Making Moral Lawyers: A Modest Proposal

Walter H. Bennett Jr.

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol36/iss1/5

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
ARTICLES

MAKING MORAL LAWYERS: A MODEST PROPOSAL

Walter H. Bennett, Jr.*

I. INTRODUCTION

A. Subject and Focus of Inquiry

This essay will focus upon a limited but recurring moment in the legal process—the point at which the operative, be he lawyer, judge, publicist, teacher or student, faces a choice between alternative ways to proceed with his legal task. Two basic assumptions upon which this discussion will proceed are that many, if not all, of these choices involve a moral decision, and that it is a desirable goal that legal operatives recognize this and act, at least in part, upon moral considerations. The primary purpose of this discussion, then, is to explore how, using pedagogical tools which have been developed, this may be achieved. A secondary and somewhat collateral purpose, but one which it is hoped will enhance the argument for the first, will be to explain why we have not achieved it to any advanced degree so far. The secondary purpose is by nature, then, essentially critical.

B. Terminology

It is important to establish from the outset the uses of the term, “morality,” and its adjective form, “moral,” in this essay. Basically, there are three uses. The first we have already seen in paragraph A above, that is—the generic sense of general considerations between “right” and “wrong” or “good” and “bad.” In the generic sense a moral subject is one that involves these considerations as opposed, for example, to a purely “legal” or mathematical subject, such as whether thirty days have run to answer a complaint. “Morality” will also be used to refer to societal mores or norms of “good”

* A.B., 1965, Washington & Lee University; M.A., 1969, University of North Carolina at Chapel Hill; J.D., 1972, University of Virginia; LL.M., 1986, University of Virginia. Instructor, Clinical Program, School of Law, University of North Carolina at Chapel Hill. The author wishes to thank Professor John Norton Moore at the University of Virginia School of Law for his criticism and advice in the preparation of this article.
and "bad"—in a sense, the collective conscience. Finally, "morality" will refer to individual conscience and individual perceptions (and emotions) of right and wrong. It is expected that the applicable meaning of the word "morality" will be evident in the following discussions from the context in which the term is used. The reader should, however, keep the above distinctions in mind.

C. Empirical Assumptions

The following discussion makes two fundamental empirical assumptions, which may be subject to debate, but which this essay will not seek to prove. Those are: (1) a significant number of members of the legal profession frequently make legal choices which are immoral in the generic sense—that is, the decisionmakers do not consider, or readily discount, moral considerations; and (2) this failure is, at least in part, a systemic failure of the profession, for whatever reason, to promote and inculcate moral reasoning as part of the lawyer's modus operandi. One suspects the debate over the truth of these assumptions is as old as the profession itself. The intensity of this debate has increased markedly in the United States since the Watergate era, and the central issue now appears to be one of degree.\(^1\) Certainly the weight of opinion is that the above empirical assumptions are correct.\(^2\) To one who has actively practiced law for a sustained period of time, as has the present writer, their truth seems self-evident. And, while these empirical assumptions may not have attained sufficient status that one could argue they deserve judicial recognition, it seems a safe wager that their validity is not an issue many lawyers would wish to see submitted to national referendum.

Implicit in the second empirical assumption stated above is a third which requires some discussion. That is, that the legal system, and particularly that part of it devoted to legal education, bears much of the responsibility for the moral effectiveness of its products and can to some degree control it. This assumption draws support from two directions. The first is the growing body of psychological data to explain individual moral development, partic-
ularly the works of Jean Piaget and Lawrence Kohlberg, that have clearly emerged as the leading models in this field. It will not be a purpose here to attempt a detailed review of their rather extensive findings, but to state an essential conclusion, primarily that of Kohlberg, which builds upon the work of Piaget, that moral development proceeds in stages and is related to, among other things, age, role models, peer influence, and cognitive ability. Further, moral development continues through the age when most persons attend law school (in his more recent studies, Kohlberg estimates through age thirty and perhaps beyond) with the higher stages of development, if they are reached, usually occurring after the twenty-second to twenty-fourth years.

These conclusions should come as no surprise to adherents of a legal education system of which the basic tenet has been for almost a century that by deft manipulation of the Socratic method, law school professors could turn unmolded neophytes into legal Cyrano de Bergeracs. That law students are susceptible to mega-changes in their intellectual processes is the assumption underlying the belief that one can learn to "think like a lawyer." And toward this end, law schools have employed many of the tools which Kohlberg's work suggests: role models (professors) and peer influence, not


4. 2 L. KOHLBERG, supra note 3, at 196-205.

5. See id. at 445-60; see also Kohlberg, Continuities in Adult Moral Development Revisited, in LIFESPAN DEVELOPMENTAL PSYCHOLOGY: PERSONALITY AND SOCIALIZATION (P. Baltes & K. Schaie, eds. 1973). Kohlberg's most recent work in this area indicates that moral development in the higher stages is related to personal, life experiences of moral responsibility that are more likely to occur after one reaches adulthood. In this regard, experiences of higher education may be of particular importance. On this subject, see also Kohlberg & Kramer, supra note 3.
to mention reward and punishment. One may argue that the mega-changes in the students' thinking process which law school seeks to induce should not include moral considerations (and indeed, this has been a cardinal rule of legal theorists and educators in the past). However, given the findings of Kohlberg and the basic assumption of legal educators that significant changes can be wrought in the thinking process of law students, it seems beyond serious dispute that the opportunity is there.

II. THE CAUSE OF THE PROBLEM: THE MYTHICAL SEPARATION OF LAW AND MORALITY

Why do lawyers make immoral choices? How are legal institutions responsible? To understand where the answers to these questions begin, it is necessary to examine carefully the legal system's traditional view and treatment of morality. In this regard, the following excerpts from Oliver Wendell Holmes' famous address, "The Path of the Law," are informative:

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness....

... The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.

I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or

6. As one commentator has noted, Oliver Wendell Holmes held this view as did Christopher Columbus Langdell. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. LEGAL EDU. 11, 32 (1982). See also Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897).
Making Moral Lawyers

no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to consider—a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. . . .

For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we could gain very much in the clearness of our thought.7

Several points should be made about this eloquent and unabashed endorsement of the separation of the study of law from morality. As one commentator, Professor James R. Elkins, has noted, Holmes' attitude is a direct legacy of legal Positivism, particularly that of Hans Kelsen—that divorced legal theory from all judgments of morals and politics.8 Professor Elkins also noted that Christopher Langdell's scientific case method was based precisely on this premise—that the study of law should be disembodied from the influence of less "scientific" disciplines and considerations.9 The case method, which began in the Positivist era and became, and to a large degree remains today, the ordained method of legal teaching, institutionalized the notion that the study of law should be divorced from cloudy issues of morality. Indeed, in its operation and implementation it did just that—pursuing through Socratic discourse the elusive rule, and in the end forming it into stark, black letter for the pursuers to see and commit to memory.

