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# Professional Ethics and the Lawyer's Duty to Self

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# PROFESSIONAL ETHICS AND THE LAWYER'S DUTY TO SELF

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A peaceful society depends on the high ethical standards of its lawyers: Communal trust in the legal process gives force to the law that helps to maintain society as a cohesive organism. In the past decade of turmoil, mutual trust and confidence in our institutions has declined; individual interests have been increasingly collectivized and subjected to legal processes.[1] Under such circumstances, the ethics of lawyers have become still more noticeable and important.

It is impossible to determine whether there has been a decline or an improvement in ethical standards of lawyers in this era compared with other times. The new importance and prominence of lawyers in society is a state of affairs which seems likely to continue for some time, however, and attorneys[2] and courts[3] have addressed themselves in recent years to the ethical standards required by the lawyer's new role. This Commentary asserts that although much attention has been paid to immoral conduct and the means to prevent it, the greater hazard to lawyers generally is that of amoral conduct. The appropriate safeguard against amorality is greater concern for the lawyer's duty to self.

## I. AMORALITY AND RELATIVISM

The conventional distinction between amorality and immorality is particularly cogent for the lawyer. Amoral conduct implies that the actor has no standard of right and wrong by which to judge conduct

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1. *See generally* G. LODGE, THE NEW AMERICAN IDEOLOGY (1975).

2. *See, e.g.*, M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

3. *See, e.g.*, United Mineworkers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (lawyer paid salary by union may represent members without charge); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964) (union may channel members' job injury claims to selected lawyers); NAACP v. Button, 371 U.S. 415 (1963) (NAACP may encourage public to bring suits through NAACP staff attorneys).

and, in fact, fails to perceive that the conduct in question even raises an ethical issue. Like a cog in a machine, the amoral person is oblivious to all about him save his own narrowly defined function. Expediency in fulfilling one's role is perceived as the final and the only good. Immoral conduct, on the other hand, implies that the actor is aware of moral standards but has consciously chosen to violate them.

While immorality—conscious wrongdoing—is a frequent subject of criticism of lawyers,[4] amorality may create more widespread uneasiness among the public. No research on this point has been published, but it seems reasonable to suppose that the lawyer's role as a hired advocate is itself the source of much concern. Those vanquished in legal disputes rarely attribute high moral purpose to their opponents. More often than not, and sometimes with justification, the citizen unhappily or unsuccessfully entangled in legal machinery blames the lawyer, the judge, or the legal process itself for his misfortune. It is easy and natural to view opposing advocates as unprincipled hired gunslingers.

The general tendency in the United States to legalize disputes[5] exacerbates this problem. The courts are often the forum chosen to resolve disputes between deeply held values and to answer political questions. Whether courts are the proper agency to resolve such conflicts is beyond the scope of this discussion. Whenever members of the public are dissatisfied with the outcome of the adversary process, however, they are likely to question the competence and the morality of the advocates of opposing views.

In a society undergoing major social, political, and moral changes, law intrudes farther and farther into the lives of individuals and institutions; the potential for discontent with lawyers, the agents of uncomfortable change, inevitably grows. In these circumstances, the lawyer is or should be drawn to systematic examination of his purpose and principles.[6]

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4. *See, e.g.*, J.C. GOULDEN, THE BENCHWARMERS (1974); R. NADER, VERDICTS ON LAWYERS (1976).

5 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 89-93 (J. Mayer & M. Lerner eds. 1966).

6. The gap between philosophers and the practical person involved in the daily task of making society work is a continued source of mutual mistrust, too often a convenient excuse for one group not to consider the thoughts and insights of the other. Such a state of affairs is tragic, since neither group can realize its full potential without the other. The philosopher suffers if excessive detachment from practical things divorces philosophical speculation from reported reality and renders speculation irrelevant; the

The lawyer's usual response to accusations of amorality rests on the nature of the adversary process in which he is engaged. Neither advocate in a dispute can assume the truth of his position; "truth" emerges from a clash of opposing views.[7] So stated, however, this response posits a problem without resolving it. If the contest determines truth, then the advocate for the loser puts forth untruths. Witnesses give conflicting statements about the same facts; if at least one description of the facts is false, it would appear that a substantial number of lawyers are liars. Citation to "authority" is matched by citation to countervailing "authority" to such a degree that the structure of law appears to be a Tower of Babel in danger of collapsing under the stress of lawyers clamoring over, around, and under the edifice.[8] This led Felix Cohen to observe: "How the edifice of justice can be supported by the efforts of liars at the bar and ex-liars on the bench is one of the paradoxes of legal logic which the man in the street has never solved." [9]

