into account impacts and consequences *extra* maximizing his client's bottom line is especially significant in counseling situations (as opposed to ones in which a lawyer is representing a client whose action has already staked out a legal position.)

In considering the private practitioner's obligation, a distinction can often be drawn between defending the client for past acts which he has already committed and advising the client on his future course of conduct. . . .

In the latter situation . . . there are more options open to determine how the client will conduct himself, and the lawyer's responsibility to exercise moral judgments may consequently be greater. *If a substantial public interest will be affected by his client's conduct, the lawyer's advice should not be limited to the technical validity of the proposed action, without regard to its social or economic consequences.*

Califano, *supra* note 81, at 190 (emphasis added).

tial information he's just obtained from the criminal in the course of the attorney-client relationship which obtained between them?

According to the Model Rules of Professional Conduct, confidentiality "may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established," prior to the attorney agreeing to represent the prospective client.<sup>84</sup> And the Model Rules of Professional Conduct provide that "[a] lawyer shall not reveal information relating to representation of a client . . ."<sup>85</sup> But the Rules contain exceptions to the duty of confidentiality, providing:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.<sup>86</sup>

First of all, this rule gives an attorney professional *discretion* to disclose relevant information to prevent a client from committing a future criminal act. A decision to not make the disclosure *permitted* by the rule does not violate the rule.<sup>87</sup> Additionally, although the rule, itself, does not address the issue the Comment states that "[i]n any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to [prevent the crime]." (In many cases, it would seem, disclosure to the potential victim would be sufficient to thwart the client's intended crime so that disclosure to law enforcement officials, who might well apprehend the criminal in question, would not be "necessary.") Most crucially, perhaps, Rule 1.6(b)(1) allows such discretion *only* respecting a crime that "the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>88</sup>

84. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1992) [hereinafter MODEL RULES].

85. *Id.* Rule 1.6(a).

86. *Id.* Rule 1.6(b)(1).

87. *Id.* Rule 1.6 cmt. Judge Harnett writes of Rule 1.6 of the Model Rules:

Note carefully that the lawyer is not required to make this disclosure; it is a discretionary act. The narrowness of the lawyer's responsibility here illustrates plainly *the ascendancy of the lawyer's commitment to his client's interest over any commitment to the public good.*

HARNETT, *supra* note 74, at 92 (emphasis added).

88. It is interesting to note that Rule 1.6 as proposed would have allowed disclosure to prevent crimes other than those likely to result in death or substantial bodily harm. Proposed Rule 1.6 would have permitted disclosure "to prevent the client from committing a criminal or fraudulent act

As can be seen, the attorney in the given hypothetical involving the criminal who preys upon the trust and friendship of elderly women to fleece them of their lives' savings, is not

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that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interests or property of another." MODEL RULES, *supra* note 84, Proposed Rule 1.6(b)(2)(Final Draft, May 30, 1981). Those opposed to the proposed rule thought that it "transformed the lawyer into a 'policeman' over a client." CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 48 (1987). They also believed that Rule 1.6(b)(1) as adopted "would encourage fuller and franker communication between a lawyer and client by narrowing the circumstances in which the lawyer could disclose client confidences." *Id.*

It is further interesting that the Model Rules of Professional Conduct replaced the Model Code of Professional Responsibility, adopted by the House of Delegates of the American Bar Association in 1969 to supersede the original Canons of Professional Ethics, which had been adopted in 1908 by the ABA. The Code, as amended in 1974, refers to the ethical obligation of confidentiality in Canon 4—"A Lawyer Should Preserve the Confidences and Secrets of a Client"—and Disciplinary Rule 4-101 which provided:

DR 4-101 Preservation of Confidences and Secrets of a Client

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101((A), (B), (B)(1)) (1983) [hereinafter MODEL CODE].

However, the Model Code contained several exceptions to the rule of confidentiality. Disciplinary Rule 4-101(C)(3) provided that "(C) [a] lawyer may reveal: . . . (3) [t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE DR 4-101(C)(3). Thus, the Code gave an attorney the professional discretion to disclose information necessary to prevent the client from committing any future crime; i.e. the attorney was given this discretion to reveal such information regardless of the seriousness of the client's intended crime. *See*, ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 64 (1984); *see also*, CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OR PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 49 (1987). In other words, an attorney could disclose any information necessary to prevent his client from committing any crime, whether a crime of violence, a property crime, or an economic crime (as in the given hypothetical.) And apparently, although the Code didn't specifically address the issue, the attorney could reveal such information to *anyone* in a position to prevent the client's prospective crime, including law enforcement officers as well as the client's potential victims.

