Clinical Teaching, Ethical Negotiation, and Moral Judgment

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Mary Jo Eyster*

Clinical Teaching, Ethical Negotiation, and Moral Judgment

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I. PROLOGUE

After several years of struggling with the issues addressed in this Article, I am revisiting and reconceptualizing them with the insights and perspectives gained through the literature on the feminist/feminine views of morality and moral development. Through this reading and thinking, I feel that I have been able to reconcile some of the difficult conflicts and problems that have troubled me. Principally, I feel more comfortable with the realization that I do not, and I believe can-

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* Clinical Associate Professor, Brooklyn Law School. The Author is grateful for the extensive work of research assistants Mari Majefski and Melissa Garren. She would also like to thank her husband, Richard Eyster, for his comments and suggestions, and her secretary, Lorraine Joyce, for typing numerous drafts and other invaluable assistance.
not, provide a single formula for the law student and lawyer to follow in order to achieve ethical and effective negotiation behavior. I now believe that this cannot be done in a way that satisfies the feminine/care ethic which has heretofore been subordinated in typical writings and practices in the negotiation arena. The need for contextual decision making conflicts with the desire for uniformity. As I revisit my concerns, and my methods for dealing with these concerns in my teaching, I know that I have experienced the discomfort and dissonance identified by Carol Gilligan, in her portrayals of Amy, Hillary, and Jake1 as well as by other writers who have explored the alternative ethical voice—the Care Ethic.

I rely, in part, on the theories of Lawrence Kohlberg2 and others who have advocated the teaching of moral judgment and decision making throughout the years of formal education. Although many feminist writers have criticized the methodologies of some of these studies because of the complete absence of female subjects, I still believe that the theories about the effect of formal education on the de-

1. Carol Gilligan, In A Different Voice—Psychological Theory and Women's Development (1982). Amy is an eleven year old girl whom Gilligan uses to portray the nature of a moral conflict for the developing female adolescent. She describes Amy's conflict as "the eleven-year old girl's question of whether or not to listen to herself" in attempting to make a moral choice. Id. at 51. Hilary is a twenty-seven year old lawyer who experiences tension between adhering to the adversary system and assisting an opponent in discovering a document useful to his client. Id. at 135. These, and other examples, demonstrate the tensions that many lawyers might experience in the process of negotiating disputes. Jake, an eleven year old boy, is used to demonstrate a different process of resolution of moral conflict. Jake relies on applying rules to the situation, and then conforming his feelings to the outcome dictated by the rules. Id. at 49-50.

velopment of moral judgment are sound. The precise way in which Kohlberg and others have measured and tested moral development may be incomplete, and therefore flawed, but the notion that moral reasoning can be nurtured and developed during and beyond the years of formal education is, in my view, entirely consistent with the writings and practices of feminism. Phyllis Goldfarb writes of a "Theory-Practice Spiral" based on the fundamental precepts of both feminism and clinical education.\textsuperscript{3} She claims that our understanding of moral and ethical action is necessarily informed and modified by the context in which we see and judge that action.\textsuperscript{4} This learning is, consequently, not static nor capable of being reduced to simple formulas.

What follows is a description of some serious issues that arise in the present practice surrounding negotiation—problems which I encountered in the practice and teaching of dispute resolution negotiation in a law school clinical program. I describe the methods of teaching that I developed to attempt to deal with these problems, and my perceptions about the shortcomings of my efforts. I am now more comfortable with the realization that I cannot provide a simple prescription to resolve these issues. This is, in my view, all the more reason why we must teach our students a process of reasoning that allows them to confront ethical problems in context and to resolve them.

Some of the teaching in this area has done generations of lawyers a grave disservice; it has allowed them to conclude either that the answers are capable of simple resolution by application of clear rules to facts or that there are no limits to a lawyer's conduct. As I will postulate below, the absence of any rules, coupled with an "ethos" that favors aggressive and even ruthless conduct, produces practices that would be judged by most non-lawyers to be immoral.

I do not have empirical data to support my conclusion that my students learn from the process I describe here. I have not attempted to verify my observations by administering the type of tests utilized by Kohlberg and others.\textsuperscript{5} I realize the seeming inconsistency of accepting the conclusions of Kohlberg while rejecting his methodology, but I

\textsuperscript{3} Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1650-51, 1653 (1991).

\textsuperscript{4} The author explains that it is only through repeated opportunities to make and to act upon moral judgments that the student develops this skill. This process can be guided by the teacher who is sensitive to the context in which the moral issue arises. \textit{Id}.

\textsuperscript{5} Kohlberg's theory provides the basis of testing instruments designed to appraise the level of an individual's moral reasoning using the Defining Issues Test (DIT). The DIT is a "pencil and paper instrument comprising six vignettes, each presenting, a moral dilemma. . . . For each vignette subjects are asked to choose among twelve possible moral reasons, those reasons they find most important in resolving the dilemma. The DIT measures the degree to which the subject chooses principled moral reasoning". Hartwell, \textit{Experiential Teaching, supra} note 2, at 512. Kohlberg himself used a slightly different testing method, based
think that seeming inconsistency is merely the reflection of a difference in objectives. I am not as much concerned in measuring the ability to engage in sound moral reasoning as I am in teaching sound moral behavior. I am not convinced that moral conduct and the ability to respond “correctly” to a written hypothetical are necessarily co-extensive. This does not mean that testing is irrelevant. I think that the testing demonstrates that teaching can have an impact on how students analyze moral problems; they are able to be guided and influenced by formal teaching, even at an age when moral judgment was once thought to be fully in place. It is my belief that by teaching and modeling both the reasoning and the corresponding behavior, I can help students to bridge the gap between theory and conduct.

Talking about ethics and moral issues is, in my view, not an adequate method for preparing students to behave ethically. As I discuss below, I have noted a divergence between what students say in classroom discussions, and what they do, or propose to do, in real life situations. I do not suggest that the discussion of these issues serves no purpose; merely that discussion alone is not sufficient. Similarly, testing student development through a written test is insufficient. I have observed that my students develop a better understanding and facility for moral decision making and ethical conduct through the program I describe.

As others have written, it is still not clear how, or even whether, the influx of women and minorities into the profession will transform practice and ethical norms. I feel, however, that unless we discard the lessons and practices that have stifled our growth as a profession, neither we nor our students can fully realize the potential. As a clinical professor, and as a woman, I am now more comfortable with the notion that we must feel our way into and through this transformation.

II. INTRODUCTION

The theme of this Article is that we must begin to focus our legal educational efforts on moral character as well as technical skills if we are to improve the overall ethical conduct of the profession. By teach-
ing our students that to “think like a lawyer” is to focus on rules only, and to screen out other concerns, we are thwarting the development of their full moral potential. One of the starkest demonstrations of the failure of a rules orientation in teaching law, and especially legal ethics, arises in the teaching and practice of negotiation, particularly the negotiated settlement of lawsuits.\(^7\) Although commentators, practitioners, and educators have engaged in a wide variety of analyses, rationalizations, and other efforts to articulate a rule based ethic for negotiation,\(^8\) these efforts have been unsuccessful and unsatisfying.\(^9\) I believe that the reasons we have been unsuccessful in achieving a satisfactory negotiation ethic go to the heart of our system of legal

\(^7\) Although my focus is on the ethics and practice of negotiation, the failure of our educational regime in terms of producing moral and ethical professionals is not so limited. Professor Himmelstein wrote a powerful critique of our teaching methodologies almost 20 years ago. Jack Himmelstein, *Researching Law Schooling: An Inquiry Into The Application of Humanistic Educational Psychology To The Teaching of Law*, 53 N.Y.U. L. Rev. 514 (1978). More recently, feminist writers and others have explicitly or implicitly criticized the narrow focus of legal education, particularly as it focuses on teaching students to divorce analysis of rules from other concerns. See Cahn, *supra* note 6, at 25-35 passim; Hartwell, *Clinical Education, supra* note 2, at 131-33 passim; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 817-29 (1984) [hereinafter Menkel-Meadow, *Problem Solving*]; Richards, *supra* note 2, at 361.

