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MORAL DEVELOPMENT, ETHICAL CONDUCT, AND CLINICAL EDUCATION

STEVEN HARTWELL*

I. INTRODUCTION

Ed was one of a group of seven students assigned to a neighborhood clinic.¹ Each student assumed responsibility for cases carried over from the previous semester. During the distribution of these cases, Ed made a persistent and identical inquiry about each potential client: "Was this a good person who deserved help?" Ed rejected two debtors with technical defenses because "good people pay their debts."² He decided to represent a young woman in a marriage dissolution because he felt that she had been wronged when her husband had walked out on her and their one-year-old baby. Ed promptly telephoned the husband's attorney regarding child support. Immediately after the call, Ed reported that the opposing attorney was a "real turkey" who was unable to see what a "low-life scum" the husband was.

Because of his attitude, Ed encountered conflicts with his fellow clinic students. One complained that the rest of the students had to carry a disproportionate number of cases because Ed devoted most of his time to his dissolution case. A second student admonished Ed for his acrimonious exchanges with the husband's attorney because this student felt Ed had jeopardized her efforts to settle a landlord-tenant dispute with the same attorney. I told Ed that I thought his difficulties with his colleagues might have arisen because he had not sorted out the ethical responsibilities owing to his client, his colleagues, and the opposing attorney.³ Ed

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1. "Ed" was an actual clinic student. Minor and nonessential facts have been altered to preserve anonymity and confidentiality.

2. Both clients freely acknowledged their debts. One debtor pled the Statute of Limitations and the other a setoff, alleging that the print size of the note was in violation of Regulation Z of the federal banking laws. *See* 15 U.S.C. § 1601 (1988) (requiring creditors to make writings clear and conspicuous).

3. The Preamble to the American Bar Association MODEL RULES OF PROFESSIONAL

responded that his colleagues were insensitive to the needs of his client and that he had already apologized to the opposing attorney. Within a few days, Ed engaged in another shouting match over the telephone with the opposing attorney. He also stopped talking with his fellow clinic students.

One Friday morning late in the semester, I accompanied Ed to family court. The husband's attorney moved to reduce the child support that Ed had recently obtained. The hearing was delayed because the court file had not been sent from the clerk's office. After Ed concluded a private conversation with the opposing counsel, he asked me to accompany him to the clerk's office to fetch the errant file. He explained to me that the judge had warned both counsel that if the file was not immediately forthcoming, she was leaving for a luncheon and would not be back in court until the following Monday.⁴ I asked Ed why we were fetching the file since the local rules provided that the husband's attorney, as the moving party, was responsible.⁵ Ed responded that the other attorney had asked Ed to get the file so he could telephone his office and Ed agreed because he thought "it was the nice thing to do."

I admonished Ed that the ethical rules of professional conduct required him to be a zealous advocate for his client⁶ and the local rules made his opposition responsible for the file. If the file were unavailable, the judge would take the opponent's motion off-calendar, preserving Ed's

CONDUCT (1989) observes that:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts.

Id. at para. 8.

4. See generally H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR 130 (1977) (explaining how timing of a lawyer's actions is a significant strategic weapon).

5. I later realized I was annoyed that Ed had made himself and me, as his supervisor, look like errand boys. See generally Packer, *The Structure of Moral Action: A Hermeneutic Study of Moral Conflict*, 13 CONTRIBUTIONS TO HUM. DEV. 1 (1985) (moral conflicts are typically disclosed initially by such "moral" emotions as anger, guilt, and sadness).

6. The various ethical rules create a troublesome solution to Ed's ethical dilemma. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) ("A lawyer should represent a client zealously within the bounds of the law"). *But see id.* at EC 7-38 ("A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings . . . and similar matters which do not prejudice the rights of his client."); *Id.* at EC 7-39 ("[P]roper functioning of the adversary system depends upon cooperation between lawyers and tribunals . . . without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1989) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or . . . conceal a document").

hard-won support order. Ed responded that he understood he was acting against the best interests of his client when he agreed to get the file, but he had felt compelled to get it because he felt trapped between his client and the opposing attorney. When he tried to help his client, he got into fights with the attorney. When he tried to cooperate with the attorney, he acted against the best interests of his client.

Ed's behavior over the semester puzzled me. The ethical rules that directed Ed to zealously represent his client and treat the opposing attorney with courtesy did not seem overly difficult to understand or apply in practice. Although Ed was a bright and diligent student, he seemed unable to chart a course between a demanding client and an aggressive opposing attorney or to appropriately manage his conflict with the other clinic students.

II. SYNOPSIS

This Article relates my efforts to understand Ed's behavior as ethical conduct⁷ and how that understanding has affected my clinical teaching. It will recount how I came to understand the ethical conduct of Ed and his fellow students as an interaction between their environment and their ongoing moral development. The experiential nature of clinical education provides an exceptional environment for fostering moral development as well as for significantly influencing the future ethical conduct of students as lawyers. In the following sections, I briefly summarize the theory of moral development that has enhanced my clinical teaching. This Article relates my early attempts to realize this theory in my regular clinical teaching and concludes with a presentation and analysis of my present pedagogy.

III. MORAL DEVELOPMENT THEORY

A. Kohlberg's Theory of Moral Development

Following my semester with Ed, I became interested in Lawrence Kohlberg's theory of moral development.⁸ Kohlberg's theory attempts to explain how individuals develop their capacity to reason about moral

7. For purposes of clarity and convenience, moral questions within a legal context are referred to herein as "ethical" questions. Otherwise, no distinction is intended between "moral" and "ethical."

8. See generally 2 L. KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984) (the most complete statement of Kohlberg's theory). *But see* S. MODGIL & C. MODGIL, *LAWRENCE KOHLBERG: CONSENSUS AND CONTROVERSY* (1986) (providing a recent criticism).

problems.⁹ According to his theory, an individual's moral reasoning reflects his or her current stage of moral maturity that can be identified by characteristic forms of moral reasoning.¹⁰ These various stages, in reflecting the maturation of an individual's moral reasoning, form an invariant sequence¹¹ among all people, independent of gender, race, or culture.¹² All people pass through the same identifiable stages and in the same order, although they may reach various stages at different ages.¹³

Over the past thirty years, Kohlberg and his colleagues have developed and refined a structured interview protocol by which a subject's stage of moral development can be identified according to the way the subject responds to a series of hypothetical moral dilemmas.¹⁴ Using this

9. Kohlberg's primary concern is moral reasoning, not moral conduct. Kutnick, *The Relationship of Moral Action: Kohlberg's Theory, Criticism and Revision*, in S. MODGIL & C. MODGIL, *supra* note 8, at 125, 126-27; Willging & Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 307-08 (1982).

10. 2 L. KOHLBERG, *supra* note 8, at 170-205.

11. In support of the invariance of the stages, see Colby, Kohlberg, Gibbs & Lieberman, *A Longitudinal Study of Moral Judgment*, 48 MONOGRAPHS SOC'Y FOR RES. CHILD DEV. 1, 28-56 (1983) [hereinafter *Longitudinal Study*]; Dickinson, *Moral Development Theory and Clinical Education: The Development of Professional Identity*, 22 W. ONTARIO L. REV. 183, 188-90 (1984).

12. See Snarey, *Cross-Cultural University of Social-Moral Development: A Critical Review of Kohlbergian Research*, 97 PSYCHOLOGY BULL. 202 (1985) (critical review of 45 studies conducted in 27 cultural areas including Kohlberg's United States research). *But see* Edwards, *Cross-Cultural Research on Kohlberg's Stages: The Basis of Consensus*, in S. MODGIL & C. MODGIL, *supra* note 8, at 419 (differences in language, culture, political and economic systems among subjects challenge the notion of universality). Kohlberg's implicit incorporation of the western male notion of the person is particularly problematic. *See* Shweder, *Beyond Self-Constructed Knowledge: The Study of Culture and Morality*, 28 MERRILL-PALMER Q. 41, 62-64 (1982). The scoring system has been criticized as sexist. C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) [hereinafter *IN A DIFFERENT VOICE*].

Recent changes in the scoring system appear to have met this criticism. *Compare* Walker, *Sex Differences in the Moral Reasoning: A Rejoinder to Baumrind*, 57 CHILD DEV. 522 (1986) and Walker, *Sex Differences in the Development of Moral Reasoning: A Critical Review*, 55 CHILD DEV. 677 (1984) (concluding that apparent differences in moral reasoning attributed to gender are better explained by differences in education and occupation) with Baumrind, *Sex Differences in Moral Reasoning: A Response to Walker's Conclusion That There Are None*, 57 CHILD DEV. 511 (1986). *But see* Dickinson, *supra* note 11, at 188-89; Gilligan & Menkel-Meadow, *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 BUFFALO L. REV. 10 (1985) (demonstrating the continued importance of the feminist critique of Kohlberg in legal literature).

13. *Longitudinal Study*, *supra* note 11, at 46-50.

14. 2 A. COLBY, L. KOHLBERG, J. GIBBS, D. CANDEE, B. SPEICHER-DUBIN, A. HEWER, & C. POWER, *MEASURING MORAL JUDGMENT: STANDARDIZED SCORING MANUAL* (1978). To identify a subject as reasoning at a certain stage means she typically reasons at that stage. Subjects don't "have stages" as they "have brown hair." Strictly speaking, a "stage" is a

protocol, thousands of subjects of different ages, cultures, occupations, and educational levels have been tested, creating a comprehensive literature.¹⁵

The central problem of morality for Kohlberg is the achievement of justice. In other words, how can one determine the legitimate claims of people in a given situation and balance their claims according to principles that impartial, rational people would accept as governing principles?¹⁶ Each stage of moral reasoning moves the individual's moral reasoning progressively closer to these ideal principles.¹⁷

The current scoring method recognizes five sequential stages of moral development.¹⁸ Stage 1 is an egocentric stage in which the primary reason for acting morally is the superior power of authority that may be used to

label an observer, informed by a particular theory of moral development, would apply in categorizing the responses of a subject to certain hypothetical stories presenting a series of moral dilemmas. 2 L. KOHLBERG, *supra* note 8, at 395-442.

15. For a comprehensive review of Kohlbergian literature, see Rest, *Morality*, in HANDBOOK OF CHILD PSYCHOLOGY 566 (4th ed. 1983). As of 1983, there were approximately 5000 published articles dealing with moral development. *Id.* at 618 n.7.

16. *Id.* at 574; see also 1 L. KOHLBERG, *Education for Justice: A Modern Statement of the Socratic View*, in ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT 29 (1981). In part, Kohlberg's theory is attractive to the legal community because of its Rawlsian philosophic orientation. See *id.* at 192-226. Additionally, there are many continuities between the cognitive basis of Kohlberg's theory and legal reasoning. Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974). Finally, Kohlberg's theory is attractive to some legal ethicists because it rejects role-differentiated ethics. See Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359 (1981) (criticizing amoral and authoritative ethical standards for lawyers).

17. Kohlberg offers three principal arguments for his claim that progressively higher stages are more advanced morally: (1) each stage in the sequence is progressively more differentiated and integrated; (2) with development, each new stage employs cognitive operations that are more reversible (i.e., they fairly consider the claims of all parties) and equilibrated (i.e., the solution is acceptable to all parties); and (3) each new stage has a more encompassing perspective on society. Rest, *supra* note 15, at 575.