The simplistic view of the adversary process therefore merely states, without resolving, the suspicion that the legal system chains lawyers to immorality, to the conscious espousal of error. Philosophy of law, of

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practical person's rejection of philosophical speculation may cause a narrow perception of reality and values, crippling his ability to function effectively in a world of change. *See* Frankel, *Philosophy of Practice*, in ETHICS AND SOCIAL JUSTICE 1 (E. Kiejer & M. Munite eds. 1968). Lawyers, as the persons charged with carrying out many of society's functions, are in particular need of a capacity for philosophical thought. At the same time, lawyers are continually confronted with reality and the pressures of representing clients, paying the overhead, and living their own lives. With regard to the subject of this Commentary, the lawyer's potentially conflicting roles are the source of continuous ethical difficulties; *see* notes 20-31 *infra* and accompanying text. Such issues cannot be understood or satisfactorily resolved without awareness of philosophy in its etymological sense—the love of wisdom.

7. *Report of the Joint Conference of the American Bar Association and the Association of American Law Schools on Professional Responsibility*, 44 A.B.A.J. 1159, 1160 (1958) ("An adversary presentation seems the only effective means for combatting [the] natural human tendency to judge too swiftly . . .").

8. Excessive complexity can, of course, destroy the fairness, comprehensibility, and utility of an area of legal principles designed to achieve societal goals. Aside from popular conceptions about the complexity of a field of "law," even lawyers sometimes recognize that something is remiss in an area of legal principles when its proclaimed goals are frustrated, injustices multiply geometrically, and experts in the field cannot hope to comprehend all areas of the subject. The Internal Revenue Code comes to mind as one of our more byzantine legal structures in need of substantial reform. The primary political obstacle to reform will probably be the fear of massive unemployment among accountants and lawyers if true reform did take place.

9. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 238 (1950).

course, is not a topic that often engages practicing attorneys, nor does it figure largely in law school curricula.[10] Those who reflect most seriously about the adversary system, however, reject the simplistic view that law is a lying contest; they realize that the adversary system is an ill-defined process in which a forcefield of shifting principles interacts with multidimensional "facts."[11]

> In a certain sense, it is true that lawyers are liars. In the same sense, poets, historians and map-makers are also liars. For it is the function of lawyers, poets, historians and map-makers not to reproduce reality but to illumine some aspect of reality, and it always makes for deceit to pretend that what is thus illumined is the whole of reality. None of us can ever possibly tell the whole truth, though we may conscientiously will to do so and ask divine help towards that end. The ancient wisdom of our common law recognizes that men are bound to differ in their views of fact and law, not because some are honest and others dishonest, but because each of us operates in a value charged field which gives shape and color to whatever we see.[12]

Thus, one philosophical assumption lawyers ought to share is that truth is a matter of degree, and that dogmatic assumptions about reality, facts, legal principles, values, and ethics are working presumptions at best and dangerous traps at worst. The principle of tolerance for the views of another is an occupational prerequisite for the lawyer.

A philosopher would characterize this view of the legal process as "relativism"; it would be emphatically rejected by anyone believing that either reason or revelation produces absolutes. The lawyer is more likely to call his attitude "common sense." The adversary process rests on the assumption that the search for truth is a continuous process, and that even in the precise sciences, one paradigm regularly gives way to another contradictory paradigm,[13] with no end to the process expected.

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10. An important departure from the more traditional law school jurisprudence teaching materials is W. BISHIN & C. STONE, LAW, LANGUAGE, AND ETHICS (1972). The book examines the philosophical assumptions that underlie different jurisprudential "schools," and does not merely collect the writings of the leaders of each labeled school to be studiously read and memorized by students. The former approach develops a deep understanding of the philosophical issues involved and a healthy skepticism necessary for competent lawyering. *See* Oberer, *Luncheon Speech to New Bar Members*, 3 UTAH B.J. 25 (1975).

11. *See generally* F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933).