Holmes' statement also reveals that he was attracted by the notion that law should be studied in pure form, "uncolored" by the "unnecessary confusion" of less precise disciplines. There is something very seductive about this inclination among lawyers to attack and solve all problems through the high science of laws and legal reasoning unimpeded by more basic considerations. It has obvious intellectual roots in Positivism, but one suspects it has psychological and emotional roots as well. At a point later in his lecture, Holmes says that lawyers are trained in logic, and it is in the "process of analogy, discrimination, and deduction . . . in which they are most at home."10 And again, "[T]he logical method and form flatter that longing

8. Elkins, supra note 6, at 33-34.
9. Id.
10. Holmes, supra note 6, at 465.
for certainty and for repose which is in every human mind.¹¹ There is also in Holmes' remarks an element of distrust of the imprecision of, and distraction in, matters "outside" the law. He repeatedly refers to the "confusion" caused by moral ideas.¹² This attitude is sustained in the study and practice of law by the widely held and, some might argue, mythological belief that the best students and the best lawyers are the ones who can focus upon the legal question and place extraneous matters, be they irrelevant facts or their own feelings about the case, aside.

Finally, we should note the view of morality implicit in Holmes' statement. In terms of the definitions of "morality" reviewed at the beginning of this essay, Holmes is referring to morality primarily under the second definition—morality in terms of social mores—the "ethical rule which is believed and practised [sic] by [one's] neighbors,"¹³ the "fossil records of a good deal of history" from which our laws, at least by some accounts, derive.¹⁴ Until recently, when lawyers and legal theorists discussed law and morality, the discussion traditionally took this form. Under the Positivists, the argument was that there was no necessary or inherent relation between law and morality. For Holmes, the relation existed,¹⁵ but he saw it operating as an inevitable process of history, not as a matter to which lawyers were advised to devote much attention, and certainly not a matter to be studied in law school.

With the advent of the Legal Realists, it was inevitable that the issue of the relation between law and morality would come quickly to the fore. The focus of debate shifted to the questions, not of whether there was a relation between law and morality or whether it should be a matter of intellectual concern, but to the nature of the relation and in what manner and to what degree it existed.¹⁶ From the absolutist position of the Positivists, this was a step of major proportions, but from a modern perspective, the discussion

---

¹¹. Id. at 466.
¹². Id. at 459, 462-64.
¹³. Id. at 459.
¹⁴. Id. at 464. The relation between law and morality in the sense of mores or societal conscience is the subject of innumerable works by some of the world's foremost legal scholars. In addition to that of Holmes, three excellent examples are: R. POUND, LAW AND MORALS (1924); Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958); Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958). More modern treatments of the general subject by various essayists may be found in MORALITY AND THE LAW (R.A. Wasserstrom ed. 1971).
¹⁵. "The law is the witness and external deposit of our moral life." Holmes, supra note 6, at 459.
¹⁶. Even H.L.A. Hart, modern inheritor of the Positivist mantel of Austin and Bentham, recognized the frequent intersection between law and morality, but maintained that it was, if not coincidental, at least not inherently ordained. See supra note 14.
was limited in both purpose and scope. The terms in which morality was
discussed were still in harness to the Positivist tradition, and the pull of that
tradition continued to confine the range of the discussion. Within these
bonds there was inevitably no sustained attempt to deal with law and moral-
ity in terms of individual conscience or to propose a personal, moral judg-
ment either upon the law or its application in an illustrative case.\textsuperscript{17} The one
hope for an exception to this posture was the development of legal ethics
courses in law schools. But with that debatable exception, the discussion of
morality was reserved for scholars, theorists, and third year students search-
ing for a last intellectual dip before the philistinian rigors of law practice.
Other courses, and the curriculum as a whole, locked comfortably to Lang-
dell's revered and well-tested method, continued to march in the shadow of
the Positivists and to the tune of Justice Holmes.

But what of the Rules of Ethics and courses designed to teach them? Pro-
fessor James R. Elkins has addressed at length the failure—indeed, the in-
herent incapacity—of ethical rules to solve complex moral issues.\textsuperscript{18} While
this may be open to debate, the treatment of the study of professional ethics
by law schools and students has been open for all to see. Traditionally, eth-
ics courses have been reserved for the second or third year, and were (and
are) frequently reduced-credit courses. One may question where this leaves
them in the hierarchy of law school courses and how it has affected their
treatment by professors and students. In fact, past treatment of ethics
courses by law schools is perfectly in line with the notion that legal studies
should be unencumbered by moral issues. Reserving those problems for a
single, less emphasized course focusing almost entirely upon ethical rules
and relegated to somewhere in the second or third year, sufficiently compart-
mentalizes and insulates those studies from the mainstream of the law
school. This is especially true when students are told either directly or by
implication in their first year, when pressures to conform are most intense,
that success in law school will only be inhibited by diversion to moral issues.
It is not surprising to learn that, as Professor Elkins and others have docu-
mented, many law students view ethics courses as burdensome and irrele-
vant to the central focus in law school,\textsuperscript{19} just as Justice Holmes viewed
moral issues as burdensome to legal analysis.

There is further evidence that this attitude translates into the practice of
\textsuperscript{17} It is interesting in this regard to analyze the debate between Professors Hart and
Fuller over the German wife case which will be discussed infra in more detail. See Fuller, supra note 14; Hart, supra note 14.
\textsuperscript{18} Elkins, supra note 6, at 22-31.
\textsuperscript{19} Id. at 25-29. See, e.g., Pipkin, Law School Instruction in Professional Responsibility: A
law in an even more perverse manner. Professor Ted Schneyer, citing numerous empirical studies on the behavior of lawyers, argues convincingly that lawyers use legal rules as much for what they allow one to get away with, as for what they prohibit.\textsuperscript{20} Indeed, it would be surprising if this were not so, as that is precisely how lawyers are trained to deal with rules in general. It is even more likely if we accept Professor Elkins' premise that lawyers develop in law school the attitude that ethical considerations only serve to inhibit their primary purpose to represent clients to the limits of the law. In this context, interpretation of the limits set by ethical rules becomes crucial, and the broader the limits, the more one is allowed to do. Used in this fashion, ethical rules are only peripherally helpful at best as guidelines for matters of individual conscience. On the whole, they do not effectively integrate moral considerations on a profound level in legal acts or decisions.