\(^8\) Commentators have taken varied approaches in an effort to articulate a rule-based ethic for negotiation. For example, Naomi Cahn suggests adding two sections to the Model Rules. One would recognize that the attorney's personal morality may conflict with her professional judgment. The other would require the attorney to analyze this conflict and to disclose it to the client. Professor Cahn argues that this would enable us to preserve the current system while paving the way to consideration of alternative forms of dispute resolutions. Cahn, *supra* note 6, at 49-50. Similarly, Walter Steele, Jr., proposes the addition of a rule which would impose on negotiators an “obligation of total candor and total cooperation to the extent required to insure that the result is fair.” Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 Vand. L. Rev. 1387, 1403 (1986). In contrast, Rex Perschbacher suggests that there are currently existing regulatory rules of conduct which can provide guidance for ethical behavior in negotiations. Perschbacher would extrapolate a standard of conduct for negotiators from statutes, decisions, administrative regulations, etc. existing in other fields of law such as contract, tort, agency, and malpractice. Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 Ariz. L. Rev. 75 (1985). Gerald Wetlaufer acknowledges that lying in negotiations is both routine and an effective tactic. However, he also supports the delineation of clearer lines between acceptable and unacceptable behavior in addition to making room for ethics to enter into the negotiation process. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219 (1990). See also PAUL MICHAEL LISNEK, *A LAWYER'S GUIDE TO EFFECTIVE NEGOTIATION AND MEDIATION* (CLE, 1993)(suggesting rules that are principally descriptive, rather than prescriptive); Scott S. Dahl, *Ethics On The Table: Stretching The Truth in Negotiations*, 8 Rev. Litig. 173, 174-80 (1989)(summarizing the main viewpoints on the issues of truthfulness in negotiation); Thomas F. Guernsey, *Truthfulness In Negotiation*, 17 U. Rich. L. Rev. 99 (1982).
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education and our related beliefs about professionalism. Only by making fundamental changes in the way we view our professional roles, and in the way we educate our professionals, can we achieve a satisfactory solution to the presently intractable dilemmas posed by common negotiation practice. I do not think that the problems of developing a satisfactory ethic of legal professionalism begin and end with negotiation; I think, instead, that the tensions which arise in the teaching and practice of negotiation are an important indicator of the extent of our failure to adequately incorporate the notion of moral judgment\(^9\) in our standards of professional responsibility.

Negotiation practice provides an excellent laboratory for considering these issues for a number of reasons. First, a significant percentage of our litigated disputes are resolved through some form of negotiation.\(^10\) Second, for a variety of structural reasons, the negotia-

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9. See notes 86-88, infra, and accompanying text, for a discussion of the conclusion that we have been unsuccessful in developing a satisfactory set of ethical rules to govern negotiation.

10. See James R. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. LEGAL EDUC. 11 (1982). Professor Elkins decries the persistent and traditional segregation of moral discourse from law teaching, even in the area of Professional Responsibility. He explains this as a function of the culture of legal education which values rules analysis, and devalues other perspectives. Id. at 11-19. He states that students come to expect courses, including courses on ethics, to teach rules, analysis, and substantive law “as if it had no moral content or import.” Id. at 30. “Students come to any values-oriented course with expectations derived from the law school culture. In this case the student subculture treats values-courses as if they were not ‘real’ law courses.” Id. It may be difficult to articulate a definition of moral judgment that would accurately describe varying ideas as to what it entails. Richards draws on both Kohlberg and Jean Piaget in stating that “moral development is viewed in terms of the kinds of reasons offered by people at various ages for believing or thinking acts to be wrong and right and acting on these perceptions.” Richards, supra note 2, at 365. Walter Bennett defines the term “moral” in three related ways: the general considerations between right and wrong; the societal mores or norms that govern right and wrong; and individual perceptions and emotions. Bennett, supra note 2, at 45-46. Carol Gilligan states that “[t]he essence of moral decision is the exercise of choice and the willingness to accept responsibility for that choice.” Gilligan, supra note 1, at 67. She explains that “[w]omen’s construction of the moral problem as a problem of care and responsibility in relationships rather than as one of rights and rules ties the development of their moral thinking to changes in their understanding of responsibility and relationships, just as the conception of morality as justice ties development to the logic of equality and reciprocity.” Id. at 73. My use of the terms “moral,” “morality,” and “moral judgment” throughout this Article is an admittedly imprecise mixture of these various concepts.

11. Commentators, statistics, and common perception indicate that well over 50% of civil cases end in a negotiated settlement while fewer than 10% are tried to a verdict. See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 27-28 (1983); Richard D. Mink, An Attorney’s Responsibility for His Client’s Reputation and Self-Esteem in the Settlement Context, J. LEGAL PROF. 191 (1987); Robert H. Mnookin & Lewis Kornhauser, Bar-
tion process lends itself to unethical and unscrupulous conduct. Third, and perhaps most important, legal scholars and commentators do not even agree on whether certain practices are, or should be, prohibited. Based on my own efforts to resolve the dilemmas that I feel are inherent in current negotiation practices, and from my reading of others' proposals, suggestions, and analyses, I have reached the conclusion that satisfactory reform is unlikely to be achieved solely through new rules formulated by the legal profession. Until we educate our students in a manner that makes moral judgment a legitimate and central feature of professional conduct, I think we will not

12. Even a seemingly straightforward issue such as the role of lying in the negotiation process does not receive universal condemnation. Some commentators would agree with the position taken by Professor James White: "To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation." James J. White, *Machiavelli and The Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 928 (1980). See, e.g., Guernsey, *supra* note 8, at 125. Charles Curtis has advanced this viewpoint most forcefully in claiming that one of the lawyer's legitimate functions may be to lie for the client, and to otherwise act in ways that neither the lawyer nor the client would do on his own. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN L. REV. 3, 6, 9 (1951).


A more obviously complex matter like the duty of the attorney to disclose unfavorable facts and legal authority to her adversary has inspired extensive discourse. See *Gary Bellow & Bea Moulton, The Lawyering Process*, 586-606 (1978); Dahl, *supra* note 8, passim; Guernsey, *supra* note 8, 113-20. Other kinds of misrepresentations, such as the use of false demands, the denial of settlement authority, and the pretense of an uncooperative or unreasonable client may be advocated or discussed without any reference to the attorney's ethical duty. See *e.g.*, Kenney F. Hegland, *Trial Practice Skills in a Nutshell*, at 295 (1978); Michael Pickering, *The Art of Settlement Negotiations*, 62 LAW INSTR. J. 31, 33-35 (1988).

be able to achieve a standard of negotiation practice that would satisfy Amy and Hilary, and probably not Jake.13

In Part III of this Article, I discuss the reasons why I believe that it is both important and difficult to teach law students the process of negotiation and how to conduct themselves in the process. I describe the structural and ethical problems and why they are so seemingly intractable. I then describe the curriculum which I have developed to enable students to enter their professional careers with an effective and ethical approach to negotiation; and I explain why these efforts have not been entirely satisfactory.

In Part IV, I explain why I think that the difficulties which I have identified cannot be resolved merely through rewriting the rules. I describe the obstacles in the drafting of the current ABA Model Rules that blocked the passage of rules of conduct which would have required lawyers to act honestly in their negotiations. Further, I postulate that it is the underlying ethos of the profession, the way we perceive our roles, which inhibits us from requiring a higher standard of conduct of our profession.

Finally, in Part V, I attempt to make the case for a different approach to legal education, and a different view of the role of the profession; a view that derives from the work of moral psychologists, as well as from the writings of feminists and other legal scholars. I rely on the writings of these scholars to suggest ways in which we might view our roles as educators and as professionals which differ from the currently prevailing viewpoint. In addition, I explore the application of these ideas to legal education generally, and to the problems of negotiation in particular.

III. THE CHALLENGE OF TEACHING EFFECTIVE AND ETHICAL NEGOTIATION PRACTICES

My experiences as a clinical teacher have convinced me that students feel more apprehensive about negotiation than they do about almost any other lawyering task. The absence of rules and models creates an aura of mystery and uncertainty which needs to be dispelled.14 Many students express reluctance to raise the issue of settle-

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13. See supra note 1.
14. There is substantial agreement among commentators that the area of negotiation lacks specific and clear rules of procedure and of ethics. See, e.g. Cahn, supra note 6; Dahl, supra note 8; Gifford, supra note 12; Menkel-Meadow, Problem Solving, supra note 7; Eleanor Holmes Norton, Bargaining and the Ethic of Process, 64 N.Y.U. L. Rev. 493 (1989); Geoffrey M. Peters, The Use of Lies in Negotiation, 48 Ohio St. L.J. 1, 2, 9, 13 (1987). Cf. William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1084-90 (1988). Whether there is a need to fill this void and, if so, how to begin to do so are questions that have led to much debate.
ment with an adversary; they fear it is a sign of weakness. Some treat the negotiation process much like oral argument, not surprisingly since that is one oral skill which is stressed in the curriculum. Accordingly, they seek to reach “agreement” by persuading the adversary of the correctness of their position. They listen only in order to refute, and when they do not succeed in this endeavor, they assume that compromise is hopeless. More importantly, unless “ethics” has been highlighted as the topic of the class, students engaged in mock negotiations often overlook the serious ethical issues raised by the problem.