Thus, the latest version of the rule defining client-attorney confidential-

authorized by Model Rule 1.6(b)(1) to violate the confidentiality such criminal acquired from the attorney by consulting him and to reveal the imminent commission of the crime. (And, even if the lawyer were so authorized, he could make disclosure only sufficiently to allow the intended victim to elude the criminal's design and *not* sufficiently to make apprehension by law enforcement officials likely.) But should an attorney who finds herself in such a situation prefer the pristine abstruseness of the rule, purportedly aimed at facilitating thorough development of the facts necessary to proper client representation and to encourage early seeking of legal assistance, to the very real-world and specifically urgent needs and interests of the hypothesized elderly woman.

Consider this admonition of the Model Rules from the following perspective. Suppose for the last several months that the women in a certain city have been terrified of a man journalists have come to call the "dinner-rapist." He has raped nine women in this city during that time, always employing the same *modus operandi*: he consults a woman who provides a professional service, e.g. doctor, insurance agent, attorney, real estate agent, etc. and in the course of the consultation arranges a dinner date with the woman; at some point after dinner, whether while driving her home, or after they are back at her or his apartment, he rapes the woman. Suppose, further, that this "dinner-rapist" consults a male attorney. While asking "theoretical" questions about the chances for conviction and possible sentences for a "hypothetical" defendant, who "might have" committed the crimes ascribed to the "dinner-rapist," he confesses to this male attorney that he is, in fact, the dinner-rapist. The attorney has responded to some of the questions in general terms but quickly indicates that he is not interested in representing this individual. The criminal indicates that he understands but then informs this attorney that he has found an attractive female attorney with whom, in fact, he has an appointment in half-an-hour. He drops her name and the name of the well known office building in which her office is located so that the male attorney, to whom the "dinner-rapist" is currently speaking, would have no trouble, whatever, contacting her and adverting her to the danger she is in.

But should the male attorney confine his efforts to such narrow notification. The Comment to Rule 1.6(b)(1) of the Model Rules states, as noted, that "[in] any case a disclosure

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ity actually narrows the ability of attorneys to blow the whistle on a client who has confided an intention to act criminally toward another individual.

adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to [prevent the crime]." Disclosure to the female attorney so that she can flee, or otherwise protect herself would be sufficient to prevent the dinner-rapist from having the opportunity to rape her. But should the male attorney, to whom the dinner-rapist has confessed, feel constrained to truncate disclosure at that point? Is it "ethical" for him to hew closely to this formalistic, black letter line when rapid disclosure to law enforcement authorities may well result in the apprehension of a savage criminal who has been an actual and mental menace to many, many women? Shouldn't he violate the comment's "ethical" stricture in behalf of much more crucial ethical considerations relating to the sanctity of human lives and personalities?

The Supreme Court has addressed an attorney's conduct when faced with a legal problem similar to the above hypotheticals. In *Nix v. Whiteside*,<sup>89</sup> the Supreme Court gave some support to the importance of an attorney preventing even a non-violent client crime in preference to monolithically zealous prosecution of a client's interests, regardless of public interest considerations.

While preparing for his Iowa state court trial on a first-degree murder charge, Whiteside, consistently stated to his court-appointed counsel, Robinson, that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had had a gun.<sup>90</sup>

Whiteside's defense theory was self-defense. Approximately one week prior to trial, he, for the first time, told his attorney that he had seen "something metallic" in the victim's hand.<sup>91</sup> When the attorney asked about the change in his version of the incident, the respondent said, "If I don't say I saw a gun, I'm dead."<sup>92</sup> Counsel admonished Whiteside that such testimony would be perjury and that it was not necessary to prove that the victim had had a gun but only that Whiteside reasonably believed that he had been in danger, in order to establish self-defense.<sup>93</sup> Upon Whiteside insisting that he would testify that he saw "something metallic," counsel told him that if Whiteside did so, he would advise the court that

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89. 475 U.S. 157 (1986).

90. *Id.* at 160-61.

91. *Id.* at 161.

92. *Id.*

93. *Id.*



Whiteside was committing perjury, and that he would seek to withdraw from representation.<sup>94</sup>

Whiteside testified at trial, and admitted on cross examination, that he had not actually seen a gun in the victim's hand.<sup>95</sup> His counsel presented evidence to establish a basis for the fear that the victim had a gun.<sup>96</sup> The jury found Whiteside guilty of second-degree murder.<sup>97</sup>

Whiteside moved for a new trial, claiming that Robinson's admonitions not to testify that he saw a gun or "something metallic" deprived him of a fair trial.<sup>98</sup> The trial court held a hearing, made specific findings that the facts were as Robinson related, and denied the motion.<sup>99</sup>

The Supreme Court of Iowa affirmed respondent's conviction, holding that an attorney's duty to a client does not extend to assisting the client in committing perjury.<sup>100</sup> Relying on DR 7-102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers, which prohibits a lawyer from using perjured testimony, and Iowa Code § 720.3 (1985), which criminalizes subornation of perjury, the Iowa Supreme Court concluded that Robinson's actions were not only permissible, but required.<sup>101</sup>