18. An earlier version of the scoring manual scored a Stage 6, a stage of universal ethical principles, that remains only as a philosophical construct. Currently, Stages 5 and 6 are not distinguished for scoring purposes and potential Stage 6 responses are coded as belonging in Stage 5. Although Stage 6 remains a philosophical claim, its disappearance from the scoring system has removed it from its former status as an empirical claim. See 2 L. KOHLBERG, *supra* note 8, where Kohlberg states unequivocally that Stage 6 remains as a theoretical postulate, but not an operational certainty, and that "[a]s far as we can ascertain all our Stage 6 persons must have been killed in the 1960's like Martin Luther King." *Id.* at 425. But see *id.* at 250, where Kohlberg proposes the existence of a Stage 7 "ethical and religious thinking," that Stage 7 deals with one's religious beliefs. *Id.* But see Locke, *A Psychologist Among the Philosophers: Philosophical Aspects of Kohlberg's Theory*, in S. MODGIL & C. MODGIL, *supra* note 8, at 30 (indicating that Kohlberg's arguments in favor of a Stage 7 weaken his arguments for a Stage 6 separate from Stage 5).

punish.¹⁹ Physical power is valued in its own right, not in terms of respect for an underlying moral order.²⁰ Stage 1 is characteristic of the moral reasoning of young children and many adult delinquents.²¹

Stage 2 is also egocentric but the individual is able to recognize that other people have interests and needs.²² Individuals at Stage 2 are "instrumental relativists."²³ A lawyer who morally reasons at Stage 2 will persistently place his own needs before those of his client unless he has more to gain by meeting the client's needs. He has no sense of duty to the client nor any appreciation of the public character of law practice.²⁴

At Stage 3, individuals look primarily to social approval and maintenance of loyal, trusting relationships when resolving moral problems.²⁵ They take a "good boy-nice girl" perspective in attempting to please others.²⁶ Willging and Dunn write that lawyers at this stage "adapt behavior to the level apparently expected by others in significant relationships with the lawyer."²⁷ Client expectations loom large at this stage as would the expectations of judges and lawyers. Conflicts of loyalty are more likely to be resolved by the strength of the relationship than by rules or principles.²⁸

I identified Ed's moral reasoning as approaching Stage 3.²⁹ He rejected the debtors because their technical defenses offended his "good boy" morality that nice people paid their debts and chose the dissolution case because "good boys" protect women whose husbands walk out on them.³⁰ I concluded that Ed could not maintain complete loyalty to his client without engendering the disapproval of his fellow students, therefore he distanced himself from them so as not to need their

19. 2 L. KOHLBERG, *supra* note 8, at 624.

20. *Id.*

21. *Id.* at 624-26.

22. *Id.* at 626.

23. *Id.* at 626-28.

24. *Id.*; *see also* Willging & Dunn, *supra* note 9, at 313; Dickinson, *supra* note 11, at 186.

25. 2 L. KOHLBERG, *supra* note 8, at 628-29.

26. *Id.* at 628-31; *see also* Willging & Dunn, *supra* note 9, at 313-14; Dickinson, *supra* note 11, at 187.

27. Willging & Dunn, *supra* note 9, at 314.

28. *Id.*

29. To suggest that Ed morally reasoned at Stage 3 is not to say his moral reasoning could not usefully be categorized in other ways, e.g., by Maslow's hierarchy of needs. *See* Simpson, *A Holistic Approach to Moral Development and Behavior*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES 159-70* (T. Lickona ed. 1976) [hereinafter *MORAL DEVELOPMENT AND BEHAVIOR*].

30. *See supra* note 2 and accompanying text.

approval. His relationship with the opposing attorney was more problematic. When Ed felt a strong sense of loyalty toward his client, he adopted his client's animosity toward her husband as his attitude toward her husband's attorney. However, when Ed was forced into a relationship with the attorney, Ed sought his approval.³¹ Characteristic of Stage 2, Ed vacillated in a hopeless attempt to meet the immediate approval of both his client and the opposing attorney. Although I had no way of verifying this analysis,³² it provided a rational and comprehensive means of making sense of his behavior.³³

In Stage 4, moral reasoning is characterized by reference to the impartial rules of a social system. A Stage 4 individual takes the perspective of a typical member of society, a perspective based on a conception of a social system as a consistent set of rules that applies impartially to all members.³⁴ Willging and Dunn state that, at Stage 4, "a lawyer would look to the Code of Professional Responsibility as the most authoritative source of guidance for his decisions on ethical issues relating to his own behavior."³⁵

I recognized most of Ed's colleagues as individuals operating at Stage 4. They did not hesitate to represent debtors whose defenses were technical because their Stage 4 ethics identified these technical defenses as impartial rules that applied to all members of society.³⁶ They behaved toward their clients and opposing attorneys consistently within the ethical rules because they perceived the rules as an impartial, authoritative source of guidance.³⁷

31. See *supra* note 3 and accompanying text.

32. See Willging & Dunn, *supra* note 9, at 314. It may be misleading to test the prevalence of Stage 3 solely by such behavioral outcomes as following the client's wishes or deferring to judicial authority, because those outcomes, but not the moral reasoning process, may be identical to outcomes reached through Stages 4 or 5. The key difference between Stage 3 and Stages 4 and 5 is whether the lawyer looks outside the personal relationship for guidance in his decision making. *Id.*

33. At the time, from my ten years of experience in supervising approximately 100 clinic students, I would say Ed was among the least mature in his overall behavior. Kohlberg's theory helped me to understand that part of Ed's immaturity could be attributed to his delayed moral development. Studies of law students and other graduate students of similar age indicate that roughly three to five percent might be expected to reason at Stage 2 and that around ten percent might be expected to reason primarily at Stage 3. Willging & Dunn, *supra* note 9, at 314.

34. 2 L. KOHLBERG, *supra* note 8, at 631-33; Willging & Dunn, *supra* note 9, at 314; Dickinson, *supra* note 11, at 187.

35. Willging & Dunn, *supra* note 9, at 314.

36. See *supra* note 2 and accompanying text.

37. *But see, e.g., supra* note 5 and accompanying text (demonstrating the ambiguity of the rules governing professional responsibility). Perhaps typical of Stage 4, these students tended not to question whether their perception of impartiality was warranted — a question

At Stage 5, individuals have a perspective as rational moral agents aware of universal values and rights.³⁸ For individuals at Stage 5, societal rules, including the ethical rules of professional responsibility, are subject themselves to evaluation according to some theory of social welfare that is consistent with the protection of personal rights. Stage 5 lawyers are rule-oriented in their analysis of moral dilemmas if the rules are rationally consistent with principles of social welfare and personal rights.³⁹ However, while individuals at Stage 4 tend to externalize rules as emanating from the system, individuals at Stage 5 internalize principles as originating within themselves as autonomous moral agents.⁴⁰

In a number of discussions with students, I observed that they expressed Stage 5 characteristics. Yet, I cannot say that any student has ever conducted their clinic responsibilities exclusively through Stage 5 moral reasoning.⁴¹

B. *Moral Reasoning and Moral Conduct*

Lower stages of moral development do not necessarily equate with conduct that is less ethical. To say that Ed's moral reasoning was at Stage 3, for example, does not mean his conduct was immoral or unethical according to the ethical rules of professional responsibility.⁴² Arguably, Ed

that becomes important to students at Stage 5. See *infra* notes 38-40 and accompanying text. Stage 3 reasoning, however, would warrant compliance with the ethical rules as something a stereotypically "good" attorney would do. See *supra* note 26 and accompanying text. Or, an attorney might reason that a rule need not be followed if his firm, to which he owes allegiance, does not find the rule binding. See *supra* note 28 and accompanying text. This kind of Stage 3 reasoning seemed to have been characteristic of the Watergate defendants. Candee, *The Moral Psychology of Watergate*, 31 J. Soc. ISSUES 183, 191 (1975).

38. See 2 L. KOHLBERG, *supra* note 8, at 634-36; Willging & Dunn, *supra* note 9, at 314-15; Dickinson, *supra* note 11, at 187.

39. See Willging & Dunn, *supra* note 9, at 315.

40. See 2 L. KOHLBERG, *supra* note 8, at 88-93.

41. For example, I have never seen a clinic student refuse to comply with a rule because he or she reasoned that the rule was inconsistent with an articulated moral principle of general welfare or personal rights. Indeed, the extant literature has found that many attorneys are "client-dominated," that is, they essentially act to avoid conflict with their clients. See, e.g., Nelson, *Ideology, Practice and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 534-39 (1985) (almost all attorneys in large firms have never had disagreements with their clients); see also Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, in THE SOCIOLOGY OF THE PROFESSIONS 106 (R. Dingwall & P. Lewis eds. 1983) (study of British solicitors found that the solicitors served no more than a "translation" function in carrying out the demands of their clients).

42. Kohlberg cautions that to equate his stages of moral development with values is to commit the naturalistic fallacy of confusing "is" with "ought." Kohlberg states:

There simply is no valid psychological definition of moral behavior, in the sense

was ethically correct in refusing to represent the debtors whose defenses turned on technicalities. However, the moral reasoning he expressed, that "good people pay their debts"⁴³ was, within the Kohlberg scheme, typical Stage 3 reasoning. Similarly, if Ed had instead volunteered to represent the debtors because "nice attorneys help people bothered by bill collectors," he still would have expressed Stage 3 reasoning despite the contrary result. The moral reasoning in either case revolves around the immediate concerns of being a socially acceptable, nice person.⁴⁴

C. *Ed's Conduct as Within an Ethic of Caring*

A major criticism of Kohlberg's system is that it is narrowly concerned with attaining justice and fails to account for other ethics, most notably an ethic of caring.⁴⁵ According to an ethic of caring, the individual's central moral concern is the mediation of human relationships.⁴⁶ This ethic was not operative in Ed's moral reasoning. His immediate confrontational posture toward the husband's attorney and his refusal to discuss any accommodation of the clinic caseload with his colleagues suggested that he envisioned them as opponents in a contest of rights rather than as members of a network of relationships upon whose mediation the resolution of the conflict depended.⁴⁷

Ed's loyalty to his client may be interpreted as his justification for doing battle on her behalf (characteristic of Stage 3) rather than as a manifestation of a more general ethic of care. When circumstances at family court motivated Ed to behave as a professional colleague with the husband's attorney, Ed's loyalties conflicted.⁴⁸ If Ed's ethic had been one

that no observation and categorization of behavior "from the outside" or "behavioristically" can define its moral status in any psychologically valid sense.

But . . . there is such a thing as behavior that is consistent with an individual's moral principles or that springs from a moral decision.

Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with It in the Study of Moral Development*, in *COGNITIVE DEVELOPMENT AND EPISTEMOLOGY* 228-29 (T. Mischel ed. 1971).

43. See *supra* text accompanying note 2.

44. See *supra* notes 25-28 and accompanying text. Had Ed's moral reasoning been at Stage 4, he might have refused to represent the debtors on the basis that no rule required him to do so. See *supra* notes 34-35 and accompanying text. Had Ed's moral reasoning been at Stage 5, he again might have refused to represent the debtors, but his moral reasoning would have entailed consideration of such criteria as public good or the protection of personal rights. See *supra* notes 37-40 and accompanying text. For example, he might have reasoned that the debtors' defenses were based on laws unfairly favoring a privileged few.

45. See *IN A DIFFERENT VOICE*, *supra* note 12, at 24-39, 173-74.

46. *Id.* at 62-63.

47. See *supra* text accompanying note 3.

48. See *supra* text accompanying notes 4-5.

of care, he would have searched for a way to resolve the conflict through accommodation rather than choosing sides according to the strength of the more immediate relationship.