In summary, having observed students’ approaches to the ethical and practical issues presented by settlement negotiation, I am convinced that they must be afforded opportunities during law school to learn how to negotiate effectively and ethically. I am also becoming increasingly convinced that, in order to accomplish this dual objective, it is necessary to challenge, and perhaps to defy, some of the prevailing wisdom concerning the limits of ethical conduct. As detailed more fully below, efforts to achieve these goals within the current system are not wholly satisfactory.

It is widely perceived that the negotiated settlement of legal disputes accounts for the vast majority of dispute resolutions. Statistics support this view, but they do not reveal the full picture. Pre-litigation settlements are difficult to tally accurately. There are also post-verdict, pre-appeal settlements that may not be counted as negotiated resolutions. Personal experience as well as statistics indicate the critical importance of negotiation in the dispute resolution process.

In view of the obvious significance of the settlement process to the overall litigation picture, it seems clear that lawyers should be given some introduction to, and training in, the process of negotiating settlements. It also seems somewhat remarkable that there are few rules of ethics or procedure that directly address the negotiation process.

15. See Norton, supra note 14, at 496 n.13, 497 n.15; Trubek & Sarat, supra note 11, at 85-87.

16. In fact, the rules of the Code are not specific to the negotiation process at all. In the ABA Model Rules, none of the rules is specific to negotiations with the exception of Rule 1.2(a) which requires the lawyer to “abide by the client’s decision whether to accept an offer of settlement . . . .” Negotiation is referred to in the comments of a few of the rules. For example, the comments to Rule 1.7, pertaining to conflicts of interest, discuss the difficulty of assessing conflicts of interest in contexts other than litigation. The proposition is illustrated with a reference to negotiations: “For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.” Model Rules of Professional Conduct Rule 1.7 cmt. (1983). Rule 4.1 forbids a lawyer to knowingly make a false statement of material fact or law to a third person. Comment 2 following the rule states that
Because of the vagaries of the process, the student and the novice attorney are particularly vulnerable, and are often unprepared to respond either effectively or ethically to the pressures of negotiation. In the absence of any concrete guidance on ethics or procedure, practitioners rely heavily on experience, common sense, and instinct.17

The factors which make negotiation difficult to the novice practitioner also make it a difficult subject to teach. The difficulty lies not in the teaching of negotiation skills, per se, but rather in achieving a satisfactory set of principles that yield both ethical and effective negotiation conduct. A thorough examination of both the literature and the actual experience of negotiation practice may lead to an unhappy conclusion: the better one becomes at concealment and deceit, the more successful one will be at achieving favorable results for the client.18

17. There have been several attempts at prescribing a model for successful negotiating, and these can be quite helpful to both the novice and the experienced negotiator. Nonetheless, even these models often leave questions unanswered, or acknowledge that there are no definite answers to the intractable ethical dilemmas. See Roger Fisher et al., Getting to Yes (2d ed. 1991); Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In (1981)[hereinafter Fisher & Ury, Getting to Yes]; Gifford, supra note 12; Guernsey, supra note 8; Eve Hill, Alternative Dispute Resolution in a Feminine Voice, 5 Ohio St. J. ON Disp. Resol. 337 (1990); Menkel-Meadow, Problem Solving, supra note 7; Norton, supra note 14.

18. This was illustrated by Scott Dahl's interview of 14 Texas attorneys, representing diverse civil practice areas of private law firms. After integrating their responses to hypothetical questions exploring various ethical aspects of negotiations Dahl concluded that a "client first" attitude is strongly entrenched in the legal profession. Most of the interviewees were untroubled by the idea of misleading the other side, viewing it as "part of the 'game' of negotiation." Dahl, supra note 8, at 199. Many of them apparently "agree on the boundary of permissible deceit, which in turn shows that these lawyers are not 'hunting for the rules of the game as it is (being) played' but rather they are following what they view as permissible conventions of untruthfulness in negotiations." Id. (footnote omitted). See Guernsey, supra note 8; Norton, supra note 14; Wetlaufer, supra note 8, passim (the author condemns the various practices that he catalogs, but his extensive list of deceptive tactics and justifications demonstrates the prevalence of these practices); White, supra note 12. Robert Condlin examines the tension between the ethical and practical demands of negotiation from a slightly different perspective in Bargaining in the Dark, 51 Md. L. Rev. 1
The same tension does exist, to some degree, throughout the adversary process. However, there are features of the negotiation process that make this tension particularly acute. Although the problem may initially be seen as a failure to prescribe sufficient rules, I believe that the problem is more fundamental. As will be discussed below, the structural features of the negotiation process, coupled with the lack of a uniform ethic of fairness and honesty, contribute to an inherently conflicted practice. The mixed message that is being communicated seems to be: learn to do all the things that will trick your adversary into under/over-valuing the case, but do it in a way which avoids outright lying about material facts or the law. This is a difficult and unsatisfying lesson for the professional to adopt, and for the educator to teach.

A. Uncharted Waters, Unguided Practices

The structural features of negotiation that make it particularly susceptible to ethical dilemmas are the following: 1) negotiation is a largely invisible, undocumented, and unreviewable process; 2) negotiation is a largely invisible, undocumented, and unreviewable process

19. See Guernsey, supra note 8, at 99 (discussing the tension between advocacy and honesty as applied generally to the practice of law). The basis of the tension arises from Canon 7 of the ABA Model Code that requires that “a lawyer . . . represent a client zealously within the bounds of the law.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Cannon 7 (1980). Gerald Williams explains that there is no separate body of law that pertains to negotiation—rather it is viewed as an adjunct of litigation. GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT, 90 (1983).

20. See Guernsey, supra note 8, 105-120; Hegland, supra note 12, at 289, 295; Norton, supra note 14, passim; White, supra note 12, at 928 and passim. But cf. Menkel-Meadow, Problem Solving, supra note 7. Menkel-Meadow advocates another view of negotiating that would require more openness and honesty to maximize mutual gain. The problem solving strategy that she describes, which is supported by an economic analysis, would require more open disclosure and information sharing in order to achieve maximum mutual gain. Id. at 822-23. This is a model that has not yet, to my knowledge, received wide-spread acceptance, although it may be growing in popularity. See Condlin, supra note 18, at 11-68.

21. See Norton, supra note 14, passim. Cf. Gifford, supra note 12; Mookin & Kornhauser, supra note 11, passim (describing the interrelationship between the formal, adjudicatory model and the “private ordering” negotiating process). While the experienced negotiator can use this freedom effectively to gain information, to make selective revelations, and to discover weaknesses, the novice may be confused or misled by the process. See, e.g., Bellow & Moulton, supra note 12, at 508-22. Cf. Peters, supra note 14, at 49. Second, negotiations are usually conducted privately. White, supra note 12, at 926. Cf. Melvin Aron Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 HARV. L. REV. 637, 640 (1976) (describing the negotiation process through case histories from an African society because of the paucity of such accounts in our own culture). This means that students will have had little opportunity to observe lawyers negotiating. In the absence of relevant models students are most apt to assume the lawyer's role with which they are most familiar—either the trial or appellate advocate. Neither of these roles is well suited to effective negotiating.
Ethical negotiation is a wholly informal process ungoverned by any codified procedural rules; and negotiation practices are not specially addressed, except in the most general way, by either the ABA Model Rules of Professional Conduct or the ABA Model Code of Professional Responsibility. These features seem to contribute to the prevalence of practices that, by generally accepted standards of conduct, would be judged dishonest.

The “invisibility” of the negotiation process is well known and has been discussed by many commentators. In many, perhaps most, negotiations there is no judge present. The clients may at times be present, although this is not the customary practice and is not required in most cases. The issue of what attorneys tell their clients about the process, both before and after, is an open question; it can safely be stated that clients do not always know what transpired in the actual negotiation session.

For most individual litigants there is no access to “market” information on settlements. Clients are, of course, informed of the outcome of the negotiations because the decision whether or not to settle is one the client must make. However, even the outcomes are somewhat “invisible” in the sense that the terms of settlement agreements are

Although the reliance on legal authority or other norms, and a certain amount of “argument” concerning both facts and law are useful negotiation tactics, the absence of a final arbiter makes these models flawed. However, for an interesting perspective on the role of norms and principles in negotiation see id.

22. The complexity of the process of settlement negotiation, and its interrelationship with other aspects of the lawyering process, has been detailed and analyzed by Prof. Donald G. Gifford. Gifford, supra note 12. Clearly a process this complex cannot be reduced to definitive rules. However, the trial process, including jury selection, opening statements, witness examination, etc., is no less complex. Nonetheless, there is a set of rules that serves as the basic framework for the process. Negotiation lacks even this sort of uniform framework. Of course, it could be argued that rules of procedure govern pre-trial and trial practice in only the most skeletal fashion. Strategy and tactics, rather than adherence to the rules, make the lawyer a skilled, successful litigator. However, even the novice can, by following the rules, know when and how to get into the game and what steps to follow toward completion. The negotiation game is far less accessible.