It is worthwhile to pause here and review where we have come. The best empirical data indicates that an individual's moral development can and does continue during the years when most people attend law school. Legal education, however, until recently operated upon the premise that the study of law should be divorced from the "confusion" (Holmes' term) of moral issues—and here, unlike Holmes, who spoke of morality primarily in terms of societal mores, we are speaking of moral issues in the generic sense. Morality, insofar as it was the subject of general legal debate, was confined in the main to theoretical issues of social mores and their relation to the law. Issues of individual conscience were generally not subjects of most law courses or of theoretical debate. Insofar as they were allowed to surface, they were confined safely in relatively low status ethics courses where the focus was often upon peripheral rules rather than central moral issues. From all appearances then, Holmes' admonitions were being followed; law schools were not confused by, much less teaching, morality. But was this so?

It might be profitable to recall at this point one of the basic lessons of the American Legal Realists: what we propose to do and what we think we are doing are sometimes not what in fact occurs. The existing empirical data implies that this has been true in legal education. First, we must consider Kohlberg's findings that moral development continues through age 30.\textsuperscript{21} Are we to assume that this development continues unaffected by an experience as intellectually and emotionally intense as law school? Professor Lawrence J. Landwehr has applied Kohlberg's method of analysis to a study of moral development in practicing attorneys. It shows that, if anything, the effect of law school upon moral development is to arrest it at the fourth of

\textsuperscript{20} Schneyer, supra note 1, at 1554.
\textsuperscript{21} See supra note 5.
Making Moral Lawyers

six progressive stages. The fourth stage is described by Kohlberg as a law and order orientation, where duty to authority and maintenance of the social order are the goals. It is not until stage six that one's behavioral goals are modeled upon self-chosen, abstract, ethical principles which serve as guides to conscience.

While Landwehr's work should not be viewed as conclusive, its indications are not discordant with common sense. One would expect persons steeped in the lore of rule supremacy and trained to view suspiciously loftier ideas of moral principle to be rule oriented.

There is another reason, however, beyond the suggestions of empirical studies and common sense, why we should question the assumption that law schools do not teach morality. And this requires, as the Realists advised, that we strip away the mythology of our work, and take a hard look at what we do. One of the most basic functions in the legal system, again as the Realists taught us and as everyone who opens a casebook soon learns, is to make decisions. In this regard, the Realists focused upon the judicial officer, and clearly judges are the system's most notorious decisionmakers. But it is much broader than that; the entire system operates on decisions, from the police officer's decision to arrest, to the prosecutor's decision to prosecute, to the lawyer's decision to take the case, to the jury's verdict, and on to the Supreme Court. Focusing for our purposes upon the lawyer, the number of decisions from the first telephone call from a client until a case is settled, pled or tried and appealed, are almost infinite. And what are these decisions but choices between different courses of action or inaction—some with minimal effect, whether to plead a marginally arguable defense, and some with potentially very heavy effect, pleading adultery and alimony to up the ante in a child custody/support action?

If a lawyer making these choices is trained to believe that he is bound in them only by the lodestar of success in the case and the Rules of Ethics, and

22. See Landwehr, supra note 3. While this study presents an exercise of more than passing interest, it cannot be termed conclusive based upon the nature of the sample used. Professor Landwehr applied Kohlberg's system and analysis to answers to questionnaires from 195 (21%) of 900 attorneys randomly selected from the MARTINDALE-HUBBELL LAW DIRECTORY (1978) in California, New York, and Wisconsin. The results show that 90% of the responding attorneys were at stage four of Kohlberg's six stages as contrasted to approximately 70% of the population as a whole. Landwehr, supra note 3, at 44-45. Whether Landwehr selected his sample from the biographical section of MARTINDALE-HUBBELL (which tends to be weighted in favor of larger firms and more profitable attorneys) or from the simple listings or both, is unclear from his report. In any event, numerous attorneys—most likely those in smaller firms and located in rural areas—are often not listed in the MARTINDALE-HUBBELL DIRECTORY.

23. 2 L. KOHLBERG, supra note 3, at 174-76.

24. Id.

25. See supra note 22.
operates upon that belief, he is operating under the moral premise that, in making his professional choices, he may ignore his own conscience, as long as the Rules of Ethics are satisfied, and the effects of his acts upon others. He, in effect, has been taught that he can limit what goes into his decision and ignore the unfortunate consequences that come out. This is morality. It may not be good morality, but it is morality nevertheless. It is simply another way of expressing a basic truism that the Realists stated in the context of judicial decisions: every choice is a choice between values. If you limit the values to only those which are not afflicted with perplexities of personal conscience or (if possible) societal mores, and here the “limitation” process may become very difficult, you are still left with values—probably values with less worthy moral implications—and you have still made a moral choice, albeit a lopsided one.

It may be too strong a statement to say that law schools have taught immorality (or even amorality), but it is illusional to think that law courses can be taught in a moral vacuum. As one commentator has phrased it, “[D]oing nothing in the way of conscious moral education is not ethically neutral or liberally tolerant . . . .”26 To assume that it is seems at least minimally condescending, if not arrogant. It assumes either that what one teaches—the Law—is morality enough in itself, or that students are moral automatons whose values are set and unchangeable or, worse, irrelevant. Or, it assumes what is patently impossible—that one can, by Socratic dialogue or scientific case method, lead students upon an inquiry without moral overtones. Surely if policy choices are implicit in legal decision, moral choices are as well. Legal decisions are the marrow of law school courses and learning to make them is the skill which law school imparts. What does a system teach that tells a person to make decisions based upon his ability to manipulate rules in his favor if it is not morality? And while the message of law school is no longer that simplistic, with even first year classes discussing social goals and policy, is not the answer still the same? Law schools are teaching morality. It is folly to think otherwise.

III. MORAL CHOICE: WHAT IT IS, WHY IT IS IMPORTANT, AND HOW TO TEACH IT

At this point, it will be helpful to state outright: while law schools are teaching morality and have been doing so all along, they have been doing it poorly. Furthermore, the teaching of morality is an intrinsic part of the legal education process. Inevitably, then, the teaching of morality in law school will continue. The question then becomes how best to teach it in

26. Richards, supra note 3, at 373.
harmony with the general goals of a legal education. The answer first involves understanding the basic moral elements of legal choice, and we can accomplish this by an exercise in structural analysis.