D. *The Development of Moral Reasoning*

Kohlberg observes that individuals cannot be taught didactically to move toward a higher stage of moral development.⁴⁹ No amount of lecturing or good advice causes people to move positively from one moral stage to another. Students who take courses in logical reasoning learn to reason more logically but they do not develop morally.⁵⁰ Law students attending courses on professional responsibility may learn the rules and sharpen their moral decision making using the rules, but they do not learn to reason at a higher moral stage.⁵¹ Yet, formal education as a whole does have a powerful, positive effect on individual moral development, as measured by Kohlberg's stages. As the students' formal learning progresses, they continue to consistently develop their moral reasoning. When they cease formal schooling, they ordinarily show little evidence of further moral growth.⁵²

The most significant factor that promotes moral development in formal schooling seems to be the confrontation of differing values among peers. Students develop morally when they find that their present moral

49. Attempts to induce moral development through programs of discussion and modeling have not produced consistent or powerful findings. The results of the best designed studies show "a jumble of contradictions and no convincing trends." Rest, *supra* note 15, at 596. Certainly, an intellectual understanding of moral development does not positively influence its growth. *See generally* Evans, *Moral Stage Development and Knowledge of Kohlberg's Theory*, 14 J. EXPERIENTIAL EDUC. 14 (1982). Even well-designed experiential school programs may fail because the authoritarian structure of the school may itself undermine moral development. Sullivan, *Kohlberg's Stage Theory as a Progressive Educational Forum for Value Development*, in S. MODGIL & C. MODGIL, *supra* note 8, at 238.

50. J. REST, DEVELOPMENT IN JUDGING MORAL ISSUES 207-11 (1979).

51. Willging & Dunn, *supra* note 9, at 357. The subjects were 41 third-year law students enrolled in Legal Ethics and Professional Responsibility. The course goals were to convey the body of legal rules contained in the *Code of Professional Responsibility* and to stimulate student thinking about alternate responses to ethical dilemmas lawyers face in practice. The purpose of the study was to see if such a course could serve as a specific intervention experience to stimulate moral reasoning. The subjects took the Defining Issues Test (DIT) before and after the course. The DIT results indicated no statistically significant change in moral reasoning. The DIT is discussed in more detail *infra* notes 131, 192-96 and accompanying text.

52. J. REST, MORAL JUDGMENT RELATED TO SAMPLE CHARACTERISTICS: DEVELOPMENT AND OBJECTIVE TEST OF MORAL JUDGMENT, FINAL REPORT app. A at 9 (Aug. 1976); Rest & Thoma, *Relation of Moral Development to Formal Education*, 21 DEVELOPMENTAL PSYCHOLOGY 709 (1985); Willging & Dunn, *supra* note 9, at 323.

criteria are inadequate in responding effectively to moral questions they view as important to their well-being.⁵³ A student, for example, who morally reasons at Stage 3 in terms of personal loyalty and immediate personal relationships may find that his moral reasoning is inadequate in dealing with his fellow students in a large, culturally heterogeneous law school.⁵⁴ In such an environment, only impartial rules, typical of Stage 4 moral reasoning, provide an adequate personal basis for responding to one's peers.⁵⁵

Although I had no way of measuring Ed's moral development over his clinical semester, and was not thinking of those terms, I believe that he made some progress. In a conversation we held several months after the semester concluded, Ed expressed considerable insight into his own moral reasoning. He was particularly concerned that as a practicing lawyer he would not be as driven by a sense of loyalty to his clients as he had been in the clinic.⁵⁶ He stated that, as a practicing lawyer, he was going to have to think more in terms of the ethical rules of professional responsibility. Of course, I have no way of knowing whether, as a "good student," he had merely learned to say that to please me or whether he had in fact begun a movement toward Stage 4.

IV. FOSTERING MORAL DEVELOPMENT THROUGH CLINICAL TEACHING

A. *An Experiential Classroom Exercise*

To test my observations of my clinic students' moral stages and the possibility of influencing their moral development, a colleague⁵⁷ and I decided to see if we could create a controllable educational environment to induce moral development. We created this environment within the Interviewing and Counseling course we taught together.⁵⁸

53. Rest, *supra* note 15, at 598. Legal scholars debate the effect of clinical education on student character reformation. Stark, Tegeler & Channels, *The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin*, 37 J. LEGAL EDUC. 409, 410 (1987).

54. Rest, *supra* note 15, at 590.

55. See *supra* notes 34-37 and accompanying text for a discussion of the standards of judgment in Stage 4 moral reasoning.

56. See *supra* text accompanying note 3; but see *supra* text accompanying note 4 (Ed sought approval from the opposing attorney as well as his clients).

57. Dr. Janet Sims, Ph.D., a licensed clinical psychologist, was employed as a counselor by the University of San Diego.

58. We attempted a similar exercise in an earlier Interviewing and Counseling course. We invited the students to assist in a Saturday morning clinic to screen new clients. The clients were two confederates seeking a dissolution of marriage. The client's story raised a number of ethical issues. For example, the clinic already represented the husband in a

We requested our students to participate in a special Saturday morning clinic.⁵⁹ They individually were to interview and advise litigants in small claims court.⁶⁰ I told the students that I would be available for consultation in an adjoining office. The "clients" were, in fact, a single confederate who sought the same advice from each student: how she should present her side of a rent dispute.⁶¹ I told each student to advise the client to lie under oath that she had paid the rent. When students asked for clarification, I uniformly responded, "You asked for my advice and my advice is that, if your client wants to win her case, then you must tell her to perjure herself."⁶²

We thought that this exercise would strenuously test the moral reasoning of our students, the majority of whom we assumed to morally reason at Stage 4.⁶³ We wanted them to experience the pull between loyalty to authority (Stage 3)⁶⁴ and prescribed ethical conduct (Stage 4).⁶⁵ We assumed they would reject my advice and refuse to tell their client to lie.⁶⁶ Although many of the twenty-four participating students grumbled either to me or to the client about my proffered advice, twenty-three told

different case and the client wanted the family income understated on the legal forms in order to file as an indigent and to avoid tipping off the Internal Revenue Service. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 4.1 (1989). The students were told I was available in the adjoining office to provide supervision and advice. When my advice was sought, I advised the students to ignore the conflict of interest and to permit the false information. In no instance was my advice challenged and in all instances, my advice was faithfully transmitted to the client. My colleague and I concluded that the exercise was simply too complex to permit us to identify accurately the cause of the students' failure to conduct themselves ethically.

59. The interviews took place in a clinic faculty office. The students were responsible for seeking the permission of the "client" to audiotape. Ed, incidently, had long since graduated.

60. Attorney representation is not permitted in small claims court. CAL. CIV. PROC. CODE § 117.4 (West 1990). The jurisdictional maximum was then \$1500. *Id.* § 116.2.

61. All of the interviews were audiotaped. I acknowledge the invaluable services of Karen Hoyt, one of the confederates in the initial exercise described in note 56, *supra*, and of Laura Hartwell, an indefatigable confederate in both exercises. I also acknowledge Ms. Hartwell's contribution in first alerting me to the feminist perspective cited in note 12, *supra*.

62. The student advice, as well as my own, would have amounted to subornation of perjury, a felony in California. *See* CAL. PENAL CODE § 127 (West 1990).

63. *See* Haan, Brewster, Smith & Block, *Moral Reasoning of Young Adults: Political-Social Behavior, Family Background, and Personality Correlates*, 10 J. PERSONALITY & SOC. PSYCHOLOGY 183, 183-84 (1968); Willging & Dunn, *supra* note 9, at 314.

64. *See supra* notes 25-28 and accompanying text.

65. *See supra* notes 34-35 and accompanying text.

66. We assumed that students at Stage 3 would follow my advice because they would adapt their behavior to that apparently expected by me as a person with whom they had a significant relationship. *See* Willging & Dunn, *supra* note 9, at 314.

their client to perjure herself.

B. *Theory: "The Agentic State"*

We were distressed by the almost universal failure of our students to conduct themselves ethically, as well as by our failure to accurately predict their conduct. In search of an explanation for their failure, I returned to theory, rereading the electric shock experiment conducted by Stanley Milgram in the early 1960s.⁶⁷ Before Milgram began his experiment, he and his staff asked groups of psychiatrists, college students, and middle-class adults to estimate what percentage of the proposed subjects, if any, would comply with the instructor's request to administer electric shock to a victim who failed to learn. Respondents in all three groups uniformly predicted that no subject would give the victim the maximum shock. They predicted that all of the proposed subjects would eventually defy the instructor, most predicting defiance when the voltage reached the "strong shock" level.⁶⁸

The predictions were wrong. In the standard experimental protocol, in which the victim could only be heard to protest from an adjoining room, nearly two-thirds of the subjects continued to the maximum voltage.⁶⁹ Even when the subject sat next to the victim and held the victim's hand down to the shock plate, the obedience level reached nearly one-third.⁷⁰

In order to explain this unexpected compliance by otherwise moral people, Milgram postulated an "agentic state."⁷¹ He proposed that as individuals learn rules from an authority, they necessarily learn that the rules are dependent upon authority.⁷² They perceive the source of moral rules as exterior to themselves, residing in others who represent

67. S. MILGRAM, OBEDIENCE TO AUTHORITY (1974). Participants in Milgram's simulated learning experiment were asked to administer electric shock to a "learner" at progressively higher voltages whenever the learner made an error. *Id.* at 20-21. The experiment attempted to measure the subject's degree of obedience to the experimenter's instructions to continue applying the shocks despite the learner's protests to stop. *Id.* at 25-26. The study has been widely cited as demonstrating the alarming degree to which ordinary people will obediently inflict pain upon another when requested by someone in authority. See, e.g., DipBoyle, *Alternative Approaches to Deindividualization*, 84 PSYCHOLOGICAL BULL. 1057 (1977). A simulation of the experiment is available on videotape. *Moral Development* (CAM Productions 1980).

68. S. MILGRAM, *supra* note 67, at 27-28.

69. *Id.* at 28-29.

70. *Id.* at 28.

71. *Id.* at 32-33.

72. *Id.* at 132-34.

authority.⁷³ From a Milgram perspective, law students would perceive the ethical rules of professional responsibility as dependent upon some external authority, such as the state bar, rather than as the collective expression of the moral reasoning of individuals such as themselves. Hence, when confronted by such perceived authority represented by their clinic supervisor, they shift responsibility for the consequences of their actions to the authority.⁷⁴ Therefore, a conflict between abstract authoritarian rules and a concrete authority figure is likely to be resolved in favor of the latter.⁷⁵ Milgram's analysis predicts, and our exercise seemed to support his prediction, that students at Stage 4 will ignore the rules when told to do so by a person of perceived legitimacy.⁷⁶

My initial analysis of the power of this "agentic state" led me to conclude that students had to attain Stage 5 moral reasoning to act ethically.⁷⁷ To act ethically, students had to be able to defy an immediate figure of authority in order to follow abstract rules. This was not possible for students at Stage 4 because they understand the source of their morality as exterior to themselves.⁷⁸ Students could only defy my instruction if they understood themselves to be autonomous moral agents. According to Kohlberg's system, only individuals who have morally developed to Stage 5 have sufficiently internalized moral principles to reach this autonomy.⁷⁹

This conclusion troubled me for a number of reasons. Stage 5 moral reasoning is not common.⁸⁰ Only highly selective groups of individuals, such as students engaged in advanced moral philosophy, regularly demonstrate Stage 5 moral reasoning.⁸¹ Law draws its practitioners

73. *Id.* at 133.

74. *Id.* at 133-34.

75. See Haney, Banks & Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIM. & PENOLOGY 69 (1973). In an experiment conducted in a mock prison constructed at Stanford University, student conduct was found to be more influenced by a simulated but realistic prison environment than by abstract moral principles. Twenty-four students chosen for their maturity and emotional stability were asked to play the roles of prisoner or guard. The experiment, designed to run over a two-week period, had to be terminated after only six days because of the increasing brutality of the "guards" toward the "prisoners." *Id.* at 81.