23. See supra note 16.


25. It may be seen as acceptable for lawyers to deceive their clients, depending on the statement and the circumstances. See In re Mal De Mer Fisheries, Inc., 884 F. Supp. 635 (D. Mass. 1995). Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact and, therefore, lawyers may feel that it is permissible to misrepresent those facts. Lisa G. Lerman, Lying to Clients 138 U. Pa. L. Rev. 659, 734 (1990). See also, Dahl, supra note 8, at 184-85. Cf. Gifford, supra note 12, at 839-43 (discussing the problem of lawyer dominance of negotiation counseling).

generally not publicly known and may be kept confidential. Consequently, a client may be informed that an insurer will pay $5,000 for her broken wrist, but she will not necessarily know what other settlements were reached for other plaintiffs' broken wrists. She may be able to learn what juries awarded for similar injuries and some settlements are reported, but access to this type of information is not universal. This makes it virtually impossible for the client to judge whether the outcome of the negotiation in her case was a "fair" one. In most cases, there is no requirement that the result be approved by a court, even when the court is informed of the terms of the settlement.

Compounding the problem of invisibility is the lack of procedural guidelines to govern the process. Even the basic framework of the negotiation process, including when and how to begin negotiations, how to respond to offers or demands, when to conclude negotiations, and how to finalize agreements, may be unknown to the novice. Contrasted with, for example, pre-trial and trial procedures, no structural rules are available to the novice attorney to guide her in negotiating. Unlike pleadings and discovery requests, there is no set rules for negotiating cases.

The ABA Model Code's Ethical Considerations also bear on this issue. Ethical Consideration 7-7 allows a lawyer to make decisions on her own in certain circumstances that do not affect the merits of the case, "[b]ut otherwise the authority to make decisions is exclusively that of the client . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

Ethical Consideration 7-8 states that a lawyer should advise a client of the possible effect of each legal alternative; however, "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

27. See, e.g., Hegland, supra note 12, at 279-88, 300-01 (discussion of the difficulty of evaluation of the case's worth). See also Gifford, supra note 12 at 830-31 (discussion of the difficulty of assessing the settlement prospects of case before the negotiation begins).

28. FED R. Civ. P. 23(e). The absence of any defined structure or limitations on the process of settlement of most civil cases is not clearly desirable or necessary. A cogent argument can be made for requiring some type of judicial input and approval once the disputants have invoked the power and authority of the court by bring the matter to litigation. To a greater or lesser extent, the settlement of certain categories of civil lawsuits already requires some judicial oversight. See, e.g., Mnookin, supra note 11.

29. There are, of course, numerous articles, studies, and how-to-pieces written for the practitioner. These serve essentially the same function as pieces written on the art of cross examination, jury selection, and oral advocacy. They are not grounded, however, in specific rules of practice or ethics. Rather, they are efforts to describe what lawyers do in negotiating, what is effective, and what pitfalls to avoid. See supra note 17.

30. Trial and pre-trial conduct is governed by the Federal Rules of Evidence as well as the Federal Rules of Civil Procedure.
time or manner to embark on settlement discussions.\textsuperscript{31} Of course, there have been numerous articles, treatises, and books written on negotiation practice which offer valuable insights and guidelines.\textsuperscript{32} I distinguish between these works and rules because descriptive works, while useful, lack the authority and enforceability of prescriptive rules. Thus, the settlement negotiation process is lacking the structural features that would help insure the integrity of the process; publicity, an impartial arbiter, accountability, and procedural guidelines.\textsuperscript{33}

Absent structural guarantees of regularity and fairness, the integrity of the negotiation process might be safeguarded by clear and enforceable rules proscribing unethical practices. Such rules do not presently exist. The two principal sources of ethical guidance are the ABA Model Code of Professional Responsibility\textsuperscript{34} [hereinafter "Code"] and the ABA Model Rules of Professional Conduct [hereinafter "Model Rules"][.\textsuperscript{35} The provisions of the Code and the Model Rules are not specific to the negotiation process.\textsuperscript{36} Thus, rules pertaining to misrepresentation of law and fact, concealment of witnesses and evidence, and expression of personal opinions were not tailored to the negotiation process.\textsuperscript{37}

There is a wide range of opinion as to how these rules apply, what types of practices are proscribed, and what types are accepted. Various types of misrepresentations, such as lying about the client's willingness to settle, making false demands, and misrepresenting the dollar amount acceptable to a client are among the practices that may be criticized or applauded depending on the commentator's interpretation of what ethical representation under the rules requires.\textsuperscript{38} Fre-

\textsuperscript{31} As noted by some commentators, without this guidance some attorneys are reluctant to even begin the negotiation process for fear of making a mistake in valuing the case. Murray & Rau et al., Processes of Dispute Resolution, 140-41 (2d ed. 1996).
\textsuperscript{32} See supra note 17.
\textsuperscript{33} The concept of "due process" is generally understood to include features of the following types: rules of procedure, an impartial decision maker and fact finder, reviewability, and, often, openness of the proceedings.
\textsuperscript{34} The ABA Model Code of Professional Responsibility was first adopted in 1969 and served as the basis for the Codes of Ethics of many states, including New York.
\textsuperscript{35} The ABA Model Rules of Professional Conduct were adopted in 1983 after extensive debate as a newer, more updated statement of the aspirational rules that should govern the lawyer's work. The Model Rules have now been adopted, or serve as the basis for the codes, in about half of the states. However, many states still use the Model Code.
\textsuperscript{36} See supra notes 12 and 16.
\textsuperscript{38} See supra note 12. Gerald Wetlaufer gives a very thorough account of the types of deceptive practices that may be used in negotiation and explores the usual ratio-
quently, commentators who support the use of tactics that the layperson would call deceitful do so from a sense of obligation. That is, the dictates of our adversary system, and especially Cannon 7 (zealous advocacy), require the most aggressive conduct permitted by the rules. In the absence of clear prohibitions, deceit of the kind described above may be seen as a requirement of zealous advocacy.

The extent to which the variety of deceitful behavior is accepted is apparent when one reviews textbooks and treatises on the negotiation process. Authors nearly always describe a range of practices that are designed, in some measure, to deceive the opponent. Very rarely are deceitful practices condemned outright. Frequently, a separate section on "ethics" advises the reader to avoid material misrepresentations. The practices described in the "tactics" chapters are not clearly within the proscription. In fact, some commentators utilize an apparently circular logic to defend the various deceitful practices common in the negotiation process: these misrepresentations are not unethical because they are an acceptable part of the process. A variation of this reasoning is: these are not material misrepresentations pro-

nalizations and justifications. Wetlaufer, supra note 8, at 1224-26. The most common types of deceptive practices include: bluffing (making demands or statements that are not serious, such as stating that a particular item must be agreed to); puffing (exaggerating the value of the case or some aspect of the proof); making false demands; concealing settlement authority or the "bottom line;" and misstating the client's willingness to settle or to try the case. Other types of deceptive practices, such as misrepresenting a material fact, such as the fact that the plaintiff has died, are less common, and less often defended as essential to the process. See Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983)(voiding settlement); see also Dahl, supra note 8.

39. MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANNON 7 (1980) requires zealous advocacy within the bounds of the law which has been interpreted as requiring the lawyer to go to the limit of what is legally permissible in advocating for the client. See Curtis, supra note 12; supra note 19. The Model Rules have a somewhat modified requirement. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983).

40. I do not intend to criticize the works I cite here; I use them merely as examples of the tension that is prominent in this area. Two somewhat recent works, in which the authors demonstrate sensitivity to the ethical dilemmas, still stop short of outright condemnation. Paul Michael Lisnek writes of the need for the effective negotiator to limit the exchange of information (which is often accomplished by misrepresentation) even though he acknowledges that the "cooperative" negotiator will have difficulty utilizing these tactics. Lisnek, supra note 8, at 66. Another recent text states that "most lawyers know that it is accepted practice to obscure—even to misrepresent—the bottom line in a negotiation." MURRAY, supra note 31, at 96. These two books, and numerous earlier works that were less sensitive to the ethical issues, treat the "tactics" of negotiating as a separate matter from the ethics. See Menkel-Meadow, Problem Solving, supra note 7, at 759.