A. The Anatomy of Moral, Legal Choice

Traditionally, the question or moral legal choice has been framed in terms of a conflict between the law and social mores. An excellent and particularly poignant example of this appears in the debate between Professors Lon Fuller and H.L.A. Hart in the 1958 *Harvard Law Review* on the question of the relationship between law and morality. To illustrate that, at least in some instances, legally compliant behavior can fly in the face of conventional morality, Professor Hart proposed a case actually decided by a postwar German court wherein the wife of a German soldier, wishing to be rid of him, reported him to Nazi authorities for anti-Hitler statements made to her in private. For these statements, which were illegal under Nazi law, he was sentenced to death by a German court, though apparently this sentence was commuted in some fashion and he was sent to the front. The postwar court faced the choice of letting the wife go unpunished or, in effect, punishing her retrospectively for acts which, though clearly immoral, were at least aided and condoned by the statutes and legal system in effect at the time. The German court chose the latter course but did so by holding the Nazi statute under which her deed was accomplished to be null and void as against universal conscience and decency, a result which Hart condemns as a subterfuge and which Fuller applauds as a victory of moral principle over Positivism.

The focus of both writers here is upon the conflict between law and collective morality and the choice between two evils—one (letting her go) which offends principles of common morality and one (punishing her retrospectively) which offends a basic principle of the law. The argument unfolds over which of these is the worse evil and, while in that sense questions of individual conscience are ignited, they are not addressed per se. What Professors Hart and Fuller ultimately are arguing is policy, and what is missing in their treatment from a modern perspective (and one should concede that it was not within the purpose of either of them to address this point) is analysis of the moral choice faced by the decisionmakers in the post-war German system. How should the individual approach this di-

---

28. The wife was actually charged under an 1871 statute, which remained in effect through the Nazi era, making it a crime to deprive someone of his freedom. The court, nevertheless, faced the dilemma that her offense had been accomplished by application of legally enacted laws by a duly constituted court. Hart, *supra* note 14, at 619.
lemma as judge, lawyer, or prosecutor? How would one feel about being faced with the choice and how should one respond on a personal moral level? On a moral level, are the choices as clear as Professors Hart and Fuller imply: if the court does nothing will the wife, in fact, go "unpunished"? Is it clear that criminal punishment of this woman is the moral thing to do even if it is the moral consensus? Does it matter if the decisionmakers in this instance were all men; would a woman's perspective add to the moral inquiry—raise different issues of conscience? On the most elemental level, if one decides to let her go free or to manipulate the legal rules to punish her, how will it square with conscience; how will one sleep at night?

Justice Holmes was clearly correct when he said that moral considerations would lead to "confusion" in legal study and analysis. Without them the decision is simplified, though no less of a moral decision. But we need to be clear about where the Fuller-Hart analysis stops. It asks the most basic questions of law and societal morality and of policy considerations in the choice between the two. It does not reach significantly beyond this to the deeper level of individual conscience. Perhaps it implicitly assumes that the dictates of societal mores and individual conscience are the same in the case in point. For some, no doubt, this would be true, but the inquiry into this realm, which, for purposes of this essay to follow we may begin to refer to as the moral third dimension, is not seriously assayed.

For an illustration of this third dimensional level of discourse in action, it is necessary to turn to one of this country's foremost, though perhaps somewhat neglected, moral scholars as he grapples with a choice of the deepest moral and legal implications. As is true of other famous sages, he spends a good deal of time by a river—in this case the Mississippi—and we locate him on a raft at a muddy bank somewhere near Arkansas. Faced with the clear dictates of the legal system and social morality, Huckleberry Finn is wrestling with a third voice. He is trying to decide whether to turn in to the authorities his friend and companion, Jim, the escaped black slave. It is, as he says, a "close place":

And then think of me! It would get all around, that Huck Finn helped a nigger to get his freedom; and if I was to ever see anybody from that town again, I'd be ready to get down and lick his boots for shame. That's just the way: a person does a low-down thing, and then he don't want to take no consequences of it. Thinks as long as he can hide it, it ain't no disgrace. That was my fix exactly. The more I studied about this, the more my conscience went to

29. Holmes, supra note 6, at 459, 462-64.
grinding me, and the more wicked and low-down and ornery I got to feeling. And at last, when it hit me all of a sudden that there was the plain hand of Providence slapping me in the face and letting me know my wickedness was being watched all the time from up there in heaven, whilst I was stealing a poor old woman's nigger that hadn't ever done me no harm, and now was showing me there's One that's always on the lookout, and ain't going to allow no such miserable doings to go on just so far and no further, I most dropped in my tracks I was so scared. Well, I tried the best I could to kinder soften it up somehow for myself, by saying I was brung up wicked, and so I wasn't so much to blame; but something inside of me kept saying, "There was the Sunday School, you could a gone to it; and if you'd a done it they'd a learnt you, there, that people that acts as I'd been acting about that nigger goes to everlasting fire."

It made me shiver. And I about made up my mind to pray; and see if I couldn't try to quit being the kind of boy I was, and be better. So I kneeled down. But the words wouldn't come. Why wouldn't they? It warn't no use to try and hide it from Him. Nor from me, neither. I knowed very well why they wouldn't come. It was because my heart wasn't right; it was because I warn't square; it was because I was playing double. I was letting on to give up sin, but always inside of me I was holding on to the biggest one of all. I was trying to make my mouth say I would do the right thing and the clean thing, and go and write to that nigger's owner and tell where he was; but deep down in me I knowed it was a lie—and He knowed it. You can't pray a lie—I found that out.

So I was full of trouble, full as I could be; and didn't know what to do. At last I had an idea; and I says, I'll go and write the letter—and then see if I can pray. Why, it was astonishing, the way I felt as light as a feather, right straight off, and my troubles all gone. So I got a piece of paper and a pencil, all glad and excited, and set down and wrote:

Miss Watson your runaway nigger Jim is down here two mile below Pikesville and Mr. Phelps has got him and he will give him up for the reward if you send.

Huck Finn

I felt good and all washed clean of sin for the first time I had ever felt so in my life, and I knowed I could pray now. But I didn't do it straight off, but laid the paper down and set there thinking—thinking how good it was all this happened so, and how near I come to being lost and going to hell. And went on thinking. And got to thinking over our trip down the river; and I see Jim before me, all the time, in the day, and in the night time, sometimes
moonlight, sometimes storms, and we floated along, talking, and singing, and laughing. But somehow I couldn't seem to strike no places to harden me against him, but only the other kind. I'd see him standing my watch on top of his'n, stead of calling me, so I could go on sleeping; and see him how glad he was when I come back out of the fog; and when I come to him again in the swamp, up there where the feud was; and such-like times; and would always call me honey, and pet me, and do everything he could think of for me, and how good he always was; and at last I struck the time I saved him by telling the men we had small-pox aboard, and he was so grateful, and said I was the best friend old Jim ever had in the world, and the only one he's got how; and then I happened to look around, and see that paper.