12. Cohen, *supra* note 9, at 238.

13. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

Even the fundamental legal principles on which social order seems to rest are subject to continual change. For example, the value and concept of "personhood" has been central in western legal thought,[14] and underlies the expression of several legal concepts across the range of disputes and relationships found in our legal system. "Person" is a relatively stable concept, yet it is not immutable; it once included the concepts of ship and corporation and excluded slaves and women. Tampering with the concept of personhood can send tremors throughout society, as when courts exclude fetal life from the protection of the right of personhood,[15] establish when personhood ends for the hopelessly incapacitated,[16] equalize voting rights by tying voting power to personhood rather than to acreage,[17] or elaborate and extend the rights of personhood in the civil rights and criminal law decisions of the past few decades.[18]

At the periphery of our culture are concepts not central to what a society is or aspires to be and therefore more vulnerable to the assault of fact and experience. For example, the holder-in-due-course concept of commercial law, a cardinal rubric for generations of lawyers and a mercantile society, is rapidly eroding, since the underlying purpose for its existence is no longer relevant.[19] In the dark space of discarded legal principles, the holder-in-due-course doctrine may soon find the companionship of privity, "states' rights," proximate cause, pierced corporate veils, and the Latin maxims of better or at least older days.

The individual who chooses law as a profession is soon confronted in law school with the subtleties of the law in evolution. By a process

14. *See generally* THE STATUS OF THE INDIVIDUAL IN EAST AND WEST (C. Moore ed. 1968).

15. *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

16. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (guardian of comatose patient may withdraw life-support systems if physician and Ethics Committee find no reasonable possibility of recovery).

17. Reynolds v. Sims, 377 U.S. 533, 580 (1964) ("people, not land or trees or pastures, vote"); Gray v. Sanders, 372 U.S. 368 (1963) (voters in different counties must be given equal weight); Baker v. Carr, 369 U.S. 186 (1962) (apportionment of state legislature presents justiciable question of equal protection).

18. *See, e.g.*, BUREAU OF NATIONAL AFFAIRS, THE CRIMINAL REVOLUTION & ITS AFTERMATH: 1960-1974 (1975); A. GOLDBERG, EQUAL JUSTICE (1971).

19. *See, e.g.*, Robbert, *Consumer Protection in Practice: Securing Debtors' Rights*, 23 LA. B.J. 151 (1975); Note, *Focus on Debtors' Rights: Making The Bill Collector Pay*, 23 U. KAN. L. REV. 681-707 (1975).

like osmosis, one absorbs the traditions and methodology of the profession. One learns to "think like a lawyer," analyze the "facts" in light of "the law," and remain poised in a dispute without knowing or caring what its outcome will be; "issues" and not conclusions are examined. The relativism necessary to the practice of law shifts easily into cynicism; tolerance for other views becomes quite naturally the belief that all views are equally wrong, and that "truth" and "justice," the supposed aims of the legal process, are empty words. The adversary process of law is naturally seen, not as the central nervous system of society, but a cynical exercise of lawyerly skills by practitioners indifferent to the outcome. The legal profession, while no more or less vulnerable to immorality than others, seems to be in considerable danger of a profound amorality.

## II. THE CODE OF PROFESSIONAL RESPONSIBILITY

Into an uncertain world of ever-changing fact and principle steps the skeptical lawyer, trustee for society's values, well schooled in his craft and assigned diverse roles by the organized bar's self-defined Code of Professional Responsibility.[20] The Code assumes that universal ethical responsibilities for lawyers are to be defined in terms of the lawyer's duties to the profession, his client, the courts, and society at large. The Code has been criticized because it was drafted with the perspective and to meet the needs of lawyers practicing in large firms, while ignoring the circumstances of solo or small firm practitioners;[21] because it is more concerned with protecting the economic interests of attorneys than expanding the availability of legal services;[22] because universally defined ethical duties cannot meet the needs of lawyers operating in a bewildering array of different circumstances;[23] because the Code's definition of minimum roles and duties are interpreted by lawyers as a definition of maximum roles and duties.[24]

Some of these criticisms are valid, but miss the fundamental difficulty of the Code. The Code begins on the correct path by defining the *roles*

20. ABA CODE OF PROFESSIONAL RESPONSIBILITY; ABA CODE OF JUDICIAL CONDUCT.

21. Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968).

22. Note, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

23. *See, e.g.*, J. CARLIN, LAWYERS ON THEIR OWN 3 (1962); Shuchman, *supra* note 21.