76. See 2 L. KOHLBERG, *supra* note 8, at 70-71.

77. After reviewing the original Milgram study, Kohlberg concluded that the typical moral reasoning of individuals who refused to participate in the electric shocking of the "learner" indicated Stage 5 moral reasoning. See *id.* at 546-48.

78. See *supra* notes 34-37 and accompanying text.

79. See *supra* notes 38-41 and accompanying text.

80. Snarey, *supra* note 12, at 226.

81. See, e.g., J. REST, *supra* note 50, at 143 (liberal Protestant seminary and doctoral candidates in moral philosophy posted high DIT scores). High DIT scores correlate with

unselectively from diverse elements of society. Entrance into law school is not predicated upon the attainment of some stage of moral development. Neither success on the bar examination nor high scores on professional responsibility examinations indicate a high stage of moral reasoning.⁸² Even under ideal circumstances, the development of an individual's moral reasoning, as measured by a change in a Kohlberg stage, is a very slow process.⁸³ The notion that the moral reasoning of the legal profession might somehow be elevated to Stage 5, either through training or by selection, seemed unrealistic.

C. Ethical and Educational Concerns

I was also troubled by the exercise itself. On the one hand, we felt the exercise was a powerful learning experience for many of the participants.⁸⁴ The realistic, experiential nature of the exercise demonstrated to the students and to myself their vulnerability to an authority figure with an intensity no lecture could have reached.⁸⁵ On the

Stage 5 moral reasoning. See *infra* notes 193-96 and accompanying text.

82. *But cf.* Springhall, *Psychology for Secondary Schools*, 35 AM. PSYCHOLOGIST 336, 346 (1980) (a high level of personal development, as a psychological construct that includes moral development, significantly correlates with how effectively academic achievement is used in adult life).

83. See *Longitudinal Study*, *supra* note 11, at 28-56 (a 20-year longitudinal study of fifty-eight subjects, beginning at age 10). During the 20-year period, most subjects moved one Stage upward with only a few moving two full Stages. Fifty-six subjects scored upward and two vacillated slightly, but no subject skipped a Stage. Furthermore, most reached Stage 4, but none solidly reached Stage 5.

84. Our debriefing interviews suggested that about one-fourth of the participating students were affected profoundly by the moral implications the simulations revealed. Continued moral development among adults may depend more upon specific, powerful experiences in deliberating moral dilemmas than continued formal education. Willging & Dunn, *supra* note 9, at 355. See also IN A DIFFERENT VOICE, *supra* note 12, at 70-75 (moral deliberation by women considering an abortion may positively influence their moral development). The experience of Watergate, for example, may have accelerated the moral development of at least one of its culprits, Egil Krogh, by exposing to him the inadequacy of his moral reasoning. See Candee, *supra* note 37, at 192. We thought perhaps our exercise had served as a safe but powerful "Watergate experience."

85. Some psychologists have noted that observers have a "preliminary practical understanding" of conduct that varies considerably from the understanding of the participants. See Packer, *Hermeneutic Inquiry in the Study of Human Conduct*, 40 AM. PSYCHOLOGIST 1081 (1985). For example, following the "small claims" scenario, see *supra* note 58 and accompanying text, my co-instructor asked me in class how she should advise a client. Although the students knew she was a psychologist and not an attorney, she asked the question as if she fully intended to render advice. I directed her to advise her client to perjure himself. The students were then asked to write down what they would do if they were in my co-instructor's position. Twelve students responded that they would refuse the direction. Three responded that they were unsure what they would do. Compare these

other hand, the exercise was built upon deception which raised serious and unavoidable questions of teaching ethics.⁸⁶

Although we conducted a thorough debriefing after the simulation and took other steps to minimize harm to the students, we could not know for sure what hurt feelings might remain hidden.⁸⁷ The deception also raised questions of trust between student and instructor.⁸⁸ As clinic instructors, we ask students to trust the legitimacy of the skills we teach.⁸⁹

figures with the near unanimity of unethical behavior among students in the two simulations. See *supra* notes 58-68 and accompanying text. See also S. Pepe, Summary of Selected Findings of the Study on the Standards of Legal Negotiations (unpublished paper on file at the University of Michigan Law School Library) (lawyers who participated in a negotiation simulation were found less likely to interpret certain behaviors as unethical than lawyers who merely observed the same simulation).

86. Social scientists often use deception as a vehicle for uncovering socially useful information. For example, in the frequently cited Krebs and Rosenwald study (linking moral reasoning to moral conduct), the subjects were solicited by a newspaper advertisement stating that they would be paid three dollars for taking several personality tests. Krebs & Rosenwald, *Moral Reasoning and Moral Behavior in Conventional Adults*, 23 MERRILL-PALMER Q. 77 (1977). In this study, when the subjects convened, they were told the purpose of the experiment was to explore redundancy among personality scales. They were told further that because of a room assignment mix-up, they would have time to complete only the first test (a simplified Kohlberg moral reasoning test). They were asked to complete the remaining tests at home, given a self-addressed stamped envelope, and reminded that in accepting the three dollars they had to complete and return the remaining tests in a timely fashion. All of the instructions were misleading or false. The purpose of the study was to see how moral reasoning related to moral conduct, as measured by mail return rate. The study was never intended to benefit the subjects. Nothing in the study indicates that the subjects were ever debriefed. The study did produce socially useful information that could not have been performed without deception. But the method is troubling. *Id.* at 78.

Subjects in studies that involve deception seem less troubled than critical observers. See Smith & Berard, *Why Are Human Subjects Less Concerned About Ethically Problematic Research Than Human Subject Committees?*, 40 AM. PSYCHOLOGIST 165 (1985); see also Rubin, *Deceiving Ourselves About Deception: Comment on Smith and Richardson's "Amelioration of Deception and Harm in Psychological Research"*, 48 J. PERSONALITY & SOC. PSYCHOLOGY 252 (1985) (findings do not demonstrate that harmful effects of deception can be ameliorated).

Subject deception can also be used as a red-herring to institutional review boards, whose approval for proposed experiments involving treatment of human subjects is often required. See Ceci, Peters & Plotkin, *Human Subjects Review, Personal Values, and the Regulation of Social Science Research*, 40 AM. PSYCHOLOGIST 994 (1985). Institutional review boards, rather than deciding the degree and kind of deception appropriate to the goals of a study, may simply use subject deception as an excuse to censor studies intended to produce socially unacceptable results (e.g., that racial discrimination does *not* exist in the United States).

87. See Smith & Richardson, *Amelioration of Deception and Harm in Psychological Research: The Important Role of Debriefing*, 44 J. PERSONALITY & SOC. PSYCHOLOGY 1075 (1983) (discussing debriefing rationale and procedures).

88. Stark, Tegeler & Channels, *supra* note 53, at 421.

89. If the clinician professes a "learning mode" teaching methodology in which teacher

This trust is particularly important in clinical teaching because what we teach may counter students' intuition. Our conduct could be justified on the basis that we were attempting to show them a greater truth about their susceptibility to unethical conduct, but I never felt very good about deceiving my students.⁹⁰

It was also unclear what the exercise had taught. Certainly, the exercise taught my students not to trust me as an authority on legal ethics. Over the remainder of the semester, students who had participated in the exercise took relish in challenging my ethical advice. I did not know whether their challenging attitude was toward all authority in general, or specifically toward me.⁹¹

D. Pedagogical Doubts

Continued reflection on my work with Ed and the Milgram exercises led to additional questions as to whether my approach in fostering moral development was effective.⁹² Searching for guidance, I turned to the clinical writings of Professor Robert J. Condlin. In a series of articles, Condlin has made a number of observations about clinical teaching and professional responsibility.⁹³ He has observed that everyone interprets the

and student are concerned with investigating, understanding, and clarifying the ambiguity of human communication in an interdependent fashion emphasizing mutual respect (as we professed), then student trust becomes a paramount concern. See Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 228-48 (1980); see *infra* text accompanying notes 92-114 (further explaining the learning mode).

90. The exercises were not conducted as social science experiments, but as structured educational experiences. We did not intend to "test" the theories of Kohlberg or Milgram. Compare our exercises, *supra* notes 58-66 and accompanying text, for example, with the Krebs and Rosenwald study, *supra* note 86. The fact that our goal was didactic rather than research does not necessarily make deception acceptable. See Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978); Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 457-62 (1970) (both criticizing traditional legal education for being dominating and manipulative). Manipulation and domination of students may be more invasive in the clinic because of the closer working relationship between teacher and student. Condlin, *supra* note 89, at 225-26.

91. This is an unanswered question of learning hierarchy. See generally G. BATESON, *MIND AND NATURE: A NECESSARY UNITY* (1979) ("Much can be learned from a single instance, but not . . . about the nature of the larger . . . class, of such trials or experiences."). *Id.* at 123.

92. My experiences with Ed, my understanding of Kohlberg and our "Milgram" experiments prompted my further reading and reflection in leading to the present article.

93. See generally Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 317 (D. Luban ed. 1984) [hereinafter *The Moral Failure*]; Condlin, *The Myth of the Clinical Methodology*, in 2 *CLINICAL LEGAL EDUC. PERSP.* 9 (1978); Condlin, *"Tastes Great; Less Filling": The Law School Clinic and Political*

world in slightly different ways according to one's disposition and experience.⁹⁴ Individuals may use identical language in describing different events since language is less precise and less complex than the events described.⁹⁵ Hence, all language is ambiguous, and all dialogue must deal in some manner with this ambiguity.⁹⁶

There are two fundamentally different modes for handling this ambiguity which Condlin calls the "persuasion mode" and the "learning mode."⁹⁷ With the persuasion mode, the listener is primarily concerned with asserting his conception of what the speaker means by the ambiguity.⁹⁸ The listener attributes meaning to the speaker's ambiguity and privately evaluates whether he agrees or disagrees with the speaker. The listener responds accordingly.⁹⁹ In a dialogue, the speaker first listens to what the listener has to say and makes her attributions of meaning to his ambiguity, and thus a cycle has begun.¹⁰⁰

People use the persuasion mode in order to defend their ideas and attack the ideas of others.¹⁰¹ Individuals who seek to dominate and manipulate others use the persuasion mode.¹⁰² It is the preeminent mode of trial practice and of competitive negotiating.¹⁰³ In Condlin's analysis, both traditional law teaching *and* clinic teaching employ the persuasion mode.¹⁰⁴

With the "learning mode," the listener asks the speaker to clarify and understand the ambiguity.¹⁰⁵ To do this effectively, the listener must admit his misunderstanding and share his intellectual reactions with the speaker.¹⁰⁶ In the learning mode, the listener collaborates with the speaker in helping to clarify ambiguity.¹⁰⁷

Condlin relates these different modes to the clinical teaching of

Critique, 36 J. LEGAL EDUC. 45 (1986) [hereinafter *Tastes Great*]; Condlin, *supra* note 89.

94. Condlin, *supra* note 89, at 228.

95. *Id.* at 229.

96. *Id.* at 228-38.

97. *Id.* at 233-35.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 231.

103. *Id.* at 329-30.

104. *Id.* at 249.

105. *Id.* at 223-33.