It was a close place. I took it up, and held it in my hand. I was a trembling, because I'd got to decide, forever, betwixt two things, and I knewed it. I studied a minute, sort of holding my breath, and then says to myself:

"All right, then, I'll go to hell"—and tore it up.

It was awful thoughts, and awful words, but they was said. And I let them stay said; and never thought no more about reforming. I shoved the whole thing out of my head; and said I would take up wickedness again, which was in my line, being brung up to it, and the other warn't. And for a starter, I would go to work and steal Jim out of slavery again; and if I could think up anything worse, I would do that, too; because as long as I was in, and in for good, I might as well go the whole hog.30

This is moral discourse31 at its deepest level, and though some of its elements defy easy definition, it will be helpful to attempt to identify them. First, there are the elements already identified in the debate between Professors Hart and Fuller: the law and social morality. In Huck Finn's dilemma, unlike that of the German court, these two elements are in basic harmony. It is socially immoral and illegal to harbor a fugitive slave and assist in his escape.32 Whether, in fact, a child could be legally punished for such an

---
31. The term "moral discourse," which will recur with more frequency as this essay progresses, was introduced to discussions of morality and the law by Professor Thomas L. Shaffer who has done the most comprehensive modern work on the subject. See T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981); Shaffer, Advocacy as Moral Discourse, 57 N.C.L. REV. 647 (1979); Shaffer, The Practice of Law as Moral Discourse, 55 NOTRE DAME L. REV. 231 (1979) [hereinafter Shaffer, The Practice of Law].
32. The Fugitive Slave Law of 1850, ch. 60, 9 Stat. 462, 463-65 (repealed 1865) prescribed a fine not exceeding $1,000.00 and imprisonment of not more than six months for aiding, harboring, or concealing a fugitive slave. The laws of the various Southern states provided
offense is irrelevant. Huck believes he can be punished, not only for his antislavery activity, but for a crime with which he has considerably more familiarity—stealing. We also have, as in the German wife's case, a decisionmaker (Huck) and a quandary. But here the quandary is not between law and conventional morality; it is rather between those two elements, which are in accord, and individual conscience.

At first, after some struggle, which one suspects is reflex for Huck Finn when he is called upon to comply with the law and what society views as morally correct, Huck takes the moral "high road" and writes the letter to Miss Watson to turn Jim in. The struggle to this point is basically between what Huck wants to do and what the law and society have told him is "right." (It is analogous, perhaps, to an American lawyer who wants to harbor illegal immigrants from El Salvador to the United States but knows that it is illegal and a breach of legal ethics to do so.) And, after Huck reaches his first decision, which brings him in line with both law and conventional morality, he feels "good and all washed clean of sin." He is, in effect, on Kohlberg's fourth level—obedient to the rules and norms of society—a comfortable feeling for Huck, and apparently, a very unusual one.

But it does not last long, because Huck takes the next step. He lays the paper down and pauses to think. It is here that the moral discourse truly begins. Huck is no longer focused upon himself and his relation with legal rules and social morality; he is focused upon Jim and the effects of his proposed course of action upon Jim. And, as Huck's stream of consciousness builds to a climax, he finally sees himself and the entire situation through Jim's eyes: "and [Jim] said I was the best friend old Jim ever had in the world, and the only one he's got now; and then I happened to look around, and see that paper."

The juxtaposition of the progression of Huck's moral self-examination as it slams into the "paper" wall of legal and social propriety exposes vividly Huck's journey through the third dimension. He has moved from a position of protecting and reconciling his own interests to considering the effects of that course upon someone else. And, he has accomplished this by taking a critical step outside his own frame of reference and into the shoes of the other person. He adopts, at least briefly, Jim's perspective. Not only do we have a decisionmaker weighing his choice in relation to law and social morality (which in this case are on the same side of the scale), but one stepping outside of this activity to weigh what those choices will mean to a third party. In a sense, this is analogous to what Professor James Elkins calls the criminal penalties as well, ranging from minimal fines to imprisonment and death. See W. GODDELL, THE AMERICAN SLAVE CODE (reprint 1968) (3d ed. 1853).
"critical perspective" in moral discourse—the ability he believes lawyers must develop to move outside their traditional roles in decisionmaking and to view critically and skeptically what they are doing in terms of its effect upon other people.33

B. How Moral, Legal Choice Benefits Lawyers and Society

In terms of the mythos about what lawyers are trained to do—represent the interests of the client to the limits of the law—this is "unlegal" activity. And, some may ask, are lawyers socially desirable who pause to consult their own conscience and their view of morality before accepting a case or filing the third set of one hundred-plus interrogatories? For several reasons, aside from the assumption stated at the outset of this essay that lawyers too frequently behave immorally, I believe the answer to this question is "Yes."

First, not every decision will be as difficult as the one faced by Huck Finn or the German Court. In most cases probably law, social morality, and conscience will agree or at least be close enough that a course of action may be chosen which does not seriously violate any of them. Second, when this is not possible, it will be to the long-term benefit of everyone if lawyers are able to recognize it. This involves viewing the attorney-client relationship in other than purely legal terms: with the lawyer as legal hired gun and the client as an impersonal vessel bearing a case. Professor Thomas Shaffer, writing on the subject of moral discourse in the attorney-client relationship, argues that lawyers should discuss matters of conscience relating to a case with their clients:

The broader professional consequences could be revolutionary: Lawyers would have to become morally attentive, attending, that is, to the persons of their clients as much as to the problems clients bring to them. Law students would come to insist on education which trains them in the skills of sincerity, congruence, and acceptance. Every level of the legal enterprise would come again to think of moral development as part of its task, all toward a professional ethic of receiving as well as giving. Parents give; children receive; adults give and receive.34

And one might add to this that, not only might lawyers become more morally attentive, but clients might as well. If lawyers and clients on both sides of a legal dispute adopted this approach instead of the single-minded beating of war drums which often occurs now, chances of settlement or arbitration and other extra-legal solutions may be greatly enhanced. It might even oc-

33. See Elkins, supra note 6, at 42.
34. Schaffer, The Practice of Law, supra note 31, at 250 (footnotes omitted).
cur in some situations that, through their own "good offices," lawyers, engaging in reciprocal moral discourse, could bring this about. With the new emphasis on alternative dispute resolution and deemphasis of litigation, there are signs that a trend is beginning in this direction. As the momentum builds and more potential clients opt for these less expensive and less emotionally taxing solutions, there is no reason why lawyers should be ignored as possible arbiters of disputes short of litigation. It is predictable, however, that if lawyers continue to be viewed by a large segment of the population as moralless guns-for-hire and fail to develop skills to be otherwise, this opportunity to expand "legal" services will pass them by.