24. *See, e.g.*, J. PIKE, BEYOND THE LAW 11 (1963).

lawyers must play in a legal system. In an adversary system, the Code sees the duty of lawyers to defend their clients "zealously within the bounds of the law";[25] lawyers are guardians of the "integrity" of the profession,[26] and "active assistants in improving the legal system."[27] Specific ethical responsibilities are extensively defined through three levels of varying generalities and sanctions: the canons, the ethical considerations, and the disciplinary rules. The canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profesion." The ethical considerations are "aspirational in character and represent the objectives toward which every member of the profession should strive." The disciplinary rules state the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[28]

Even though the Code of Professional Responsibility is the product of a private special interest group representing fewer than all lawyers, it is in general the product of good intentions, and has had a salutary effect in establishing definitions for performance of the roles fulfilled by many members of the profession. Many state bars have adopted it as the basis from which disciplinary action will be determined. It is the focus of most law school classes on legal ethics. Without question, the Code is the underlying paradigm by which many lawyers establish and measure their ethical values and behavior. Were it scrupulously enforced,[29] the Code would be a powerful force in raising the public standards of professional responsibility to the client, the profession, and the administration of justice. The major defect of the Code, however, is that it simply does not go far enough.

The Code does not mention the problem of amorality, although it does indirectly serve to define the difficulty further. The Code prescribes duties the lawyer owes to others—to society, to his profession, to his client—but says nothing of the lawyer's duty to self. The internal guide-

25. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.

26. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 1. Canons 2 and 3 and the disciplinary rules may also be viewed as rules seeking to maintain the "integrity" of the profession—the economic "integrity" of the profession.

27. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 8.

28. ABA CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement.

29. *See* Thode, *The Duty of Lawyers and Judges To Report Other Lawyers' Breaches of The Standards of The Legal Profession*, 1976 UTAH L. REV. 95.

lines that must limit one's obedience to orders or external duties are unmentioned and unexamined. The Code only seeks to "point the way to the aspiring" and to provide "standards by which to judge the transgressor."[30] The only reference to the deeper foundations for ethical behavior is the caution that "each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."[31]

It is perhaps unfair to criticize the Code for something it purports not to do and, in fact, cannot hope to do—establish a fundamental self-conception and series of virtues that guide perceptions of reality, reflections upon moral questions, definition of roles, and patterns of human behavior. But in failing to make the ethical limitations of the Code more explicit, the Code may, in fact, be counterproductive to developing and reinforcing an ethical profession of the highest order. By ignoring the lawyer's relation to himself and instead emphasizing only the lawyer's relation to others and the profession, the Code allows lawyers to rationalize many forms of conduct which would otherwise transgress their duties to self and, consequently, widely held moral values. The emphasis on duty to others leads naturally and dangerously to the "hired-gun" model for deciding ethical questions. The rules that define immorality may reinforce the dangers of amorality, and allow an attorney to justify almost any conduct that promotes the interests of the client.

Ethical issues are far more complex than the Code's minimal role definitions and have more dimensions than the Code's categories acknowledge. But by omission, at least, the Code shows that the legal profession's besetting hazard, amorality, must be dealt with by strengthening the lawyer's duty to self.

## III. The Concept of Self and Ethical Development

The concept of self in law influences major characteristics of the legal system as well as the culture whose values it expresses. For example, primitive Roman law assumed the family as the unit of self in society and predicated most rights and liabilities in terms of family and status,[32] a view of self quite unlike the atomistic individual human being in a system based on the Lockean assumption of self. For several American Indian

30. *See* note 28 *supra.*
31. *Id.*
32. H. Maine, Ancient Law 109-65 (3d ed. 1888).

cultures, the concept of self has no meaning independent from conceptions of the tribe or clan; as a result, many of the "inalienable" rights "inherent" in modern American society based on the role of the "individual" have little meaning for descendants of these Indian cultures.[33] Western legal tradition has assumed the existence of a separate and independent self capable of reflection and controlling individual behavior. The concept is deeply ingrained within our philosophy, political institutions, and legal system; it directly influences the process by which we perceive events. We conceive of rights and privileges as attached to individuals, rather than groups; the rights and liberties protected by our Constitution are those of persons and citizens, not of groups or classes. Ownership of property is an individual, rather than class, privilege; self-fulfillment is universally held to be a virtue. These beliefs are too widely held to require documentation or further discussion.