106. *Id.*

107. *Id.* at 235-38.

professional responsibility.¹⁰⁸ He observes that however a clinic course may be designed, the primary source of ethical instruction is inevitably the interaction between student and clinic instructor.¹⁰⁹ If the clinic professor uses a persuasion mode in interacting with students, they will learn to use the same mode with their clients.¹¹⁰ In reviewing many hours of videotaped dialogue between various clinical instructors and their students, Conclin concluded that the dominant clinical mode was the persuasion mode.¹¹¹

In thinking about our "Milgram" exercises¹¹² and my interaction with my clinic, I was struck by my pervasive use of the persuasion mode. When ethical issues arose, I attempted to convince my students through reasoned argument to do what I thought was ethically right. I now could see that this persuasion mode was particularly inappropriate with Ed. My reliance upon rules as the basis of my arguments must have appeared irrelevant to him. For Ed, moral conduct was loyal conduct, treating his client as a friend whose rights were superior to anyone else.¹¹³ Even for students who equated morality with impartial rules, arguing about the rules presented a scenario in which the better moral conduct was that conduct supported by the best debater. Whatever my good intentions, I was teaching a model of domination and manipulation that was exactly counter to my intentions.¹¹⁴

The classroom exercises were also subject to the same criticism. I could not be sure whether we taught content, i.e., that we are vulnerable to the unethical commands of others, or context, i.e., that manipulation is an acceptable form of personal interaction.

E. Further Classroom Experience

In response to Conclin, we decided to develop other aspects of the Interviewing and Counseling course employing a learning mode that would avoid manipulating students. By this time, we occasionally required our students to audiotape client interviews. Following the suggestion of my co-

108. *Id.*

109. *The Moral Failure*, *supra* note 93, at 324-26.

110. *Id.* at 326-32. Students will then, I believe, also use the persuasion mode among themselves.

111. Conclin, *supra* note 89, at 249 (emphasizing, however, that his conclusions are based on his observations of only eleven clinical professors at seven law schools).

112. *See supra* note 67 and text accompanying notes 59-76.

113. *See supra* text accompanying notes 45-48.

114. For an analysis of the complex relationship of skills performed pursuant to theory, see M. POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* 49-65 (1962).

instructor, we requested our students to prepare written transcripts of portions of their tapes.¹¹⁵ This step, which at the time seemed wholly unrelated to my concerns about fostering moral development, in fact had a major impact.

Through these transcripts, we discovered that our students generally were unable to translate into practice the interviewing skills honed in class.¹¹⁶ We thereafter required our students to audiotape all of their client interviews and transcribe excerpts for comments and class discussion. This requirement of transcription and review greatly accelerated their capacity to translate classroom skills into practice.¹¹⁷ As students attempted to improve their listening skills in the clinic, we discovered that they became increasingly more sympathetic to their clients and therefore more vulnerable to manipulative and aggressive clients.¹¹⁸

115. The suggestion to transcribe the tapes came from Sherry Hartwell, M.S. I am also indebted to Dr. Philip O. Hwang, School of Education, University of San Diego, for helpful advice in using transcripts. Students choose any five-minute segment of their audiotape they wish for transcription. They write the dialogue on the left side of the page, leaving the right side open for comments. Clients indicate their consent to the audiotape-recording by signing a consent form. We explain to clients that we use the tapes for educational purposes and as a means for the supervisor to monitor the appropriateness of any legal advice rendered. They are assured that their names will not appear on the transcript and that the transcript and tape contents are erased after use. Clients occasionally decline taping. For a discussion questioning the ethics of "consensual" client audiotaping, see Condlin, *supra* note 89, at 216.

116. Empathy is generally described as accurately identifying and sensitively responding to the feelings and the ideas of another person. Natsoulas, *Sympathy, Empathy, and the Stream of Consciousness*, 18 J. THEORY SOC. BEHAV. 169 (1988); Wispe, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, A Word Is Needed*, 50 J. PERSONALITY & SOC. PSYCHOLOGY 314, 314 (1986). A number of useful guides for teaching empathic listening skills are available. See, e.g., G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 124-272 (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 21-37 (1977); G. EGAN, *THE SKILLED HELPER: A MODEL FOR SYSTEMATIC HELPING AND INTERPERSONAL RELATING* (1982); T. SHAFFER & J. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 195-243 (2d ed. 1987); A. WATSON, *THE LAWYER IN THE INTERVIEWING COUNSELLING PROCESS* 29-74 (1976). Scales are available that measure various aspects of empathic response (empathic understanding, respect, facilitative genuineness, self-disclosure, concreteness, and immediacy). 2 R. CARKHUFF, *HELPING AND HUMAN RELATIONS: A PRIMER FOR THE LAY AND PROFESSIONAL HELPERS* app. B at 315-29 (1969); S. WOLF, C. WOLF & G. SPIELBERG, *THE WOLF COUNSELING SKILLS EVALUATION HANDBOOK* (1980).

117. In support of requiring students to prepare transcripts of the relevant portions of interviews they have audiotaped, Professor Condlin comments, "Analyzing performance on the basis of shared memory or oral reconstructions is roughly akin to analyzing doctrine on the basis of eyewitness accounts of the reading of a judicial opinion. It may be possible, but no one would ever try to do it." *Tastes Great*, *supra* note 93, at 63.

118. The reasons students confuse sympathetic responses for empathic responses are complex. While students learn sympathy through social conditioning as they grow up, empathy must be learned consciously as a set of skills. Wispe, *supra* note 116. To students, the value-neutral quality of empathy appears to be inconsistent with the adversarial nature

To help students protect themselves against such clients without abandoning their attempts at empathetic listening skills, we added assertiveness training as a major component to the course.¹¹⁹

The audiotape transcripts and the assertiveness training began to affect what students wrote in their journals.¹²⁰ As they improved their skills of empathy and assertiveness in the clinic, they began using the same skills in their clerkships and in their social life. They reported incidents where they were able to resist inappropriate demands. One student, for example, who clerked in a large law office, resisted a demand by her department supervisor that she support him in unfairly blaming another department. She listened to his request empathetically and asserted her right to refuse. She synthesized her clinical skills into moral action.

F. Theoretical Explication: Moral Action

With these initial favorable signs that the skills we were teaching related directly to moral behavior, I turned once again to theory. Some moral theorists conceptualize moral behavior as comprised of four elements: interpretation of the situation, analysis (moral reasoning), selection of an outcome, and execution of a plan.¹²¹ Kohlberg's theory attends directly to only the second element of analysis.¹²² His theory has

of client representation. Hartwell, *Mediation in Resolving Disputes: Secret is Best*, 2 J. CONTEMP. LEGAL ISSUES (1990) (in press). Further, students tend to resist learning such skills because their orientation is towards the problem, not the client. Barkai & Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U.L. REV. 505, 505 (1983).

119. Assertiveness is the legitimate and honest expression of one's personal rights, feelings, beliefs, and interests without violating or denying the rights of others. Delamater & McNamara, *The Social Impact of Assertiveness: Research Findings and Clinical Implications*, 10 BEHAV. MODIFICATION 139, 139-40 (1986). Assertion training consists of: (1) teaching the differences between assertion and aggression, and between nonassertion and politeness; (2) identifying and accepting the rights of self and others; (3) reducing cognitive and affective obstacles to assertive conduct; and (4) developing assertive skills through practice. A. LANGE & P. JAKUBOWSKI, RESPONSIBLE ASSERTIVE BEHAVIOR: COGNITIVE/ BEHAVIORAL PROCEDURES FOR TRAINERS 2 (1976).

120. Although clinicians often discuss student journal writing at clinical conferences, little appears in legal literature. Elkins, *Rites du Passage: Law Students "Telling Their Lives"*, 35 J. LEGAL EDUC. 27 (1985); Elkins, *Becoming a Lawyer: The Transformation of Self During Legal Education*, 66 SOUNDINGS 450 (1983).

121. Rest, *supra* note 15, at 559.

122. Although Kohlberg's theory applies primarily to moral reasoning and not to moral conduct, some evidence correlates moral reasoning to conduct. See Blasi, *Bridging Moral Cognition and Moral Action: A Critical Review of the Literature*, 88 PSYCHOLOGY BULL. 593 (1980). Moral reasoning correlates most closely with conduct that is relatively simple in nature and modulated by a single moral consideration. Subjects asked to return materials in a timely manner, complied in an almost perfect correlation with their Kohlberg stage

little to offer about how individuals interpret a situation, select a strategy, or execute a plan of action.¹²³

With this broader concept of moral behavior in mind, I reconsidered our classroom "Milgram" exercise.¹²⁴ A major weakness in our classroom exercise was my faulty assumption that the behavior we observed reflected the students' moral reasoning. I did not consider how students interpreted the exercise, selected a strategy, or what might have kept them from executing that strategy. Certainly our classroom exercise, like the Milgram experiment, was not a common event in their lives. It was unlikely that any had ever been asked by a professor to act unethically in advising a client—just as Milgram's subjects had never been asked by a laboratory scientist to give someone an electric shock. Our unusual setting only marginally duplicated an authentic work setting. The setting may have distracted the students from interpreting the moral problem accurately.¹²⁵

The conduct of our students may not have been coerced in the ordinary sense of the word as I originally thought, but may have been induced out of a sense of commitment to their professor. Like the subjects in Milgram's experiment, our students participated in the exercise because they had been invited to assist someone. Their roles as voluntary participants may have interfered with their capacity to select and carry out a plan consistent with their moral reasoning.¹²⁶

G. *Reevaluation of the Exercise*

In attempting to understand what had happened to our students, I listened again to the audiotapes where I advised them to direct their clients to lie. I noted that some students did not appear to consider the moral implications of my advice. It was not that they thought my advice

when they had promised to do so. Progressively higher stage individuals complied at progressively higher rates. Krebs & Rosenwald, *supra* note 86, at 80. However, stages of moral reasoning did not correlate with student occupation of buildings at the University of California, at Berkeley during the "Free Speech Movement" apparently because of the complexity and inconsistency of the moral reasoning. Kutnick, *The Relationship of Moral Judgment and Moral Action: Kohlberg's Theory, Criticism and Revision*, in S. MODGIL & C. MODGIL, *supra* note 8, at 131-32, 138-39, 144 (1986).

123. *But cf.* Straughan, *Why Act on Kohlberg's Moral Judgments? (Or How to Reach Stage 6 and Remain a Bastard)*, in S. MODGIL & C. MODGIL, *supra* note 8, at 149-57 (Kohlberg's contributions to areas other than moral reasoning are often overlooked because of his extensive work in the field of moral reasoning).

124. *See supra* text accompanying notes 84-91.

125. *Cf.* D. REDFEARN, PREDICTORS OF NURSES' COMPLIANCE WITH PHYSICIANS' INAPPROPRIATE ORDERS 58 (1982) (observing that in the Milgram experiment, the major sanction for the disobedience came from within the individual who had volunteered to participate and obey the orders of the experiment).

126. *See id.*

moral, but they had not interpreted my advice as raising a moral issue.¹²⁷ These students failed the first element of moral conduct by not interpreting the situation as raising a moral problem. A substantial number of other students had attempted to reason with me about the moral propriety of my advice. They had interpreted the moral implications of my advice and had reasoned that the advice was unethical under the ethical rules of professional responsibility. However, they did not act consistently with their reasoning.¹²⁸ These students had successfully negotiated the first three elements of interpretation, analysis and strategy, but failed the fourth element, execution.

The review of the audiotapes, my second analysis of the "Milgram" exercise, and the student journals persuaded me that one possibility for ethical training lay in sharpening the interpretation of moral problems and shaping the behavior associated with the execution of moral conduct. Specifically, empathetic students might interpret the ethical issues implicit in a problematic situation more accurately, and assertive students might be likelier to carry out conduct consistent with their moral reasoning.¹²⁹

127. Researchers have found that many people have difficulty interpreting relatively simple moral situations and have strikingly different levels of sensitivity to the needs of others. Rest, *supra* note 15, at 559.