41. MURRAY, ET AL., supra note 31; Lisnek, supra note 8.
scribed by the Code because the participants know that these matters are frequently misrepresented.42

B. Clinical Teaching of Negotiation Practice and Ethics

The process and ethics of negotiation can be very effectively studied in the context of a litigation clinic. In its broadest sense, negotiation takes place each time a student intern seeks additional time from the adversary to prepare a litigation document or attempts to schedule a convenient time for deposing a witness. Even in the more restricted sense—negotiation of a settlement—the civil litigation clinic mirrors the experience of practitioners everywhere; a majority of the cases that are not decided by motion will be resolved through settlement. The issues that students confront in these cases include both ethical and practical problems. Frequently, the two are so interrelated that there is no meaningful way to separate them. As in all facets of the clinical experience, the problems arise in a detailed, realistic, and complex context. The lessons that can be learned from this experience are, I believe, more meaningful and more memorable than the discussions in a traditional classroom setting. Indeed, as I have learned from my teaching efforts, the ideals expressed in the classroom discussion, particularly concerning ethical dilemmas, are too often forgotten in the fray of actual practice.

The negotiation curriculum that I have used is multi-faceted. It includes readings on practice and ethics; class discussions; videotaped role-playing and critique; observations of actual negotiations; and preparation for participation in settlement negotiations in the student’s own cases.

The first components of this process can occur together, as they are somewhat complementary. I assign various readings on negotiation theory and practice, including descriptions of various strategies and approaches such as zero-sum bargaining and problem solving.43 The merits and disadvantages of the various theories are discussed in the classroom, and may be enacted in brief role playing. The application

42. "The language of DR 1-102(A)(4) (or Model Rule 4.1) is very clear—do not misrepresent. Yet, most lawyers know that it is accepted practice to obscure—even to misrepresent—the bottom line in a negotiation. The Model Code and Model Rules therefore probably do not intend to prohibit all misrepresentation." MURRAY & RAU, ET AL., supra note 31, at 96. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt (1983).

43. In past years I used a variety of texts and material in this segment of the course. For example, students might be assigned readings in FISHER & URy, supra note 17; STEPHEN GILLERS & NORMAN DORSen, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (1985); ROGER S. HAYDOCK, ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION (2d ed. 1992); MAUET, PRETRIAL (3d ed. 1995); Bellow & Moulton, supra note 12; as well as various provisions of the ABA Model Code and Model Rules.
of the Code to dilemmas that may arise in the negotiation process is discussed together with technique.

The class discussion proceeds from the readings to some more nearly real-life situations presented by the role-playing and video-tape presentations. In a simulated negotiation, students are given the opportunity to assume the roles of adversaries seeking to resolve a matter prior to litigation. Although role-playing lacks some of the energy of a live dispute, students do usually assume the advocate's role more effectively than they do in non-role class discussions. To facilitate the adoption of their roles, I have sometimes asked students to role play the settlement discussions in their actual cases. One student will be assigned to play the role of her opponent in the real case while the other student will adopt the role she actually plays in the real case. This gives the simulation more texture and interest than a totally hypothetical problem. I often intentionally assign the student who is most dismissive of the adversary's case to represent that party, in order to increase the incentive for that student to re-evaluate the case.

In these simulations the performance is videotaped out of the classroom for a number of reasons. The negotiation between two individuals in an office is more realistic than a performance before an entire class. Audience feedback (in the classroom) may affect the process in an unrealistic manner. Also, the videotaped performance can be edited for more effective class presentations; often repetitive and unhelpful material must be deleted in the interest of time. Finally, the tape provides a record that is an important tool for the students. The videotape allows both student and supervisor to review and analyze the performance—to highlight both strengths and weaknesses. Students are often surprised to see their performance on tape; frequently it felt different at the time than it looked on tape. Specific questions about the process—about what was said, who made concessions, who dominated the discussion, body-language, etc., can be answered with reference to the tape. Without this type of record, no after-the-fact account is really reliable or accurate.

44. I do not mean to suggest that the student will give a dishonest account. However, my experience is that reports by the participants of what transpired are often inaccurate. In addition, the young attorney may be reluctant to admit to her supervisor any conduct that she considers questionable. Interesting insights into the effects of audiences, both actually present and "psychologically present," on the conduct of negotiators are provided in a book entitled THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION. The authors note that audience feedback plays an important role in determining the way in which negotiators behave. JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 44-64 (1975). In particular, "positive evaluation and accountability pressures are likely to be particularly intense when a bargainer represents others who are dependent on him." Id. at 48. Further, the pressure generated by this type of audience is toward "advocacy of their preferred positions." Id. at 50-
A slightly different perspective on the negotiation process is provided by students' observations of lawyers engaged in actual settlement discussions.\textsuperscript{45} Students are given the defendant's case abstract, which briefly details the factual and legal issues as well as the probable liability and level of damages. They also sometimes observe the prior discussion between the client and the attorney, as well as the actual settlement discussions with opposing counsel. Typically, they also have the opportunity to discuss the negotiation with the defense attorney afterwards. Watching the process with full access to the information available to one side gives the student the chance to think about the process both as an advocate and as an impartial observer. After observing several discussions, the students are required to record their observations and to critique the performance they observed.\textsuperscript{46} These exercises permit them to see how problems arise and how they are resolved, and to judge the effectiveness and propriety of a whole range of techniques.

The use of simulation is helpful to assist the students in connecting theory and practice. Similarly, allowing students to observe and to critique the performance of attorneys engaged in actual settlement discussions helps to provide this link. The simulated role playing and the negotiation observation activities provide somewhat detached, but still realistic, vehicles for discussion of the relationship between theory and practice.\textsuperscript{47} These two activities give the student a low-risk opportunity to engage in, observe, and critique the process. The videotaped record of the student's negotiation role-play provides the supervisor with a full picture of the performances, unaffected by the supervisor's participation.

\textsuperscript{51}, \textsuperscript{54} On the other hand, the party neutral as to the outcome of the bargaining may facilitate fair and norm-bound conduct. \textit{Id.} at 55, 60-61.

\textsuperscript{45} The civil litigation clinic that was the basis for the curriculum I describe was offered at Brooklyn Law School through an affiliation with a government agency. The students worked under my supervision and were permitted to handle all aspects of the cases through case disposition. Final authority to settle was retained by a representative of the governmental client. Because of this affiliation, students were also given the opportunity to observe settlement negotiations being conducted by attorneys in the agency in cases that were similar to their own.

\textsuperscript{46} In the questions included in this critique, the students must respond both to strategy issues and to ethics issues. For example, they are asked whether there was any statement made by either attorney that they thought was not completely true, or that could have misled the other party. They are asked to respond to their feelings about the use of this type of tactic.

\textsuperscript{47} As has been noted by Robert Condlin, one of the difficult issues in clinical teaching is the conflict between the desire to expose our practices to critique and the nature of the teacher student relationship. If the student is asked to critique the teacher, it may be risky to be honestly critical. If the student is asked to critique her own performance, she may be legitimately concerned about the negative consequences to her grade. \textit{See} Robert J. Condlin, "Tastes Great-Less Filling: The Law School Clinic and Political Critique, 36 J. LEGAL EDUC. 45 (1986).
Only after this fairly intensive exposure to the negotiation process are students permitted to engage in negotiations in their own cases. As a first step, they must plan their negotiation by completing a written analysis of their case and their proposal for settlement. This analysis is then discussed and, when appropriate, the opponent is contacted in order to explore the possibility of settlement.

The need for, and the value of, this multi-faceted approach is clear to me for a number of reasons. First, with respect to the process and strategy of negotiation, students reveal their misgivings and confusion in the discussions and in their role-playing. For example, students often show reluctance to initiate settlement discussions for fear of appearing weak. They hesitate to name a figure because they are uncertain about the correct figure with which to begin; should they start very high, very low, or with the figure that is close to their actual desires. They also fear that they may have seriously over- or under-valued the case, or misread the opponent's real assessment of the case.

Once the negotiations have begun, it is common for students to conduct the negotiation as if it were a debate, or an argument to the court, attempting to refute rather than to hear the adversary's statements. Often their fear or confusion leads them to deny every "fact" the adverse party mentions—even facts they may know to be correct. Again, fear of appearing weak or of losing leverage prompts behavior which is often not productive.48

It is not merely the negotiation tactics that are affected by the novice's fear and confusion; these same factors may cause some of the unethical conduct that emerges in negotiation. The ethical confusion about the role is apparent in the discussion and in the role-playing. Students often do not see the ethical dilemmas presented to the practitioner when they are merely discussing ethics, probably because they fail to fully identify with the advocate's role. In the classroom, they fairly easily espouse an ethical or even super-ethical approach to problems. Students are not as concerned about how their ethics will impact on the client's interests because they do not strongly identify with the client at that point. When the students are acting in role, and especially when they are discussing strategy in an actual case, they seem to often be at the opposite extreme. They sometimes fail to even consider the ethical constraints that might bind them, and are much quicker to rationalize conduct which they would have criticized in a class discussion.