We need not here investigate what reality, if any, lies behind the concept of "self." A substantial body of thought holds that no objective reality corresponds to the term—that human beings are simply patterns of conditioned behavior.[34] Resolution of the questions concerning the existence and perception of the self is one of the central concerns of philosophy.[35] For the present discussion, however, we need not enter this complex area. Whatever the reality of the self or its underlying nature, a reliance on a concept of self and the way it is defined is clearly crucial to the values of our culture and the ways in which the legal system expresses those values. We act as if there were meaning to the concept of a self distinct from other selves in society, a self capable of conscious thought and memory, responsible for its own actions. Whether these assumptions can be confirmed or not, they underlie all ethical judgments in our society. Our relationship to this "self," real or assumed, is therefore the basis of individual ethical standards.

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33. For an analysis of early anthropological studies that formed the basis of our understanding of these Indian cultures and the conception which these cultures held concerning "self," see Hallowell, *The Beginnings of Anthropology in America*, in SELECTED PAPERS FROM THE AMERICAN ANTHROPOLOGIST 1888-1920, at 1, 34-58 (F. De Laguna ed. 1960).

34. *See generally* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

35. *See, e.g.*, H. CASTELL, THE SELF IN PHILOSOPHY (1965); D. HUME, TREATISE ON HUMAN NATURE, pt. IV, § 6 (1739); J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING ch. 27 (2d ed. 1964); R. UNGER, KNOWLEDGE & POLITICS, 191-235 (1975); Werkmeister, *The Status of the Person in Western Ethics*, in THE STATUS OF THE INDIVIDUAL IN EAST AND WEST 317 (C. Moore ed. 1968).

From the standpoint of the Western assumption that the self is all-important, it is therefore natural to classify cultures in terms of the role played by the concept of self. Lawrence Kohlberg, a developmental psychologist, has proposed a universal process of moral development based upon his empirical studies of several cultures. Kohlberg claims to have found a common sequential pattern of six stages of moral development present in a variety of cultures.[36] His description of these stages of moral development is lexical, and defines ways of thinking about universal moral questions. Kohlberg's definition of moral stages and the accompanying motives for engaging in moral behavior in each stage provide a useful and penetrating way to consider ethical development in the legal profession and in legal education. Kohlberg's stages of moral development may be paraphrased as follows:

| *Definition of Moral Stages* | *Motives for Engaging In Moral Behavior* |
|---|---|
| Stage I | |
| The Punishment and Obedience Level: The physical consequences of action determine its goodness or badness regardless of the human meaning or value of these consequences. | Action is motivated by avoidance of punishment, and "conscience" is irrational fear of punishment. |
| Stage II | |
| The Instrumental Relativist Orientation: Right action consists of that which instrumentally satisfies one's needs and occasionally the needs of others. | Action motivated by desire for reward or benefit. |
| Stage III | |
| The Interpersonal Concordance or "Good Boy-Nice Girl" Orientation: Good behavior is that which pleases or helps others and is approved by them; much conformity to stereotypical images of what is majority behavior. | Action motivated by anticipation of disapproval of others, actual or imagined; differentiation of disapproval from punishment, fear or pain. |
| Stage IV | |
| The "Law and Order" Orientation: Right behavior consists of doing one's duty, showing respect for authority, and maintaining the given social order for its own sake. | Action motivated by anticipation of dishonor, that is institutionalized blame for failure of duty and by guilt over concrete harm done others. |

36. Kohlberg, *From Is to Ought*, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY, 164-65, 170-71, 151-235 (T. Mischel ed. 1971).

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|---|---|
| **Stage V** | |
| The Social-Contract Legalistic Orientation with Utilitarian Overtones: Right action tends to be defined in terms of general individual rights and standards which have been critically examined and agreed upon by the whole of society. There is a clear awareness of the relativism of personal values and opinions and a corresponding emphasis upon procedural rules for reaching consensus. | Concern about maintaining respect of equals and of the community's reasoned respect; concern about own self-respect, that is to avoid judging self as irrational, inconsistent and nonpurposive. |
| **Stage VI** | |
| The Universal-Ethical Principal Orientation: Right is defined by the decision of conscience in accord with self-chosen ethical principles appealing to a logical comprehensiveness, universality and consistency. | Concern about self-condemnation for violating one's own principles; differentiates between community respect and self-respect; and, differentiates between self-respect for achieving rationality and self-respect for maintaining moral principles. |