128. Research confirms the popular wisdom that good intentions are a long way from good deeds. *E.g., id.* at 569.

129. Considerable literature affirms that empathetic listening and assertion strongly correlate with moral development. See 2 L. KOHLBERG, *supra* note 8, at 70-71 (concluding that empathetic identification with the victim in the Milgram experiment was insufficient to permit resistance among Stage 4 subjects); Carlozzi, Gaa & Liberman, *Empathy and Ego Development*, 30 J. COUNSELING PSYCHOLOGY 113, 113-16 (1983) [hereinafter Carlozzi] (higher levels of empathy correlate with higher stages of ego development of which moral reasoning is one construct); Kegan, *Kohlberg and the Psychology of Ego Development: A Predominantly Positive Evaluation*, in S. MODGIL & C. MODGIL, *supra* note 8, at 163 (moral development is increasingly understood as an integral element of ego development); Kessler, Ibrahim & Kahn, *Character Development in Adolescents*, 21 ADOLESCENCE 1, 7 (1986) [hereinafter Kessler] (High school seniors who were taught empathetic listening skills and assertion skills, and who participated in discussions of moral dilemmas, showed significant gains in empathetic listening, assertiveness, and moral reasoning. The gains increased in a four-week post-test.); Mosher & Springhall, *Psychological Education in Secondary Schools: A Program to Promote Individual and Human Development*, 25 AM. PSYCHOLOGIST 911 (1970) (subjects taught basic counseling skills, such as empathetic listening and assertiveness, show a significant change in moral reasoning and ego development); Mosher & Sullivan, *A Curriculum in Moral Education for Adolescents*, 5 J. MORAL EDUC. 159 (1976) (corroborating the finding that empathy training positively influences moral development).

Conventional legal reasoning typically fails to incorporate an empathetic understanding of human conduct, a failure with destructive consequences. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). Empathetic listening and assertion skills can be taught. See R. CARKHUFF WITH R. PIERCE & J. CANNON, *THE ART OF HELPING* 73-110 (2d ed. 1980); C. TRUAX & R. CARKHUFF, *TOWARD EFFECTIVE COUNSELING AND PSYCHOTHERAPY: TRAINING AND PRACTICE* 293-328 (1967); Barkai & Fine, *supra* note 118, at 508.

H. *Applying Kohlberg's Theory to the Clinic Classroom*

I decided to alter two of my courses based on my better understanding of moral development. In Interviewing and Counseling, a Kohlbergian approach was used to teach students how to render moral advice more appropriately. A Professional Responsibility course was designed to foster the students' moral reasoning. The section that follows presents the theory and practice of these two courses.

1. Applying Kohlberg to Legal Counseling

Legal counseling is the process whereby the attorney assists the client in choosing options.¹³⁰ The client may need to choose among options such as pursuing a lawsuit, seeking mediation, or accepting a settlement offer.

Increased assertiveness also aids conduct that is more consistent with one's moral reasoning. More assertive people are likelier to perceive requests of low legitimacy as unreasonable demands and therefore likely not to comply with such requests. Chiauzzi & Heimberg, *Legitimacy of Request and Social Problem Solving: A Study of Assertive and Nonassertive Subjects*, 10 BEHAV. MODIFICATION 3, 9 (1986). Hospital nurses who are more assertive are likelier to refuse to comply with the inappropriate orders of physicians (orders that might lead to the spread of infection). D. REDFEARN, *supra* note 125, at 58. Assertion training facilitates the moral development of individuals who morally reason at Stage 2 by increasing the availability and potential of approval as a consequence of their Stage 3 behavior. This approval positively reinforces continued Stage 3 behavior. It facilitates the moral development of individuals at Stage 3 who typically reason morally so as to avoid conflict and seek approval toward Stage 4 as they learn to identify their rights as legitimate moral criteria. Whiteley, *A Developmental Intervention in Higher Education*, in DEVELOPMENTAL COUNSELING AND TEACHING 251 (1980).

Hospitalized young adult psychiatric patients (whose behavior is often dysfunctionally hostile) have been successfully taught assertiveness. Fielder, Orestein, Chiles, Fritz & Breitt, *Effects of Assertiveness Training on Hospitalized Adolescents and Young Adults*, 14 ADOLESCENCE 523, 523-28 (1979). Timid, withdrawn secondary school students, some of whom were thought to have deep-seated emotional problems, have been successfully taught assertiveness. Rathus & Ruppert, *Assertion Training in the Secondary School and the College*, 8 ADOLESCENCE 257, 262-63 (1973). High school seniors given assertion training showed not only a significant increase in assertiveness at the end of the training, but a further significant increase when measured at a four-week post-test. See Kessler, *supra*, at 6-7.

In the absence of specific empathy and assertion training, neither the traditional law school curriculum nor law practice teaches either skill. Empathetic listening skills ordinarily are not learned from law practice. Barkai & Fine, *supra* note 118, at 502-07. The traditional law school curriculum does not teach empathetic listening. See Condlin, *supra* note 89. In the absence of training, people with either aggressive behavior or nonassertive behavior do not change because they tend to judge their present behavior as effective. See also Delamater & McNamara, *supra* note 119, at 146. Empathetic listening and assertion skills are most effectively taught sequentially, with empathy taught first. *Id.* at 152.

130. D. BINDER & S. PRICE, *supra* note 116, at 131-91; A. WATSON, *supra* note 116, at 141-46.

These various options entail not only legal considerations but moral considerations as well. Kohlberg's theory illustrates that people understand these moral considerations depending on their stage of moral development. Attorneys who recognize these differences can provide relevant counseling by conversing with clients at the clients' moral stage. They also understand the relationship between their own stage of moral development, that of their client, and the ethical rules.

We began by teaching students the basics of Kohlberg's theory. Once students had a working knowledge of Kohlberg, they began to see the relationship to professional ethics.¹³¹ They saw that the legal ethics incorporated in the ethical rules of professional responsibility entail Stage 4 moral reasoning.¹³² Many, if not most, practitioners reason morally around Stage 4 as well.¹³³ Although clients may morally reason at any stage, many clients reason at Stage 3 or lower.¹³⁴ It is often a revelation for students to discover that as practitioners they will operate under a code of professional ethics that many of their clients (most at Stages 1, 2, and some at 3) may find irrelevant.¹³⁵ In criminal practice, the mismatch in moral reasoning may be as extreme as a Stage 5 attorney and a Stage 1 client.¹³⁶ The result of such a mismatch, unless it is understood by the attorney, is that the counseling attorney and the client talk past each other—as I apparently did with Ed. The following student interview of a young man who believed that he was soon going to father a child out of wedlock illustrates how this mismatch operates.¹³⁷

131. I begin teaching students Kohlberg's theory by administering James R. Rest's Kohlberg-based Defining Issues Test (DIT) to them. See *infra* notes 190-96 and accompanying text. During a following class, I return their individual DIT score sheets, a copy of the six DIT stories, and a class score sheet on which scores from the entire class appear anonymously. We then read through one of the stories and the 12 statements that accompany that story. I demonstrate how each of the 12 different statements could be identified by a Stage. Each student is then given a new story, based on an actual field clinic interview, which relates a client's moral dilemma. The story is accompanied by a series of statements that could be identified in exactly the same manner as DIT statements. In this exercise, students average about 85% accuracy in identifying the appropriate Stage and are rarely off by more than one Stage.

132. See *supra* notes 34-35 and accompanying text.

133. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 L. & PSYCHOLOGY REV. 38, 44 (1982).

134. See *supra* text accompanying notes 17-28.

135. See *supra* notes 29-33 and accompanying text.

136. See *supra* text accompanying note 21 (Stage 1 is a characteristic of many adult delinquents).

137. In order to create realistic interviews rich in ethical complexity, I have written a number of brief client scripts that can be played by undergraduate drama students. In one scenario, for example, the drama student claims to have found a box that turns out to contain valuable silverware. After the law student explains the pertinent law (requiring the finder to turn the item over to the police department, CAL. CIV. CODE § 2080.1 (West

2. A "Kohlbergian" Clinic Interview

The client wanted to know his impending rights and duties as an expectant father. He also wondered if he should voluntarily support his child or try to escape his support obligations and pursue his graduate school plans.¹³⁸ After the client had told his story, and the students concluded their discussion of the applicable law,¹³⁹ the older student wondered aloud what the effect of the client's non-support would have on the future child's sense of self-worth. The client shrugged. Several minutes later, the younger student asked the client what his friends and family would think of him if he paid no support. The client thought for a moment and said that he had not considered what they would think. After a pause, the younger student stated that the law clearly required payment of child support, and that if the client paid no support, he could get into a lot of trouble.¹⁴⁰ The client, now visibly interested, asked what kind of trouble. The two clinic interns presented the potential penalties.

The moral criteria the older student thought relevant, Stage 5 considerations of the child's well-being,¹⁴¹ were perceived by the client as irrelevant. The younger student's Stage 3 question, how the client's friends and family would judge his conduct,¹⁴² interested the client, but did not seem persuasive. However, the Stage 1 discussion about punishment¹⁴³ totally engaged the client. Only the Stage 1 moral considerations appeared

1982)), the drama student asks, "Well, now that I know the law, what should I do? I think I'd like to keep it."

We advise our law students that some of the clients they are going to interview will be drama students; the rest are "real" students from the University. The law students treat all of the clients as real students from the University. After the interview, the law students sometimes guess whether their client was real or an actor. Their guessing success so far has been less than chance. I offer to reveal the client status to any law student who asks me after the semester ends. After four semesters, no student has asked. Students are initially curious to know if their client was an actor, but by the end of the semester they lose interest.

138. This client was real; the two interviewing law students later decided he was an actor.

139. A natural father has a statutory duty to provide support for his child until the child's emancipation, which is enforceable by a contempt order. W. HOGBOOM, CALIFORNIA PRACTICE GUIDE FAMILY LAW, ch. 18 (1988). For the applicable California statutory law, see CAL. CIV. CODE §§ 196a, 204 (West 1982).

140. See *supra* note 139.

141. See *supra* notes 38-40 and accompanying text (explaining that Stage 5 lawyers would only be rule-oriented if it were consistent with their theory of social welfare and personal rights).

142. See *supra* notes 25-28 (explaining that individuals who operate at Stage 3 look primarily to social approval or maintenance of relationships in resolving moral problems).

143. See *supra* notes 19-21 (describing the egocentricity of Stage 1).

relevant in helping this client make a moral decision about his conduct.

During the class discussion that followed, we noted in observing the videotaped interview that the older student who first offered the Stage 5 criteria had no difficulty in restructuring his moral reasoning to meet the Stage 1 reasoning of the client. He talked comfortably with the client about the punishment the client might face. As individuals move to higher stages of moral reasoning, they retain the capacity to reason morally at lower stages.¹⁴⁴ However, according to Kohlberg, the contrary is not true. A counselor cannot effectively counsel at a moral stage higher than his or her own present stage of moral development. Individuals may comprehend moral reasoning one stage above their own, but find it less persuasive.¹⁴⁵ They tend not to comprehend moral reasoning more than one stage above their own.¹⁴⁶

The class discussion highlighted the limitations of attorneys whose moral development is less than that of their clients. Clients whose moral development exceeds that of their attorneys may perceive their attorney's counseling as morally shortsighted and immature even if they should agree with the specific advice.¹⁴⁷ Consider, for example, a client who morally reasons at Stage 5 and who is considering withholding payment of her income taxes because she disagrees with certain government policies. She might eventually agree with her attorney's advice that she ought to pay even though she finds his supportive Stage 1 reasoning that "she might go to jail" entirely inadequate.¹⁴⁸ This would remain true of his Stage 2 reasoning that "you should help the government because life is more pleasant if you don't have to think about getting caught,"¹⁴⁹ his Stage 3 reasoning that "your friends will think badly of you if you don't pay,"¹⁵⁰ or his Stage 4 reasoning that "a fairly elected congress passed a tax law that applies impartially to everybody."¹⁵¹

3. Moral Stages and Ethical Responsibilities

Law students typically do not understand that people use different moral criteria unless they come to understand the Kohlberg system. Instead, they tend to think exclusively in terms of "good" and "bad"

144. Kohlberg, *The Cognitive Developmental Approach to Moral Education*, 56 PHI DELTA KAPPA 670, 671 (1975).

145. *Id.*

146. *Id.*

147. J. FRAENKEL, *HOW TO TEACH VALUES* 60 (1977).

148. *See supra* notes 19-21 and accompanying text.