Whiteside then petitioned for a writ of habeas corpus alleging that he had been denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to permit him to testify as he'd proposed.<sup>102</sup> Accepting the state trial court's factual finding that respondent's proposed testimony would have been perjurious, the District Court denied the writ concluding that there could be no grounds for habeas corpus relief since there is no constitutional right to present a perjured defense.<sup>103</sup>

The United States Court of Appeals for the Eighth Circuit reversed and granted the writ reasoning that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel, that Robinson's admonition to his client that he would inform the court of respondent's perjury constituted a threat to violate the attor-

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94. *Id.*

95. *Id.* at 161-62.

96. *Id.* at 162.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 163.

ney's duty to preserve client confidences, and that this threatened violation breached the standards of effective representation established in *Strickland v. Washington*.<sup>104</sup> The Court of Appeals also concluded that Strickland's prejudice requirement was satisfied because the conflict between Robinson's duty of loyalty to his client and his own ethical obligations implied prejudice.<sup>105</sup>

The United States Supreme Court reversed, holding that the Sixth Amendment right of a criminal defendant is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial. The Court noted that *Strickland* held that to obtain federal habeas corpus relief on a claim of deprivation of effective assistance of counsel, the movant must establish both serious attorney error and prejudice.<sup>106</sup>

To show such error, said the Court, it must be established that counsel's assistance was constitutionally deficient in that counsel made errors so serious that counsel was not providing "reasonably effective" assistance.<sup>107</sup> The Court then reviewed current ABA standards of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.<sup>108</sup> Relying on DR 7-102 of the Model Code, prohibiting a lawyer from knowingly using perjured testimony and assisting his client in conduct that the lawyer knows to be illegal or fraudulent, Rule 1.2 of the Model Rules, prohibiting a lawyer from assisting his client in conduct the lawyer knows is criminal or fraudulent, and DR 4-101(C)(3) of the Model Code, permitting a lawyer to disclose his client's intention to commit a crime, the Court found that "both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they *require* such disclosure."<sup>109</sup> The Court also found that both Model Code, DR 2-110(B),(C), and the Model Rules, Rule 1.16(a)(1) and Rule 1.6 Comment, expressly permit an attorney to withdraw from representation when a client threatens to commit perjury.<sup>110</sup> "Considering Robinson's representation in light of these accepted norms of professional conduct, [the Court could] discern no failure to adhere to reasonable professional standards that would in any sense make

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104. 466 U.S. 668 (1984).

105. *Nix*, 475 U.S. at 163.

106. *Id.* at 164.

107. *Id.* at 165.

108. *Id.* at 167-70.

109. *Id.* at 168.

110. *Id.* at 170.

out a deprivation of the Sixth Amendment right to counsel."<sup>111</sup> The Court went on: "[W]e see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury."<sup>112</sup> "An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plan to engage in future criminal conduct."<sup>113</sup>

The Court further held that Robinson's conduct could not establish the prejudice required for relief under the second part of the *Strickland* test.<sup>114</sup> To show prejudice, it must be established that the alleged errors "in counsel's performance rendered the trial unfair so as to 'undermine confidence in the outcome' of the trial."<sup>115</sup> The Court reasoned that "[i]f a 'conflict' between a client's proposal and counsel's ethical obligation [gave] rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain acquittal by illegal means."<sup>116</sup> Furthermore, respondent's "truthful testimony could not have prejudiced the result of the trial . . . ."<sup>117</sup>

Therefore, the Court found the Court of Appeals in error in directing the issuance of a writ of habeas corpus and reversed.

There is no doubt that at least some (many?) law students when initially confronted with such problems will take the approach that the strictures of Rule 1.6(b)(1) should not be violated, even in such urgent circumstances. They will argue that the rule must be maintained as absolutely inviolable in order to ensure maximum realization of its important interests in full communication between those with legal problems and those who do, or might, represent them respecting such problems.

But is such a black letter approach morally defensible in view of the heinous and destructive crime which may well be committed in the circumstances postulated? Hopefully, after discussion of just how exigent these particular circumstances are, and the fact that a rule's strength is not necessarily, in any significant sense, deteriorated by a rare exception in the case of such cataclysmic contingencies, at least some of these students

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111. *Id.* at 171.

112. *Id.* at 172.

113. *Id.* at 174.

114. *Id.* at 175.

115. *Id.* at 165 (quoting *Strickland*, 466 U.S. 668, 694 (1984)).

116. *Id.* at 176.

117. *Id.*

would have a change of heart and put the crucial interests of a specific human being, in specifically appealing circumstances, above the artificial purity of an abstraction.