There is another reason why it is desirable to have lawyers who consider matters of conscience (theirs and their client's) when they proceed with a case. This reason, although speculative, is based in part upon human experience and common sense. A lawyer who engages in Shaffer's dialogue with her client is more apt to reach a deeper understanding with the client about where both of them stand, what the client really wants and can expect from the case, and its importance in relation to other matters. This is likely to benefit everyone, including the judge who hears the case and the opposing side. It also adds a human dimension to law practice which at least some persons might find attractive and rewarding.

Finally, and here one treads very softly in the giant shadow of Justice Holmes, we might ask what business has a profession, which prides itself upon its powers of thorough analysis, to limit its analysis to issues which are purely "legal," whatever that means. Clearly that simplifies the analytical task and, for an overworked lawyer or judge, may come as welcome solace. But the interests a client and society have in resolution of a legal problem do not necessarily end with a neat and sophistically pleasing, legal solution. Neither does the task of the modern lawyer or judge end there if she is to adequately make her decision or represent the interests of her client. Since Justice Holmes delivered the famous address excerpted in part above, social science has taught us a great deal about the fallacy in attempts to compartmentalize the way we think and react to our surroundings. It seems particularly incumbent upon those in the legal profession, specially trained in analysis, to avoid artificial limitations upon their work. Indeed, it seems that as true professionals they would not want to do otherwise. The Realists led us intellectually past this point many years ago, and it is now permissible and indeed advisable to openly discuss and argue policy in a

35. What purely "legal" means, of course, has itself been the subject of great debate. See Fuller, supra note 14; Hart, supra note 14.

36. See supra text accompanying note 7.
professional setting. For a lawyer truly dedicated to pursuing his calling and
skills to the limit, it should be too late to construct another artificial, analyti-
cal barrier between policy considerations and matters of either public morali-
ity or individual conscience.

C. Moral Discourse in Law School: Teaching in the Third Dimension

The problem now becomes how to train lawyers to think like Huckleberry
Finn. Someone of a more cynical bent might phrase it: how to stop training
lawyers not to think like Huckleberry Finn. And, this inversion should at
least provide an indication of where to start.

First, we should stop pretending that law and morality are separate; we
should stop pretending that lawyers can practice in moral neutrality; and we
should stop pretending that we do not teach morality in law school. In his-
torical terms, we should shuck off the prehensile legacy of the Positivists
which has literally and figuratively stunted professional, moral growth since
well before Justice Holmes spoke at Harvard.

On the positive side the task, while no more difficult, is significantly more
complex. It will require lawyers, teachers, and legal scholars to do in the
area of morality and conscience what they have done in other social science
areas where legal education had formerly provided no expertise: We need to
integrate the philosophy and teaching of other disciplines. In the area of
morality, this will be a prodigious task, but it is encouraging to learn that it
has already begun. Certainly one of the leading pioneers in this field is Pro-
fessor Thomas L. Shaffer, and it is appropriate at this point to examine his
work in more detail.37

At the heart of Shaffer's proposal are themes we have already touched
upon in other contexts: that moral isolation is delusional and destructive to
both the person who pretends to be isolated and to those with whom he deals
and that it is reinforced by traditional roles adopted by lawyers in their rela-
tions to clients and each other.38 As Shaffer sees it, the key to breaking out
of this imagined box is to openly engage conscience in the relationship, and
this process is the essence of moral discourse. Underlying it is what Shaffer

37. Professor Shaffer is currently on the faculty of law at Washington and Lee University.
He was previously Dean of Notre Dame Law School, and has authored numerous books and
articles in the area of behavioral science and ethics. Several of those works most pertinent to
the discussion here are cited, supra note 31. This writer also recommends Shaffer, Moral Im-
lications and Effects of Legal Education Or: Brother Justinian Goes to Law School, 34 J.
LEGAL EDUC. 190 (1984), an incisive critique from a moral perspective of law school method
and hierarchy.

38. Shaffer, The Practice of Law, supra note 31, at 239-45.
calls the "Ethics of Care," an unabashed assertion that, not only are people not "moral islands" (Shaffer's term) whose thoughts and actions affect each other, but that they should feel responsibility for these effects and the potential for them and bring them into the open. To accomplish this Shaffer proposes a dialogue wherein mutual issues of conscience implicit in the relationship are brought to the fore. It is an exercise in "openness," attended by risks, and not to be undertaken haphazardly. In the context of the attorney-client relation, Shaffer offers the following explanation:

Moral discourse in professional relationship does not require that either party consciously change; it is possible for two people to discuss an issue of conscience, and to discuss it deeply, even though neither of them comes to change his mind. One who meets the other in a deep way, who meets the One in the other, is changed by such a meeting, but this change need not include a conscious change of mind. However, the assumption of moral discourse is that each of the discoursers is open to change. Martin Buber said, of the I-You relationship, that the tendency of the relationship was "as far as possible to change something in the other, but also to let me be changed by him." Change is the model in moral discourse, and the poetic paradigm as well, but it is openness to change—vulnerability, risk—which is the essence of moral discourse.

This part of the task is difficult enough, not only emotionally but intellectually, but the attorney's role in this dialogue is even more complex. As Shaffer notes, it may be that this conversation will convince an attorney that, from the standpoint of his own conscience, he should not take a case. So, the attorney must retain in the process his ability for "conscientious objection." We see him in this context, not only entering a new and deeper level of discourse, but maintaining at least two levels of consciousness in the dialogue itself: one as discourser with the client and one as judge of the import of the conversation. In the latter, one suspects, the objective analysis which is the meat of the current law school curriculum will stand the attorney in good stead, but certainly the exercise has become much more complex: in effect the attorney is operating in an extra—a third—mental dimension.

This aspect of moral discourse—the three dimensional component—is crucial to maintenance of a moral perspective in legal work. It may be analogized to the role of a judge in relation to the intensely focused actions of a

39. Id. at 244.
40. Id. at 248.
41. Id.
42. Id. (quoting M. BUBER, THE KNOWLEDGE OF MAN (M. Friedman & R. Smith trans. 1965)).
43. Id.
trial lawyer in pursuit of his case. The judge's perspective, theoretically, is engaged and informed, but critical and questioning. Ultimately she will reject or approve the actions of the lawyer in whole or in part. Without this component, simply exposing and discussing matters of conscience may serve a human relations purpose, but adds little or nothing to aid the lawyer in the moral aspect of his decisionmaking task.