In class discussion of a videotape that presents some dramatic moral and ethical issues in the context of a personal injury negotia-

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48. See discussion of the adversarial model of negotiation in Menkel-Meadow, Problem Solving, supra note 7, at 777-79.
tion, students have often exhibited the tendencies discussed above, as they analyze the conduct of a defense attorney representing an insurance company. The case that serves as the basis for the discussion involves an ill-prepared plaintiff's lawyer representing the parents of a child killed in a car crash. The victim was not wearing his seat belt and the plaintiff's attorney mistakenly believes that this fact would constitute a contributory negligence bar to recovery. Additionally, plaintiff's attorney is unaware of a key witness's changed testimony. The defense attorney is clearly aware of, and is deliberately using, plaintiff's attorney's mistaken view of both the law and certain key facts in order to reach a settlement that is dramatically lower than what the defendant is willing to pay.

In the discussions of the actual conduct of each attorney and of alternatives, many students favor full disclosure by the defense attorney of facts and law harmful to the defense in order to prevent an unjustly low settlement figure. Some would go even further and recommend that defense counsel offer a fair, i.e., high, figure even though a lower settlement could be reached.

Notably, the tendency toward impartiality that emerges in class discussions of "ethics" does not always carry over into their role-playing and client representation. During strategy meetings in their real cases, students have often raised the possibility of lying in order to procure an advantage in a case. For example, in seeking to schedule a witness for a deposition, students may suggest misrepresenting the witness's availability in order to secure a tactical advantage such as concluding settlement discussions before the witness's harmful testimony is revealed. On occasion, students have suggested withholding harmful documents or information prior to settlement discussions.

49. The videotape that I use was produced by the ABA, and is entitled Dilemmas in Legal Ethics: Negotiation with Discussion, DIL 2-P3. The text of the tape is reproduced in Bellow & Moulton, supra note 12, at 586-91, followed by a discussion of the ethical issues.

50. Scott Dahl used this case as the basis for one of the hypotheticals that he posed to 14 trial attorneys to examine their personal views on the ethics of negotiation practice. Dahl, supra note 8. In his article, Dahl reports that "[n]early all of the attorneys had no problem with the settlement." Id. at 189. Further, none of the attorneys interviewed would have corrected the plaintiffs' attorney's mistaken belief as to the applicable law. Id. at 190.

51. When I have asked students whether they would reveal to their client—the insurance company defendant—what they did in the negotiation, they generally express some discomfort with the prospect of doing so.

52. Both of these tactics are comparable to the conduct raised by the scenario described in the text above. See supra note 49. The tactics can be discussed with careful reference to the applicable rules of procedure and found to be legitimate, at least with respect to those rules. See, e.g., Fed. R. Civ. P. 26, 30 & 34. However, even if it is legitimate to delay discovery during settlement discussions in order to avoid unnecessary expense, it is not necessarily ethical to do so in order to procure an advantage relative to the outcome of the settlement.
It has been my experience that once they are fully immersed in the adversary role in their case work, students often do not consider the ethical constraints they have discussed in the classroom. Their focus is on succeeding in their representation of the client. As students enter a grey area without clearly delineated rules, they feel greater pressure to improvise. Absent rules and prior experience, they may be overwhelmed by the need to achieve their ends by whatever means seem effective. Additionally, students frequently perceive that their opponents have engaged in deceptions, misrepresentations, and other "sharp" practices. They perceive their conduct as justifiable survival behavior.53

Thus, in the sanctuary of the classroom, the students' performance strongly suggests that they will be driven by fairness concerns—perhaps to the detriment of a client. However, the very same students, when engaged in strategy meetings in their own cases, appear oblivious to the ethical implications of their proposed action. The tensions between fairness (both in terms of process and outcome) and advocacy, demonstrated by these examples, go beyond the common difficulty of putting into practice what one has learned in the classroom. Instead, I believe, the tension is inherent in the system of lawyering for which we are training our students. Consequently, the effort to help students reconcile their classroom ethics (or perhaps personal morality) with their lawyering roles is especially difficult and important.

The clinical program outlined above is designed to provide the students with two means of avoiding the dilemmas described. First, the reading, observation, and discussion are intended to alert the student to the danger areas. By recognizing the various circumstances in which specific issues may arise, the students are prepared to anticipate problems and to identify them as such. Second, the students' active participation in the negotiation process, both through role playing and through their case work, together with their observations of actual negotiations, provides them with experience (including vicarious experience) in the resolution of these issues.

While this curriculum significantly improves a student's ability to negotiate ethically and effectively, I am increasingly persuaded that the most difficult issues that are raised in the negotiation context cannot be resolved until the student has reached a level of moral maturity and judgment that enables her to find an appropriate answer to questions left unanswered by the rules of professional ethics. Merely integrating ethical constraints (as embodied in the Code and the Model

53. See supra note 48 and accompanying text. See also Hill, supra note 17, at 373; Menkel-Meadow, Problem Solving, supra note 7, at 836-38; Simon, supra note 14, at 1099. Each of these commentators discusses the necessity for the fair-minded or cooperative attorney to modify her conduct when dealing with an aggressive opponent.
Rules) with lawyering practices is not enough because the rules do not supply answers to the tough questions. For example, a student well versed in the Code would be unprepared to decide, in the midst of a bargaining session, how to respond to the judge who asks, in the presence of an adversary, how much money her client is prepared to spend to settle the case. As noted by at least one commentator, hesitation at that point could be disastrous; the truth could greatly prejudice the client; a lie might be unethical.54

Issues concerning the disclosure of harmful evidence and/or legal authority are equally difficult to resolve. If, for example, the student learns of a witness whose testimony would undercut her case, the question of whether she can delay revealing the witness, in response to a legitimate discovery demand, in order to attempt to reach a settlement is not resolved merely by applying the "rule" to the facts. Certainly, it may be appropriate to stay discovery while settlement discussions are proceeding. Suggesting a stay for the specific purpose of concealing information, rather than for the purpose of curtailing unnecessary discovery, is not clearly improper according to any rule. In some respects the propriety of the conduct may depend on the circumstance in which it arises: what representations are made by each side, what each understands to be the basis of the settlement discussions, how important or prejudicial the concealed information, and other similar factors. Again, these are not judgments the novice attorney will be prepared to make based solely on her knowledge of the Code of Professional Responsibility or the Model Rules.

IV. THE TENSION BETWEEN REFORM AND THE ADVOCACY MODEL

The ethos of the profession is embodied in the notion of the lawyer as advocate in an adversary system.55 This advocacy role is often cited in objection to a rule of negotiation conduct that would require honesty and candor.56 However, the role of the advocate, the formal rules of dispute resolution (e.g., the Federal Rules of Civil Procedure), and the Canons of Ethics are adapted and directed to a model of dispute resolution that is completely at odds with the typical negotiation model. The litigation model contains formal rules of evidence and pro-

56. See, e.g., White, supra note 12, at 928.
procedure, a fact finder whose decision will be imposed on the litigants, a referee to monitor compliance with the rules, and a complete record of what factors influenced the decision resolving the dispute. The lawyer as advocate is held in check by these structural features designed to guarantee procedural and outcome fairness. As discussed in Part III.A of this Article, these structural guarantees are totally absent in the negotiation process.

The courtroom advocate is typically held to a higher standard of honesty and fairness than the negotiator. Lying and misrepresentation by attorneys in either pre-trial or trial proceedings may occur, but these practices are rather uniformly condemned. The advocacy role in the courtroom has never been understood to permit (much less to require) the attorney to make false, misleading, or deceptive statements.57

A. Views of Negotiation Reform: Changing Rules, Changing Ethos

One response to the problems described above might be a reform of the rules, especially the rules pertaining to professional responsibility, in order to provide the guidance of specific prohibitions and requirements that are missing in the process. Many commentators have proposed such reforms.58 Others have advocated models of negotiation that eschew heavy-handed, misleading, or outright dishonest tactics, in favor of the type of problem solving approach described by Fisher and Ury in Getting To Yes.59