Kohlberg's study not only claims a universal progression of stages of moral development, but also a universal reliance upon a common fund of moral categories, concepts, or principles.[37] Kohlberg believes that differences among individuals and cultures are really differences in stage or developmental status. Individual development may cease at one level without progressing to the next stage. Furthermore, differences in cultural circumstances may influence the speed of development but not the existence and sequence of the pattern of development. Kohlberg concludes that

> there are differences in fundamental moral principles between individuals or between groups; differences in stage. However, these stages or fundamental ethical principles on which people differ (a) are culturally universal, (b) occur in an invariant order of development, and (c) are interpretations of categories which are universal.[38]

One need not accept Kohlberg's claims to view his theory as a useful categorization of ethical systems from the point of view of the assumed primary importance of individual self-determination. Whether we view his system as a convenient expression of our beliefs about ethics, or as

37. *Id.* at 176.
38. *Id.* at 177.

a discovery about universal ethical development, it is an equally useful standard against which to measure the ethical effect of legal education and practice. From either point of view, Kohlberg's scheme suggests disturbing conclusions.

## IV. Legal Education and Ethical Development

Legal education as presently structured and practiced risks stunting moral development in stages one or two of Kohlberg's model; levels of development that Kohlberg defines as a "preconventional level" in which:

> [T]he child is responsive to cultural labels of good and bad, right or wrong, but interprets these labels in terms of either the physical or the hedonistic consequences of action (punishment, reward, exchange of favors), or in terms of the physical power of those who enunciate the rules and labels.[39]

Kohlberg's definition of "preconventional level" must be considered in light of legal education's reliance upon the "Socratic method" in large impersonal classes.

Misuse of the Socratic method may terrorize students, and create a cynicism founded upon a forced divorce between the intellectual and emotional side of a student.[40] Legal teaching often relies upon punishment or reward rather than an attitude of self-fulfillment as the stimulus to learn,[41] and therefore creates a substantial risk of causing a regression in moral development. Legal education, as well as other forms of education, cannot afford to surrender its insistence upon rigorous intellectual development of essential skills and a level of self-discipline necessary to perform effectively the diverse roles assigned lawyers in society. Nonetheless, greater care must be taken to assure that the educational atmosphere recognizes that the goal of classroom dialogue and other educational techniques is individual self-development. Socrates' guiding admonition that the objective of pursuing knowledge is "to know thyself" is difficult, if not impossible, to achieve in a classroom atmosphere dominated by anxiety over performance. Although the economics of legal education precludes small classes and individual instruction, the ethical casualties caused by abuse of the Socratic

39. *Id.* at 164.

40. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. Cin. L. Rev. 93, 116-41 (1968).

41. *Id.*

method could surely be minimized if legal educators understood the objectives and limitations of the Socratic method and made sophisticated use of its techniques in light of the emotional as well as the intellectual development of students.[42]

Students come to law school in varying stages of moral development, but with a generally similar set of moral values, goals, and ideals which stress honesty, respect for others, individual self-worth, and similar characteristics one might expect in any group of highly motivated and idealistic young people. The rigorous analytical experience of law school has varying effects upon students; some students continue to hold and live by their values, goals, and ideals; others become cynical and seem to be able to rationalize anything they do; still others construct impenetrable shells that hide their character and motivation. All too many become ethical "dropouts" in the pursuit of grades, institutional decorations to aid employment prospects, or a means to cope with the competitive pressures of academic and psychological survival.

The impact of the law school experience upon character and ethical development has not been widely studied or even seriously considered by many law professors. It must become so if law schools and legal educators are to take account of the degree to which they fail to instill a high degree of ethical responsibility in their students. Law schools may actually be creating amoral lawyers, whose skills of rationalization, attempted division of intellectual and emotional sides of their personalities, and insensitivity to ethical issues will become increasingly dangerous in the highly complex, specialized, and competitive world of law practice. Legal ethics, in the sense of personal values for determining questions of right and wrong, should become an implicit part of every course in the law school curriculum.[43] Individual ethics are not derived from the study and punctilious following of a written rubric. Only by continuous self-reflection in terms of one's own personal values, sensitivity to ethical issues raised by various areas of legal specialty, and repeated exposure to the values of respected models of ethical persons (including, one hopes, a student's teachers) can one expect to develop further the individual ethical potential and standards of students in law school.

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42. *See* Taylor, *Law School Stress and The "Deformation Professionelle,"* 27 J. LEGAL EDUC. 251 (1975).