The third dimension is reflected in the interior process of Huck Finn, who engages in moral discourse with himself including, by viewing matters through Jim's eyes, assuming a critical perspective. And, it is important to note, as Huck illustrates, that moral discourse does not occur solely in exterior conversations. Perhaps its most valuable use to legal practitioners is internal—to put them in touch with their own consciences, whether the dialogue is with another party or with themselves.

At this point, another central virtue in moral discourse (at least from a pedagogical perspective) should be emphasized: it is a process. It is not simply a matter of having feelings of conscience or perceptions of right and wrong or good and bad in an approaching decision or course of action. It is a process of systematically searching for those feelings, bringing them to light and subjecting them to the best Holmesian analysis one can bring to bear. In a real sense, this is lawyer's work, albeit in a territory alien to traditional legal voyagers. But once we accept it as a process, we begin to see how it can be applied and how it can be taught. We also begin to see that the morality to be taught in law school is not so much what is good or bad or right or wrong, though clearly individual judgments will be made on that, but the process of acting as a morally responsible and active person as one addresses legal situations and problems. It is a subject sufficiently procedural, this writer suggests, to adapt to traditional law school methodology and to avoid subjective and emotional excesses and distractions which Justice Holmes implies are inherent when morality is discussed and which, one suspects, many professors would fear. Because it is a process, it includes a system of order and control which we can put to use. As Alexander Bickel has observed, "[t]he highest morality almost always is the morality of process."45

Among the growing number of advocates for injecting legal education with a dose of moral inquiry, the tendency in the "how to" section of their essays is to suggest enhancements to, or new approaches in, law school ethics courses.46 This approach has merit, but alone it does not go far enough.

---

44. Professor Elkins has argued for a "critical perspective" in moral discourse, discussed briefly, supra text accompanying note 33.
46. See, e.g., Elkins, supra note 6, at 49-51. Commentators have suggested other ap-
Its most obvious shortcoming is that it leaves in place the compartmentalization of moral issues from mainstream legal studies. As long as this structural separation exists, the intellectual separation, which is current practice in many places now and has been an institutional mindset for generations, is likely to continue. The attraction to adhere to mythological, pure legal analysis and avoid the “confusion” of moral issues will prove too much for many teachers and students as well. It is usually easier to remain with the status quo, and there is substantial danger that even the most inventive and dynamically taught professional responsibility courses could not break this impulse, especially if they are relegated to the second or third year when the impulse is already well established.

In addition, it is time for everyone in the legal profession—and particularly those in positions of authority—to shoulder the burden of promoting professional responsibility and the morality of lawyers. When a lawyer seriously breaches standards of ethics and/or morality, it is an insufficient response for his former professor to wash his hands and say, “I only taught him in Torts.” In Professor Shaffer’s terminology, this is moral isolationism par excellence. It is not officious intermeddling for a law professor to engage students in a subject area (morality) which is supposed to be, and by necessity should be, the foundation of the profession. And from a pedagogical standpoint, who is better suited to do it?

Finally, as this essay has attempted to demonstrate, analysis of moral implications in legal decisions is part of the overall analytical process. While it may increase confusion to let it in, it maims the process of thorough analysis to hide it under euphemisms of more general policy issues or to attempt to keep it out. It is also, this writer suggests, more dangerous to the integrity of the decision itself if the moral area in which decisionmakers operate is allowed or encouraged to remain in the shadows.

The surest and most direct way to teach lawyers to think in the third dimension, and this writer predicts the one most likely to attain abiding results, is to break the Holmesian commandment and integrate moral discourse into basic law school courses. This will mean making it part of the analytical machinery one acquires in learning to “think like a lawyer”—an integral part of the standard reasoning process. This will seem a tremendous

proaches as well. See Luban, Against Autarky, supra note 1, at 189 (address the problem through structural and policy changes in law school organization and procedure); Richards, supra note 3, at 371-73 (democratize the class structure and teacher-student interaction to facilitate exchange of ideas in class on a moral level); Sandalow, The Moral Responsibility of Law Schools, 34 J. LEGAL EDUC. 163, 173-74 (1984) (broaden the curricula in law schools to areas of philosophy, literary theory and other disciplines that reflect upon moral issues).

47. Shaffer, The Practice of Law, supra note 31, at 239.
leap for some, but close examination of what is proposed may reveal that the leap is more emotional than substantive or methodological. Let us examine more clearly what this enterprise portends and what it emphatically does not.

It does not necessarily involve a change in teaching method, though one may want to consider methodological alternatives in order to encourage discussion on moral issues. At least two recent commentators have noted that the Socratic dialogue or other teaching methods adopted to critical inquiry are particularly suited to analysis of moral issues. One of them, Professor David Richards, testifies to considerable success in raising, through use of standard Socratic dialogue, the abilities of students in a criminal law course to apply techniques of legal analysis to moral issues. Indeed, the Socratic method would seem particularly suited to these issues. They are closely related to (and part of) the legal policy issues which flow from a factual situation, and they are most often inconclusive. It will not be possible (or, one suspects, advisable) to reach a firm conclusion in many instances about what is morally correct—particularly on the level of individual conscience. (The dictates of societal morality may be easier to discern). The lesson is in the exercise itself—the process—and it is difficult to imagine engaging in such a process in a law school class without considerable reliance upon the Socratic method.

It will not involve dredging for moral issues in every case. Many cases do not raise moral issues very well just as many cases do not raise legal issues very well. Other cases particularly raise moral issues which almost cry out for attention. An excellent example is the case cited by Professor Richards for use in his criminal law course to stimulate consideration of moral issues: Regina v. Dudley and Stephens, involving cannibalism, an issue that obviously strikes at the heart of moral concerns on any level. Cases on abortion, euthanasia, child abuse, and the right to die are other obvious examples. Some courses will include more cases of this nature than will others. A con-

---

48. Professor David Richards suggests, among other proposals, the use of reciprocal role playing in classes as a way to democratize the class setting and facilitate discussion on moral issues. Richards, supra note 3, at 371.

49. Id. at 371-72; Sandalow, supra note 46, at 171-72.

50. Richards, supra note 3, at 371. It is difficult to tell from Professor Richards' example whether the moral issues raised and discussed included dilemmas of individual conscience posed directly to the students or were limited to questions of societal morality. Consideration of the moral issues apparently began with the case of Regina v. Dudley & Stevens, 14 Q.B.D. 273 (1884), reprinted in [1881-85] All E.R. Rep. 61, the notorious case of cannibalization of a cabin boy by marooned and starving seamen. Then, the issues were engaged progressively during the course to a point, according to Professor Richards, where initial, absolutist positions had changed to analysis of "remarkable and discriminatively moral sophistication." Id.