57. Model Rule 3.3 states that “A lawyer shall not knowingly: make a false statement of material fact or law to a tribunal.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1)(1983).
   The comment section provides that “when evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client’s wishes.” Id. Rule 3.3 cmt.
   Similarly, the Model Code states that “In his representation of a client, a lawyer shall not; knowingly make a false statement of law or fact.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1980).
58. See supra note 8. Professor Condlin describes the possible responses to the dilemma as including, inter alia, adopting a more “ethical” zealous advocacy norm, or a more “practical,” meaning more cooperative, bargaining norm. Condlin, supra note 18, at 87-93.
59. In the original edition of Getting To Yes, Fisher and Ury proposed a model of negotiating that was described as problem solving. See supra note 17. The problem solving approach to negotiating has been endorsed and supported by other commentators, such as Professor Menkel-Meadow, see supra notes 7 and 20, and Professor Hill, see supra note 17. One group of authors concluded that they could not agree about the desirability of a code of negotiation ethics for a slightly different reason. They stated that “the strongest argument against a code of negotiation ethics is fear that cooperative negotiators would feel bound to comply with it . . . and would let down their guard on the assumption that competitive negotiators were also complying with similar rigor.” Lloyd Burton et al., Feminist The-
There are thoughtful studies, such as Gerald R. Williams' *Legal Negotiation and Settlement* 60 and Paul M. Lisnek's *A Lawyer's Guide To Effective Negotiations and Mediation*, 61 that attempt to illustrate that the most effective, or the most respected, negotiators are both trustworthy and fair in their dealings with others. Williams, for example, bases his conclusions on a survey of lawyers' attitudes about what makes an effective lawyer. Williams reports on the characteristics that are attributed to effective "cooperatives" 62 and effective "competitives," 63 and concludes that more of the effective negotiators are in the cooperative mode. Lisnek does not specifically endorse the style that he labels "cooperative" as being more "moral," but he does reveal a preference for this style. 64 It should be noted that both of these authors equate cooperative style with reasonable and fair conduct. "Cooperatives feel a high commitment to reasonable and fair negotiation; they do not view the process as a game. Cooperative negotiators assume negotiation presents an opportunity in which both sides can win. They seek to negotiate in an objective, fair, and trustworthy manner." 65

Others have similarly expressed a preference for the cooperative as contrasted with the competitive style of negotiating. Both Carrie Menkel-Meadow 66 and Eve Hill 67 have written about the advantages, from the feminist perspective, of cooperative bargaining, noting that the cooperative style gives effect to women's voices and concerns. Hill states that the competitive style contributes to the silencing of women's voices. 68 Menkel-Meadow expresses a similar view in the fol-

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60. **Williams**, *supra* note 19.
62. **Williams**, *supra* note 19, at 50. Both authors use these terms; the descriptions provided here are by Lisnek. The cooperative negotiator "feels a high commitment to a reasonable and fair negotiation; they do not view the process as a game. Cooperative negotiators assume negotiation presents an opportunity in which both sides can succeed or win. They seek to negotiate in an objective, fair, and trustworthy manner." *Id.*
63. *Id.* at 47. The effective competitive negotiator "seeks victory, rather than a win on the merits. The ethical component that ought to underlie the process is of little concern to the competitive negotiator. Success of this style depends on the ability to create sufficient pressure and tension to induce an emotional reaction in the opponent to lead to a reduction in the opponent's expectation of what can be accomplished. If the pressure is inappropriate to the person or setting, the style can lead to a termination of the proceedings." *Id.*
64. See **Lisnek**, *supra* note 8, at 47-50, (discussing the relative merits of the two styles).
68. *Id.* at 370-73.
lowing: "Whether a focus on the needs of both parties is a particularly female mode of problem solving is still unknown. To the extent that it focuses on a broader way to solve problems it obviously should be of use to all legal negotiators—male or female."69

These various expressions of a need for, and an acceptance of, a more fairness-oriented model of negotiation are encouraging, but are far from conclusive. None of the writers is confident of the outcome of the cooperative model in the face of an unabashed competitive negotiator. Lisnek follows his praise of the cooperative style with a section that focuses on the need to control and conceal information. He acknowledges that the cooperative negotiator may have difficulty with the need to limit disclosure, but stresses the importance of doing so.70

While Menkel-Meadow does not directly address the issue of how to impose cooperative conduct on the profession, she does offer some thoughts about how to respond when the adversary is making a problem-solving approach difficult.71 Hill seems less optimistic: "When faced with such competitive tactics, the cooperative negotiator must either forsake the cooperative approach and battle the competitive negotiator on her own field, continue the cooperative approach and take the very real risk of 'losing' to the competitor, or quit."72

Williams, on the other hand, acknowledges the lack of real law pertaining to the area of negotiation and calls for the adoption of specific rules.73 He looks to the area of contract law as a model for the kinds of rules that might be imposed, including rules of good faith and fair dealing and rules prohibiting the use of threats. While many would agree with Williams's proposals for reform, it is important to consider the reasons why no such reform has yet occurred.

69. Menkel-Meadow, Problem Solving, supra note 7, at 798. In an article reporting on two studies, a group of researchers concluded that there were no statistically significant differences in the numbers of male and female attorneys who display strong “care” orientations (which is equated with cooperative bargaining style). Burton, supra note 59, at 227-28. Further, they concluded that attorneys who exhibit a high degree of sensitivity to either “Care” or to “Justice” concerns were both the more cooperative and the more effective group of negotiators, id. at 231-32, 249-50, and that neither of these “moral orientations” is more predominant in male or female attorneys. Id. at 228-29. They also conclude, somewhat contrary to prevailing notions, that “[c]ompetitive negotiating behaviors are rated not as an implementation of the Ethic of Justice, but as a departure from Justice.” Id. at 240. See notes 117-21, infra, and accompanying text for an explanation of the “Care” and “Justice” orientations.

70. Lisnek, supra note 8, at 66. This reflects the dichotomous nature of this process in which one is pulled in two competing directions—truth and fairness, on the one hand, and winning the contest on the other. There is no doubt that most negotiators have been torn by these competing forces—except perhaps the truly competitive for whom there is no truth and justice pull. Id.

71. Menkel-Meadow, Problem Solving, supra note 7, at 834-38.
72. Hill, supra note 17, at 373.
73. Williams, supra note 19, at 90-104.
B. Advocacy Ethic Inhibits The Meaningful Revision of Negotiation Practice

There is substantial disagreement among commentators on what is presently permitted, or proscribed; more to the point, commentators do not agree on what the rules should provide. The need for reform of the process of negotiation is not universally endorsed. The informality, flexibility, and freedom of the process are attributes that many cite as essential to the continued success and viability of the process. Without necessarily accepting or rejecting these arguments, I want to turn to an analysis of some of the proposals for reform. I find the overall impact of the various proposals to be troubling because, in sum, I believe that they are either unworkable or do not achieve any significant success in resolving the difficult issues.

The events surrounding the drafting of the Model Rules demonstrate the irreconcilable viewpoints on whether some common negotiating tactics should be allowed or proscribed. In the early versions of the Model Rules, there were specific rules that pertained to negotiation that required a high standard of conduct on the part of the attorney. There were provisions requiring fairness, truthfulness, and disclosure when necessary to prevent even an implicit misrepresentation. These rules were either dropped from the Rules as adopted, or substantially modified so as to lessen their impact on the conduct of attorneys in negotiation. While some commentators argued that

74. See, e.g., Dahl, supra note 8; Guernsey, supra note 8, at 126-26; Norton, supra note 12, at 500-02 passim; White, supra note 12, at 927-28.

75. See Wetlaufer, supra note 38, at 1224-26 and accompanying text (describing some of the most common types of misrepresentations and other tactics that occur in negotiation).

76. In a draft version of the Model Rules, Rule 4.2 (a) required that “a lawyer ... be fair in dealing with other participants” in conducting negotiations. This was the focus of Professor White’s comments in his article, supra note 12. The fairness requirement, along with another draft provision that would have proscribed fraudulent or unconscionable agreements by lawyers, was dropped from the final version of the Model Rules. In the Proposed Final Draft version of Rule 4.1, there was a provision that would have required disclosure in circumstances where “failure to make the disclosure is equivalent to making a material misrepresentation.” MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.1 (b)(1) (Proposed Final Draft 1981). This mandatory disclosure provision was also dropped from the adopted version of the Model Rules. The drafting history of Model Rule 4.1 indicated that the ABA House of Delegates wanted to limit the scope of Model Rule 4.1 (b). According to Hazard and Hodes, the ABA House of Delegates substantially revised the proposed draft to significantly narrow the permissible range of disclosures adverse to the client. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, 711-12 (2nd ed. 1990). Combining Model Rules 4.1 (b) and 1.6, the attorney’s disclosure of client misrepresentation is not required unless it falls into the exceptions stated under Rule 1.6, which are to prevent the client from committing a criminal act likely to result in imminent death or bodily harm or to
truly ethical conduct requires honesty, not just an absence of egregious lying. Others countered that the essence of skillful negotiating rests on the ability to mislead the adversary. Absolute requirements of honesty, fairness, and disclosure of all material facts and controlling law were not universally endorsed. Although the Model Rules, as adopted, prohibit material misrepresentations of law and fact, the Comments specifically except (and therefore accept) the kinds of misrepresentations that appear to be most prevalent in the process.