In the various hypothetical cases posed, it would not seem to be a matter of "making" someone think in a prescribed way as much as a matter of getting someone to think in a more "advanced," comprehensive, abstract fashion. "Convincing" and "persuading" are much better analogies than "imposing," "dictating" or "inculcating." "Directiveness" is involved, but it is to the end of leading in a direction, not compelling that a given path be taken. But leading is legitimate because it may well display a path not otherwise known or appreciated; one *freely* chosen after its presence is discovered but one which would never have been explored but for the direction given. This sense of directiveness without compulsion seems gracefully expressed in a paper by Matthew Lipman:

The acting coach or painting teacher cannot teach it to one directly, but they may be able to teach one how to teach oneself. Insofar, as the reasoning element in moral practice involves the kind of thinking that one person can teach another to do-or to do better-it is a matter of craft. But in so far as the reasoning element in moral practice involves thinking for oneself, it is not something which one person can directly teach another person. It is something I will have to teach myself to do, *but perhaps you can help me by teaching me how to teach myself to think for myself.*<sup>118</sup>

Somewhat along the same lines, and very compatible indeed, with the law school environment is the following, (although it was written with younger students in mind:)

The solution offered by Socrates — involving young people in a process of inquiry, which entails dialogue and the inculcation of habits of inquiry — is an *educational* solution. It pre-supposes that the tools of inquiry can be taught and that children are rational persons capable of eventually forming communities of inquiry in which they explore alternative answers to moral issues. In the process, they begin to discover for themselves certain things that they have to take into account: impartiality, consistency, comprehensiveness, the relationship of parts to wholes, the relationship of ends to means and the role of

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118. Matthew Lipman, *Ethical Reasoning and the Craft of Moral Practice*, 16 J. MORAL EDUC. 134, 143 (1987)(emphasis added).

ideals and context in discussing philosophical and ethical issues.<sup>119</sup>

Incidentally, the techniques, other than discussion of moral dilemmas and conflicts, found by Penn to be (more) useful in elevating moral judgment levels,<sup>120</sup> such as skills in logic, roletaking and conceptualizations of justice, are certainly not excluded from activation in classroom enterprises intent on enhancing law students' moral sensibilities. (Role-taking would seem particularly promising). Once again, the crucial point, for now, seems to be appreciating that students' morality can be beneficially influenced, not pinpointing the most efficient, maximally effective, methodology. Once there is willingness to act on the concept, the search for the most effective means of realizing it is a sheer problem of mechanics. Additionally, of course, one would also hope that a skill like logic, which Penn refers to as useful in heightening moral judgment levels, is constantly being cultivated in law school classrooms.

#### CONCLUSION

Psychologist Lawrence Kohlberg (1927-1987) theorized a structure of moral stage development of invariant sequence and objective, universal character. He suggested that an individual would develop moral judgment responses in a smooth progression, stage by stage, and that the postulated structure would apply, essentially, to all individuals across cultures, geographical locations, etc. Empirical field research by Kohlberg and his followers, in the United States and other parts of the world, (for example, Turkey and Israel) has tended to quite strongly verify the theory. Experimental work done by associates of Kohlberg has also demonstrated that instructional interventions designed to raise moral judgment level (from one stage to the succeeding one, in Kohlberg's taxonomy of moral development,) have been successful in promoting ascent to higher (i.e. "better") moral stages in a significant percentage of the students, in a given group. Discussion of moral dilemmas and problems from the perspective of a moral development stage just above the one at which such student subjects were situated, when instruction started, proved a fruitful technique for such purposes. Later studies have also shown that other types of instructional intervention can also produce moral advance in a significant number of students in a large (college-

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119. Ann M. Sharp, *Philosophical Teaching as Moral Education*, 13 J. MORAL EDUC. 3, 4 (1984).

120. See *supra* notes 36-46 and accompanying text.

age) group. This work, in conjunction with other studies indicating an individual's capacity for evolution in moral judgment extends into her thirties, suggests that explicit ethical "instruction" in law school may refine and enhance the moral sensibilities and moral judgment perspective of approximately fifty per cent of the students in a law school course. By various intervention techniques their sense of duty and obligation may be broadened away from the selfish interests of their clients and themselves, towards more comprehensive social and communal concerns—toward, indeed, a deeper conception of justice. In view of the often bitterly derided and savagely satirized narrow moral orientation currently held by many members of the bar, it seems worthwhile to at least attempt such an approach. Its validity could be tested with the assistance of trained psychologists by conducting studies of law students to whom some of the seemingly promising intervention techniques have been administered to determine whether such efforts have, in fact, produced significant moral growth. Positive results would indicate that legal educators have much work to do in an area where, all too often they've shirked responsibility on the grounds of futility. Eventually, such work might contribute to abating the hilarity with which witticisms such as the one quoted at the outset of this paper are greeted by the lay public.