Making Moral Lawyers

A constitutional law course covering rights of privacy and free speech, or a products liability course perhaps will raise more readily cognizable moral issues than a course in commercial transactions. In these courses the task may be akin to the one Justice Holmes feared, keeping the moral issues from overwhelming and obscuring the legal ones, and clouding clear analysis. For this reason, a professor might wish to be very selective and structured in his approach to moral issues in such a course, keeping in mind that it is precisely in the emotionally charged situations that students need most to learn to apply careful analysis—not only to understand the legal choices, but their moral implications.

The task in cases and courses where moral issues are not so near the surface will be different, but no easier. There, the initial problem will be the same one that is the nemesis of every first year law student: learning to recognize and identify the issues (the moral ones in addition to the legal ones). This may be a more novel task for many professors and students than traditional legal analysis simply because the emphasis in legal studies has, until recently, been to avoid moral issues. There will also be an understandable reluctance on the part of some to get into the business of exposing for public view what one believes or discounts as a moral issue. This involves some risk. As Professor Shaffer notes, one who exposes himself on this level risks change. One also risks judgment and criticism. While these elements have been present in law school classroom methodology for a long time and have pedagogical merit if done positively, methods to reduce the threat of judgment and criticism by the professor or students (toward the professor or other students) might be considered. Professor Richards' democratization of the classroom might be helpful here. There are other methods as well.

Are law professors in general qualified to deal pedagogically with complex issues of morality? Should they undertake additional training in general ethics, philosophy, or even theology? The answer to both of these questions is probably "yes." The process to be taught involves the basic skills of identification and analysis currently developed to a high art in most law school curricula. There is no new mystery here. In any situation where one enters a new area or expands an old area of substantive inquiry, however, it is predictable that active minds will naturally seek more information. It might help a professor, for example, to have a cross-discipline degree in philosophy or to take a seminar on the teaching of Reinhold Neibuhr or to reread his

---

52. Shaffer, The Practice of Law, supra note 31, at 248.
53. Richards, supra note 3, at 370-73.
54. Alternative methods of teaching, particularly in regard to anxiety and stress reduction in students, are discussed in D. Bridges, Education, Democracy and Discussion (1979); see also A. Jones, L. Bagford, & E. Wallen, Strategies for Teaching (1979).
college text on Immanuel Kant. While this sort of activity may not be necessary, it is quite possible to view it as desirable and an opportunity not only to teach but to learn.

What should be the structural and substantive content of the moral inquiry aspect of a law course? As suggested previously, because the lesson to be taught and learned is the process itself, there is no implicit requirement that a course reach conclusions about what is morally good or bad, though probably consensus will develop on some points. The structural and substantive focus should be rather upon categorical definitions of moral issues as they relate to each other and to the law, and upon designing an analytical framework for their evaluation, resolution, and use. In terms already employed in this essay, such a focus could mean distinguishing legal, policy and moral issues from each other and determining how they interrelate and are mutually inclusive; learning to identify distinctions, where they exist, between issues of societal morality and individual conscience; weighing and balancing the imperatives in each category and resolving conflicts; attempting to identify long-term policy and value goals against which to measure judgments on moral issues; and inculcation of the three-dimensional structure of discourse which should involve self-identification by the student of her role as her own moral guardian.

A final word on educational due process: There has been a tendency in legal education to reveal the mysteries of the law to first year students by ambush. Studies too often begin without any explanation of the method involved, why it is employed, where it came from and where one hopes it will lead. Whatever the merits of this approach (and, indeed, for the relatively small percentage of law school students who begin classes with a lackadaisical mindset, it can be said to have a certain shock effect), it seems particularly unjust if one expects to engage students openly in issues of morality and conscience. It might assist efficiency and relieve anxiety to begin a course in which these issues will be raised by an explanation of the purpose for raising them and the method in which they will be addressed. Dare one suggest that the very categories of issues to be discovered—those of law, policy, social morality, and conscience—might be revealed? A minimum of notice to students of this nature might serve as an essential first step to avoid the confusion predicted by Justice Holmes and which he correctly observed inhibits the learning process.

IV. CONCLUSION

This essay has attempted to show that in the teaching and practice of law many of us have been operating under an illusion—that legal work could be
conducted separately from moral issues—and to suggest that too often that illusion has been used as an excuse to discount moral factors in legal decisions and to operate in the more comfortable roles of advocate and rule manipulator. If this is all society demands of lawyers, then we should strive mightily to follow the advice of Justice Holmes and continue to produce lawyers adept at winnowing out moral issues. The assumption in this essay is that that is no longer a sufficient goal—that society needs and deserves more from some of its brightest and best educated people than behavior as result-oriented automatons.

If this assumption is true, then the focus should shift to what to do to improve the way lawyers behave. In a profession based upon the techniques of close analysis, the skills are present to look carefully at what lawyers do, understand what in fact is going on, and devise ways to make desirable changes. The precedent exists for this self-examination as well, as the Legal Realists have demonstrated. It is the position of this writer that if that analysis is undertaken thoroughly and honestly, it will reveal that the methods we teach and practice are analytically incomplete. They simply do not deal with all of the issues, present in most decisions, which should (and do) affect the outcome. And the issues that are systematically expunged from the process (insofar as that is possible) are some of the most important to society and potentially most powerful in the decision—issues of morality and individual conscience.

If moral issues are intrinsic in legal decisions, then learning to deal with them should be part of the legal educational process. Concomitantly, their recognition in the educational process should attempt to mirror their presence in legal practice and decisionmaking. This means that identifying and analyzing moral issues should become part of the process of learned, legal analysis. While there is nothing wrong with a course, such as traditional ethics courses, which particularly emphasize moral issues, it is fanciful to believe that analysis of moral issues can be learned separately from analysis of issues of law and policy with which they are entwined. In short, the teaching and practice of morality should be undertaken across-the-board and honestly addressed wherever it naturally and logically appears.

Finally, it is not enough simply to begin discussing moral issues in law school classrooms. As part of the decisionmaking process, and thus of legal analysis, moral issues should be subjected to the same time-tested methods of teaching and analysis which to date have been so powerfully applied in legal education and practice. We need to understand how to make moral choices just as we learn to make legal choices, and the key is in the process—the process of external or internal Socratic dialogue with the added dimension of
concurrent self-analysis and criticism—and in seeing and judging one's own actions through the eyes of a detached and critical viewer. It is in this way that the lawyer will learn to operate, not only as a lawyer, but as a moral person who achieves a dimension, which in the eyes of many, has been woefully lacking.