149. *See supra* notes 22-24 and accompanying text.

150. *See supra* notes 25-28 and accompanying text.

151. *See supra* notes 34-37 and accompanying text.

morals.¹⁵² To an unreflective law student who reasons at Stage 4, a "good" client is one who follows the law and a "bad" client is one who does not. These Stage 4 students assume that clients who do not follow the law are immoral because, for these students, following the law is itself a moral proposition.¹⁵³ For their Stage 3 clients, the moral imperative resides in loyalty and in how they will appear to others.¹⁵⁴ These clients cannot be reached by moral reasoning that regards the law itself as a moral criterion.

Yet, the *Model Rules* state that "[i]n rendering advice, a lawyer may refer not only to the law but to other considerations such as moral . . . factors."¹⁵⁵ If clients do not respond to the factors lawyers regard as appropriate moral guidelines, how are lawyers to render effective moral advice to their clients?

Lawyers who reason at Stages 4 or 5 should render moral advice through criteria that their clients find relevant. Suppose, for example, a client seeks advice regarding a \$500 debt owed to a sister-in-law whom everyone in the family shuns. The sister-in-law now lives in a far-off city. She has recently written to the client demanding repayment. The debt, let us suppose, is subject to the Statute of Frauds.¹⁵⁶ The lawyer notes this affirmative defense and suggests that the sister-in-law would have to bear the expense of traveling to the client's hometown if she wants to contest the debt. The client responds that he understands that legally the debt is unenforceable but is unsure whether he ought to repay the debt anyway.

The alert and empathetic lawyer realizes the client is in a moral dilemma. The client, we will assume, morally reasons at Stage 3.¹⁵⁷ He understands his voluntary repayment primarily in terms of loyalty and of how he will appear to others. His relationship to his sister-in-law becomes a significant moral criterion. Does he have a special obligation to her as her brother-in-law? Will his family think he's a good person if he does not repay?

Unless the lawyer thinks in Kohlbergian terms, she is likely to assume that her client understands the moral dilemma the same way she does, as a Stage 4 moral dilemma between conflicting rules.¹⁵⁸ The client, however,

152. See *supra* notes 49-51 and accompanying text.

153. But cf. *supra* notes 33-37 and accompanying text (asserting that Stage 4 "moral reasoning is characterized by reference to impartial rules of a social system").

154. See *supra* notes 25-28.

155. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1989).

156. The Statute of Frauds is based upon the common law statutory requirement that debts, including a contract for a sale of goods when the price exceeds \$500, must be in writing to be enforceable. See BARRON'S LAW DICTIONARY 453 (2d ed. 1984).

157. See *supra* notes 25-28 and accompanying text.

158. See *supra* notes 34-37 and accompanying text.

does not see the dilemma revolving around rules at all, but around issues of family loyalty and the appearance of being a good person. The way in which the lawyer postulates the moral problem is irrelevant to the client. An unreflective lawyer cannot offer moral advice as the ethical rules urge.¹⁵⁹

Were the lawyer at Stage 5, she would perceive the client's problem differently. For her, issues of loyalty and appearances are relevant but insufficient criteria for resolving the dilemma. From her perspective, one owes essentially the same moral obligations to everyone, whether or not they are family or one's friends. The essence of her Stage 5 "due process" moral reasoning is that everyone is entitled to a fair and impartial legal process irrespective of their particular identity.¹⁶⁰

The Stage 5 lawyer would find the law of contract, including the Statute of Frauds, important but not decisive in deciding what ought to be done. The lawyer, noting that the debt was entered into freely pursuant to impartial laws between unsophisticated parties with an expectation of repayment, would most likely conclude that the debtor-client has a moral obligation to repay his sister-in-law.

How do these two lawyers understand their obligations to provide moral advice? The Stage 4 lawyer is likely to render moral advice when she believes that she is required to do so.¹⁶¹ She is likely to look to the ethical rules as a legitimate and authoritative source of direction. Although the *Model Rules* refer specifically to "moral factors," they concern themselves primarily with rendering advice that advances the client's interests.¹⁶² They provide:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result

159. See *supra* text accompanying notes 130-32.

160. See *supra* notes 37-40 and accompanying text.

161. See *supra* note 37 and accompanying text.

162. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1989) (providing that lawyers may refer to moral factors when rendering advice). See also Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066 (1976) (appearing to support attorney ethics at Stage 3, though not analyzed from a Kohlbergian basis). Fried writes that the lawyer-client relationship is like a friendship involving "an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity." *Id.* His view finds support in the *Model Code* which states that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1981).

in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act¹⁶³

Although, the *Model Code* does not require the counseling lawyer to render advice under the circumstances described, it permits nonlegal advice subject to the client's rejection:

Advice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however . . . the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.¹⁶⁴

Overall, the *Rules* and the *Code* appear to adopt a laissez-faire attitude toward rendering moral advice when the client's intended action is not contrary to the law. The Stage 4 counseling attorney is likely to conclude that she has no moral obligation to help resolve the client's dilemma. No rule directs her to intervene.¹⁶⁵ Furthermore, a rule-based Stage 4 analysis does not resolve the client's moral dilemma.

The Stage 5 lawyer takes a different perspective on the ethical rules of professional responsibility. As a thoughtful and rationally constructed directive, the rules are entitled to great weight. Yet, as with all societal rules, they are not definitive.¹⁶⁶ The Stage 5 lawyer believes that she should follow those rules that help bring about a fair and just society, and protect individual rights while promoting a common good.¹⁶⁷ Balancing both concerns, the Stage 5 lawyer is likely to conclude that not only should her client pay the debt, but that she should intervene to offer moral advice.

The first obstacle the Stage 5 lawyer encounters in advising her Stage 3 client is that her concerns for the protection of individual rights and betterment of society as a whole are not the concerns of the client.¹⁶⁸ She

163. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 comment 5 (1989).

164. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

165. See *supra* notes 37-40 and accompanying text.

166. See *supra* note 37 and accompanying text.

167. See *supra* notes 38-40 and accompanying text.

168. Compare *supra* notes 38-39 and accompanying text with notes 25-28 and accompanying text.

must speak in terms of Stage 3 criteria that the client finds morally relevant. She might, for example, suggest that no one will seriously criticize the client for paying a debt simply because he was not legally compelled to do so. Some family member may tease him, but none will judge him a bad person. She might add that, if he does not repay the debt, he may forever destroy any chance for family reconciliation—not just for this generation, but for the next as well—for whom the present dispute would otherwise be just ancient family history.¹⁶⁹

In this instance, we see significant differences between Stage 4 and Stage 5 lawyers. The Stage 5 lawyer may be more likely to intervene and offer moral advice, even though the ethical rules of professional responsibility do not require doing so. The Stage 5 lawyer is also more likely to suggest conduct that counters the client's immediate self-interest.

4. In Defense of an Ethically Neutral Clinic Pedagogy

The ethics that Condlin observed in the clinic, a “morality . . . collapsed into legality,” is, from a Kohlbergian perspective, the ethic of Stage 4.¹⁷⁰ In response to Condlin's observation, this paper views the position of the clinician as ethically neutral in the sense that the most important role of the clinician is to foster the moral development of their students. Persuading students to act ethically according to various ethical rules counters fostering their moral development. An alternative response to Condlin's criticism is to find a morally superior professional ethic that does not “collapse into legality.” One tempting solution is to substitute Stage 5 “principled” ethics for Stage 4 “rule” ethics. Ethics built around principles would presumably dampen, if not eliminate, the twin evils of domination and manipulation.

In a recent article, Professor William H. Simon has argued vigorously for such principled ethics.¹⁷¹ The distinct value of Simon's position, were it feasible within a clinical context, is that the clinical instructor would play a role of moral authority within the classroom, albeit at a level of “principled” authority.¹⁷² However, Simon's approach, if implemented

169. These insights would reflect an empathetic lawyer, one who is able to project herself into the client's situation and reflect feelings that the client perceives as relevant. See *supra* note 116 and accompanying text.

170. Condlin, *supra* note 89, at 331. “Positive legal rules are the only check on such a person's behavior, morality is collapsed into legality, and maximizing to the limits of one's constraints is the operative moral code.” *Id.*

171. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

172. *Id.* at 1090. Simon advocates that the lawyer should take a “discretionary” approach, which, in considering the relevant circumstances of the case, seems most likely to promote justice. His approach is a flexible and non-mechanistic way of resolving moral

within the clinic, would "collapse into legality."¹⁷³ I present his case for purposes of demonstrating that a Kohlbergian approach is more appropriate in the clinical context than the enlightened and thoughtful approach of "principled ethics."

Simon argues that the conventional approach to legal ethics, operating within a system of formalized rules, is rigidly "categorical."¹⁷⁴ Thus, a finding that a client's claim is legally permissible categorically justifies the ethics of assisting that client.¹⁷⁵ Concepts of what are "permissible" and "ethical" collapse into a single coterminous category. Simon argues that lawyers should exercise discretion in making ethical decisions by considering the merits of their client's claims and goals against those of their opponents as well as considering the public good.¹⁷⁶

From a Kohlbergian perspective, Simon argues for Stage 5 "principled" legal ethics¹⁷⁷ in lieu of the conventional Stage 4 "law and order" ethics. In place of a Kohlbergian Stage 4 rule admonishing the lawyer to "zealously"¹⁷⁸ represent the client's interests, Simon argues that "the lawyer needs to develop a style of representation that will . . . best contribute to just solutions."¹⁷⁹ In place of a rule that categorically empowers the client to decide whether to plead an affirmative defense,¹⁸⁰

dilemmas.

173. *Id.*

174. [C]ategorical . . . mean[s] simply the practice of restrictively specifying the factors that a decision maker may consider when she confronts a particular problem. In the categorical style, a rigid rule dictates a particular response in the presence of a small number of factors. The decision maker has no discretion to consider factors she encounters that are not specified or to evaluate specified factors in any way other than that given in the rule.

Id. at 1086.

175. Simon states that a "lawyer has little or no discretion to consider whether there might be legal reasons why a particular course of action should not be pursued or a particular claim not enforced, even though the course is legally permissible or the claim potentially enforceable." *Id.*

176. *Id.* at 1083, 1090. Simon finds support for his "discretionary" approach in the scarcity of legal resources which, under the prevailing approach, unfairly favors the enforcement of the rights of the wealthy and privileged. *Id.* at 1092-96.

177. Simon writes, for example, that "issues of legal ethics that are usually understood as arising from the conflicts between the interests of the client and those of third parties and the public . . . [are] better understood in terms of competing legal ideas." *Id.* at 1084.

178. *See supra* note 6. Geoffrey Hazard describes the ethical rules of professional conduct as "[providing] a black letter rule . . . of the lawyer's legal obligations." Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1982).

179. Simon, *supra* note 171, at 1098.

180. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1981) ("[I]t is for the client to decide . . . whether he will waive his right to plead an affirmative defense.").