43. *See* Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452 (1972).

Ethics classes, mandatory or otherwise, that treat the Code of Professional Responsibility as the definition of a lawyer's ethical duties risk retarding a student's ethical development. To paraphrase Kohlberg, in such narrowly focused classes in ethics, students are taught that maintaining the expectations of the group is

> perceived as valuable in its own right, regardless of immediate and obvious consequences. The attitude is not only one of conformity to personal expectations and social order, but of loyalty to it, of actively maintaining, supporting and justifying the order, and of identifying with the persons or groups involved in it.[44]

While this conventional structure for thinking about ethical duties helps individuals define their roles and motivates conformity to the roles defined, it lacks the dimension of an internal wellspring for ethical behavior as defined by stages five and six in Kohlberg's pattern. These categories are labeled by Kohlberg as the "post-conventional, autonomous or principled level." They are distinguished from lower levels of moral development because they "define moral principles which have validity and application apart from the authority of the groups of persons holding these principles, and apart from the individuals' own identification with these groups."[45]

To the extent that ethics classes in law schools consider the Code of Professional Responsibility as the sole source of one's ethical duties and encourage students to be concerned only with what others think of them, the moral development of the individual is incomplete and misleading. Ethics classes must also develop an additional and stronger incentive for ethical behavior—what the individual will think of himself in light of his own internalized principles and values.

## V. Self in Everyday Legal Practice

As we have seen, the professional hazard of legal practice is the "hired gun" justification for ethical choices and behavior, which in its extreme form could appropriately be called the "Nuremburg Defense" model of legal ethics. This model justifies any action on behalf of a client—a position of extreme ethical relativism which some profess but few live by, and which is clearly not sanctioned even by the Code of Professional Responsibility.

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44. Kohlberg, *supra* note 36, at 164-65.
45. *Id.*

A client does not buy the services of a lawyer as one might buy the services of a slave or a prostitute.[46] The relationship is horizonal rather than vertical. The best interests of a client require an independent and objective evaluation of the client's problem, and counseling about the appropriate course of conduct by one who is a "counselor" in every sense of the word. If, of course, a lawyer's self-values and conscience conflict with a client's interests or objectives, the client should be invited to find other representation.[47]

While few lawyers may perceive themselves simply as hired guns, many may believe they live out their lives in Kohlberg's fifth stage where

> right action tends to be defined in terms of individual rights, and standards which have been critically examined and agreed upon by the whole society. There is a clear awareness of the relativism of personal values and opinions and a corresponding emphasis upon procedural rules for reaching consensus.[48]

At this level of moral development, the motivation for adherence to ethical standards is a "concern about maintaining the [rationally defined] respect of equals and of the community" as well as the motivations associated with earlier stages of moral development. In Kohlberg's fifth stage the procedure for deciding ethical questions has become partially internalized but is not yet complete, since ethical values have not become sufficiently identified with self to be triggered by the more powerful forces of self-worth, self-praise, and self-condemnation. To the extent that this portrait represents the current state of the majority of the members of the profession, it leaves room for reaching a higher state of moral development. Kohlberg's model suggests that if the profession wishes to raise its collective ethical standards, the time has come to insist that lawyers live *first* by "their decisions of conscience in accord with self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency."[49]

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46. *See* J. PIKE, *supra* note 24, at 2.

47. *See* Thode, *The Ethical Standard For the Advocate*, 39 TEX. L. REV. 575 (1961).

48. Kohlberg, *supra* note 36, at 164-65.

49. *Id.* at 165. The substantive content of individual "decisions of conscience" is derived from many sources and cannot be defined without reference to society, nature, and one's roles in life. *See* R. UNGER, *supra* note 35.

## VI. CONCLUSION

Decisionmaking about ethical questions is and should be a bloody business, deeply dependent upon self-conception and the ability to engage in self-reflection. Lawyers face a particularly difficult conflict of irreconcilable role definitions since they owe duties to their clients, the courts, the profession, and society at large as well as to themselves. The point of this essay is not to suggest that these role definitions can or should be ignored but that they should be weighed in light of one's concept of self and those values (reflectively chosen with regard to universality and consistency) one perceives as essential to the maintenance of personal integrity. A profession which ignores or segregates self from the process for resolving ethical issues cannot reach the highest stage of moral development. Nor can such a profession merit the trust of the citizen at large that is necessary if law is to provide the condition of a peaceful and just society.

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