Simon calls for an "interpretive judgment" which would vindicate the legislative purpose of the affirmative defense.¹⁸¹

Simon's argument can be supported as an ideal to which lawyers may aspire. However, his enlightened approach does not provide guidance for clinical teaching.¹⁸² Simon's proposed "discretionary ethics" lack relevancy from a clinical perspective because the majority of lawyers lack the capacity, from a Kohlbergian perspective, to engage in the moral reasoning that the Simon ethic entails.¹⁸³ This incapacity is not simply an intellectual deficiency that can be corrected by a course in remedial ethics, but reflects a more fundamental immaturity in moral development. Hence, even if lawyers were intellectually convinced of the correctness of his argument, they could not morally reason at the level his ethics demand.¹⁸⁴

A second limitation to Simon's approach is that it does not tell the lawyer what to do. Simon presents the hypothetical used in this paper: a client who owes a debt subject to the Statute of Frauds.¹⁸⁵ Simon argues that from an "ethics of discretion" perspective, the debtor's attorney should advise her client not to interpose the defense. Simon argues that, if the lawyer finds that the purpose of the Statute of Frauds is to preclude judicial enforcement in factually disputed cases when reliable

181. Simon, *supra* note 171, at 1125.

182. Professor Simon has previously faulted the psychological perspective that has developed in clinical education as turning the students' attention inward toward subjective issues of attorney and client feelings and away from the political and ethical issues of law and law practice. Simon, *Homo Psychologicus: Notes on a New Formalism*, 32 STAN. L. REV. 487 (1980). In a review of Simon's article, Professor James R. Elkins, concludes that what is needed is "a conceptualization of experience which welds subjective awareness to social action." Elkins, *All My Friends are Becoming Strangers: The Psychological Perspective in Legal Education*, 84 W. VA. L. REV. 161, 219 (1981). Kohlberg's theory connects one's moral criteria as subjective awareness directly to moral reasoning as an element in social action.

183. Simon argues that lawyers can engage in what I refer to as principled Stage 5 moral reasoning because they already must do so in order to argue effectively before a court. Simon, *supra* note 171, at 1122. My own experience in the local state courts would place the great majority of argument at a rule-based level, comparable to Stage 4. I know of no rigorous empirical studies. Certainly, the data we do have points to Stage 4 lawyer moral reasoning. See Landwehr, *supra* note 133.

The issue, however, is somewhat more complex than this. Simon argues that because lawyers can make principled legal arguments before a court, they will be persuaded by principled ethical arguments in resolving their moral dilemmas. The capacity to make a principled argument as an intellectual skill is a qualitatively different phenomenon than the perception that principles are morally superior to rules in reasoning through moral dilemmas.

184. An intellectual understanding of Kohlberg's system does not by itself lead to further moral development. Rest, *supra* note 15, at 596.

185. Simon, *supra* note 171, at 1123-25. See *supra* text accompanying note 15.

evidence is unavailable, then, if reliable evidence is available, it is "quite plausible" for the lawyer to conclude not to plead the Statute.¹⁸⁶ However, Simon omits telling the reader how the lawyer who has made such a principled decision should explain her decision to the client.

The critical problem from a clinical perspective is not what the lawyer thinks is ethically right, but how this ethical reasoning is communicated to the client. Simon's omission is not a mere oversight because a system of principled ethics speaks only to those who morally reason in those terms. Unless the client reasons at Stage 5, he will not accept the morally sophisticated reasoning Simon offers.¹⁸⁷ A Kohlbergian perspective provides a much more relevant approach to the critical issue of client communications.

A third difficulty with a clinical implementation of Simon's discretionary ethics is that Simon's approach would likely result in less ethical practice. Some lawyers, who would be liberated from the current categorical rules if left to reason at what they imagine to be principled discretionary ethics, also morally reason at Stage 3. Liberated from following a rule, they would make ethical decisions on the basis of client or law firm loyalty, not principled ethics.¹⁸⁸ Stage 4 categorical rules counteract this tendency, which Simon calls "libertarian ethics,"¹⁸⁹ to perceive the highest ethical good as protection of one's own client or law firm.

However, an unanswered question remains as to whether it is possible through clinical teaching to positively influence the moral reasoning of law students. The next section reports my most recent attempt at doing so.

5. Teaching Professional Responsibility

A colleague and I decided to apply some of the insights we had learned about fostering moral development in the clinic to teaching a

186. Simon, *supra* note 171, at 1125.

187. Of course, if the client morally reasons at Stage 5, he already may have concluded that he should not plead the Statute of Frauds. Even though the client's training is presumably different than the lawyer's, principled moral reasoning from different philosophical systems tend to converge into common principles. See Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 362-64 (1981) (various theories of moral philosophy share the concept that ethics is an autonomous form of reasoning which depends on cognitive as well as emotional capacities and is based in fundamental concepts of equity and rationality).

188. The extant studies suggest that attorneys are "client-dominated," that is, that they essentially act out the will of their clients, especially where repeat business is important. See *supra* note 41.

189. Simon, *supra* note 171, at 1084-86.

course in Professional Responsibility.¹⁹⁰ Our explicit aim was to see if clinical experimental teaching methods could be used to teach substantive Professional Responsibility and, at the same time, foster the development of moral reasoning. We constructed a series of attorney-client simulations to be conducted out of class in which the students confronted various ethical dilemmas. Some of the exercises were quite elaborate, involving four or more students meeting several times during the week to complete the exercise. The students were not told beforehand what ethical issues the exercise entailed. The following week in class, students were sorted into groups of three or four and asked to: (1) identify the ethical issue raised; (2) determine what ought to be done; (3) reach a consensus on a rule that best responded to the issue; and (4) justify the rule in terms of certain operative principles provided. Although the students were invited to resort to any of the ethical rules for guidance, they could not justify their own rule on a basis that was supported by a statutory rule. The groups were typically given thirty minutes to perform this task.

While the students worked, my colleague and I circulated among the students without offering advice on how to proceed or giving opinions about their rules. We occasionally asked them to clarify ambiguities in their newly-drafted rules and we responded to factual uncertainties in the problem. A spokesperson from each group stated the group's rule, or an "interim report" if consensus had not been reached, and the group's justification for the rule. We analyzed each proffered rule by asking the effect of the rule in protecting: (1) the integrity and self-respect of the lawyer; (2) the integrity and autonomy of the attorney-client relationship; (3) the fairness and efficiency of the legal system; and (4) the public's

190. This course was taught by myself and Professor Paul Wohlmut of the University of San Diego School of Law. Interest in teaching professional responsibility was accelerated by Watergate. Ackerman, *Law Schools and Professional Responsibility: A Task for All Seasons*, 88 DICK. L. REV. 202, 205 (1984); Bresnahan, "Ethics" and the Study and Practice of Law: The Problem of Being Professional in a Fuller Sense, 28 J. LEGAL EDUC. 189, 192-93 (1976). In response to Watergate, the American Bar Association in 1975 mandated instruction of professional responsibility in all accredited law schools, though no pedagogical method was specified. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 302(a) (1988). Clinicians have long argued that clinical education is the best vehicle for teaching legal ethics. Gold, *Legal Education, Law and Justice: The Clinical Experience*, 44 SASK. L. REV. 97, 109 (1979); Thomforde, *Public Opinion of the Legal Profession: A Necessary Response by the Bar and the Law School*, 41 TENN. L. REV. 503 (1974). The clinical environment facilitates role-playing, and representing clients necessarily entails making moral judgments. Jewell, *Teaching Law Ethically: Is It Possible?*, 9 DALHOUSIE L.J. 474, 509 (1984). The clinic provides students with a safe environment in which to explore the emotional conflicts moral dilemmas inevitably engender. Watson, *Lawyers and Professionalism, A Further Perspective on Legal Education*, 8 U. MICH. L. REV. 248, 268-71 (1975). Little has appeared in the literature relating the experience of clinicians in teaching professional ethics. See, e.g., Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systematic*, 52 U. COLO. L. REV. 409 (1981).

right to be kept informed.¹⁹¹ Over the semester, the students devoted more than half of their total class hours either working together in small groups, writing rules, or in class discussion, evaluating these rules.

We wanted to know how this experiential teaching method influenced moral reasoning. To measure this influence, we administered a Defining Issues Test (DIT) to each student during the first week and last week of class.¹⁹² Although the DIT is based on Kohlberg's theory of moral development, the DIT does not purport to measure stages in the manner of Kohlberg's structured interviews. The DIT is designed to measure the degree to which a subject uses principled moral reasoning, characteristic of Stage 5, in responding to the moral dilemmas provided by the DIT.¹⁹³ On the first DIT, given during the first week of class, the students' mean score was 47.8, typical of second-year students.¹⁹⁴ On the second DIT, given during the fourteenth and final week of class, the students' mean score was 61.8. Although the difference is statistically significant, and indicates on its face a major shift among the students toward principled moral reasoning, the results should be read with considerable care.¹⁹⁵ Although specific responses to the DIT were not discussed after the first administration, we presented Kohlberg's theory as a forty-minute lecture and discussion during the middle of the semester. We cannot be sure, for

191. We claim no special originality or moral insight in formulating these four principles — only that they seemed to work well in class.

192. Ideally, we would have administered a pre- and post-course structured Kohlbergian interview. However, this administration would have required trained interviewers who would have had to invest about 60 hours of interview time. Although the DIT may be a less valid and reliable instrument to measure changes in moral reasoning than Kohlbergian interviews, we felt that its administrative simplicity, and the fact that we were only looking for any substantial change in the class as a whole, more than justified its use. Rest, *supra* note 15, at 583, 585.

193. *Id.* at 584. The DIT employs several different reporting scales. The DIT retains a Stage 6, which the Kohlberg interview has dropped. According to the DIT Guide, the P scale is "interpreted as the relative importance that subjects give to Principled moral considerations, that is, to Stage 5 and 6 items." J. REST, GUIDE FOR THE DEFINING ISSUES TEST 5 (1987).

194. Rest reports the following mean P scores for purposes of comparison: junior high school students, 20.00 (N=270); senior high school students, 31.03 (N=270); undergraduate college students, 43.19 (N=270); graduate students, 44.85 (N=270). J. REST, *supra* note 193, at 13.

195. Conklin, among others, in commenting on the present inadequacy of clinical research, has urged clinicians to engage in more systematic empirical research "that has a substantial claim to objectivity." *The Moral Failure*, *supra* note 93, at 338. Certainly, clinical education has a substantial potential to contribute to legal scholarship through an empirical perspective. See generally Leleiko, *Clinical Education, Empirical Study and Legal Scholarship*, 30 J. LEGAL EDUC. 149 (1979). We believe that administering an objective instrument, such as the DIT, is a far superior alternative to reporting our subjective impressions of changes in the moral reasoning of our students.

example, how much of the difference in the students' mean score is accountable to merely an intellectual understanding of principled moral reasoning that permitted the students to simply "take a better test" the second time.¹⁹⁶

V. CONCLUSION

Persuasive evidence exists demonstrating that it is possible, using the experimental, "learning-mode" teaching methods characteristic of good clinical teaching, to positively influence the moral development of students. The first step in moral conduct is the awareness that a moral problem exists. Empathy increases this awareness, and, as we have learned, empathy is a teachable skill. The second step is moral reasoning. The difference in DIT scores between our first and last week in the Professional Responsibility course, as well as reports of other experientially taught courses, suggest that experiential teaching methods may positively influence moral reasoning. The third step is choice; individuals consider whether they can carry out morally correct conduct against other competing interests. Assertive people are more likely to carry out this conduct, and, as we have discovered, assertiveness too is a teachable skill.

196. A subject's understanding of Kohlberg's theory or an admonition to "fake good" by taking the DIT to show "the highest principles of justice," does not seem to raise DIT scores. Rest, *supra* note 15, at 24. "Only subjects with high moral comprehension tend to have high DIT scores." Rest & Thoma, *supra* note 52, at 712. However, we hope to repeat the Professional Responsibility course a second time without referring to Kohlberg's theory (recommendation made to us by James Rest through personal correspondence) (March 12, 1989).