Among the criticisms of the proposals was the objection that these requirements would be inconsistent with the lawyer's role as an advocate. Some commentators, who have subsequently considered the desirability of a negotiation ethic that can be described as universalist, have similarly rejected it as inconsistent with the lawyer's role as we understand it.

My own analysis is that this objection is partly right and partly wrong. It is true that there is an inconsistency between the lawyer's role as presently perceived by lawyers, and the application of the universal ethical principles of fairness and honesty. To acknowledge this is not necessarily to accept the conclusion that these principles are inappropriate. It is equally plausible that the perception by lawyers of their role in the negotiation process is seriously flawed. In the discussion that follows in Part V this idea will be explored more fully.

A second objection to an honesty requirement is, in some aspects, even more alarming in the message that it sends. The objection is that, given the secrecy in which negotiations typically take place, the enforcement of rules requiring honesty and candor would be virtually...
impossible. Further, one might reasonably expect widespread violations. Better to have no rule than a rule that will be widely ignored.\textsuperscript{84} What this indicates about us, as a profession, is deeply disturbing—in large measure because it rings true. That is, given the way lawyers generally perceive their roles, adherence to a rule of conduct can only be expected if the conduct is visible and if transgressors know that they will be punished.\textsuperscript{85}

The notion of accepting, as a norm for the legal profession, behavior that is immoral by universal standards is, I feel, offensive. It is more offensive to defend our decision to do so because we are too ineffective and uncreative to find a way to enforce a requirement of truthfulness. However, the profession is clearly not prepared at this time to impose on itself the requirement of vigorous honesty in negotiation.

For the reasons just discussed, and perhaps others, lying in negotiations has been officially accepted by the profession. Some reform proposals are aimed at delineating, restricting, and codifying the kinds of misrepresentations that are acceptable and the kinds that are to be condemned.\textsuperscript{86} Some would look to the prevailing norms and practices in order to try to discern a “principled” basis (or ethic) to govern appropriate misrepresentations.\textsuperscript{87} I find these proposals unsatisfying and unworkable for two reasons. First, accepting partial honesty as a norm in the context of negotiation is unjustifiable on moral grounds. To allow ourselves to engage in deceit, as long as we are clever and precise enough to do so within the “safe” bounds, may be a workable rule, but it can hardly be said to embody a moral principle.\textsuperscript{88} Second, I have found efforts to delineate good lies from bad lies—as a rule based judgment—a difficult and hazy operation. By this I mean that it is nearly impossible to define precisely the line between puffing or bluffing (good lies) and material misrepresentations of fact or law (bad lies). If the ethics of the profession in the context of negotiation is to permit, applaud, and encourage good lies as leading to success, and if the profession is unable to articulate precisely where the line is to be drawn, then one hardly need be surprised to find success oriented negotiators lying whenever the circumstances so dictate. Thus, it seems to me, the end result of the “solution” is no different from the problem.

\textsuperscript{84} See Dahl, supra note 8, passim; Guernsey, supra note 8, at 125; White, supra note 12, at 927, 937.

\textsuperscript{85} See infra, Part IV.A, for a discussion of the work of moral psychologists and the stages of moral development.

\textsuperscript{86} See, e.g., Guernsey, supra note 8; Perschbacher, supra note 8.

\textsuperscript{87} See, e.g., Norton, supra note 14; White, supra note 12. See also Wetlaufer, supra note 8, at 1236-71.

\textsuperscript{88} Accord Wetlaufer, supra note 8.
V. EDUCATING FOR MATURE MORAL JUDGMENT

In a provocative article entitled *Ethical Discretion in Lawyering* William Simon proposed an approach to ethics rules that would require an individual attorney to make discretionary judgments in conducting negotiations as well as in other tasks. In sum, this approach would permit or require the attorney as negotiator (and in other contexts as well) to factor into her decisionmaking and conduct her personal and professional ethics. He suggested, for example, that a lawyer representing a poor and powerless client may need to be unfettered by strict rules of conduct when dealing with a forceful adversary, because of the great imbalance of power and the risk of an unfair outcome.

My principal reaction to Professor Simon's proposal at the time I first became acquainted with his work was shock. I could not imagine entrusting the profession as a whole with the type of discretionary judgment that Simon was proposing. It struck me that he was advocating a standard for a profession that was different from the profession which I knew, and that his standard was unrealistic. I have since concluded that Professor Simon's vision is correct, that attorneys should indeed be governed in their decisions and actions by their moral beliefs. However, until we have begun to equip the profession, as a whole, to listen to and exercise moral judgment, the abandonment of a strict rules-based ethic could be disastrous. In order for discretion to be exercised responsibly, moral judgment must be developed in individual professionals. More importantly, moral judgment must be accepted as a norm for the legal profession.

89. Simon, *supra* note 14. In his own words, "The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice." *Id.* at 1090.

90. *Id.* at 1113-19. Simon actually criticizes the conventional discourse that tends to characterize one possible set of concerns as "legal" and a competing set as "moral," because, in his view this characterization sets up the legal concerns as the professional, objective set, and the moral concerns as personal. *Id.* Nonetheless, his discussion of values, fairness, and justice seems to implicate the types of concerns that others refer to as moral.

91. Actually, Simon uses this example in two ways. In his first example, he posits that the attorney may take more aggressive action to achieve the client's purposes in the face of ambiguous legislative intent. *Id.* at 1105-06. In a variation on this hypothetical, he acknowledges that, in some circumstances, the attorney may act aggressively even when the legislative intent is clear, if the client's circumstances are sufficiently desperate. "[T]he lawyer might conclude that this value [minimal material subsistence] is fundamental and hence that norms that violate it are not entitled to respect." *Id.* at 1116. Finally, Simon states that the lawyer representing the powerful client against the poor and poorly represented adversary has the obligation to act so as to produce a just and fair result, even if that requires that he assist the adversary. *Id.* at 1098-99.
The moral and ethical issues raised by the process of legal negotiation are not isolated; throughout the legal profession one finds similar themes concerning the role of morality in the study and practice of law. Numerous forceful and moving articles have documented the need of students, clients, and the profession for more moral and human content in the education of lawyers and the practice of law.92 Moral judgment may be called for in a variety of contexts—the decision to take or reject a case, whether to raise a particular defense, how to examine or cross-examine a witness, and many other similar matters.93 In negotiation, the role of moral judgment may be more predominate because the question of misrepresentation is so central to the process.

In this section I want to explore some of the themes of both the moral psychologists, who have advocated education for the growth of moral judgment,94 and the feminist writers, who have advocated the recognition of a moral voice that is different from the one that predominates in our legal teaching and writing.95 I will then consider how some of these themes might be developed in legal education generally, and in clinical teaching specifically. Finally, I would like to revisit the

92. Critics within the legal profession tend to accept the social utility of the adversary system of justice and the legalism now so pervasive in Western societies, particularly in our own country. These internal critics often recognize various failings of the adversary system but believe that they can be corrected, that more competent and ethical lawyers can be produced. These critics frequently look to legal education as the appropriate means of inculcating a concern for ethical lawyering. James R. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. LEGAL EDUC. 11 (1982). For examples of commentators who advocate the need for general reform in legal education—in specific to include a more effective emphasis on ethics, see e.g., RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989); THOMAS L. SHAFFER & ROBERT S. REDMOND, LAWYERS, LAW STUDENTS AND PEOPLE (1977); Simon Yeznig Balian, Personal Responsibility for Professional Actions, 32 CATH. LAW. 337 (1989); Bennett, supra note 2; Richard O. Brooks, ETHICAL LEGAL IDENTITY AND PROFESSIONAL RESPONSIBILITY, 4 GEO. J. LEG. ETHICS 317 (1990); Cahn, supra note 6; Gary S. Goodpaster, The Human Arts of Lawyering: Interviewing and Counseling, 27 J. LEGAL EDUC. 5 (1975); Menkel-Meadow, Problem Solving, supra note 7; Thomas L. Shaffer, Moral Implications and Effects of Legal Education or: Brother Justinian Goes to Law School, 34 J. LEGAL EDUC. 190 (1984); Simon, supra note 14.

93. Simon, for example, addresses the issues of accepting representation for unpopular or undeserving clients. Simon, supra note 14.

94. Lawrence Kohlberg's teachings provide the foundation for several of the writings that advocate paying greater attention to the development of moral judgment in our law school teaching. See Bennett, supra note 2; Hartwell, Clinical Education, supra note 2; Hartwell, Experiential Teaching, supra note 2; Richards, supra note 2. Also see the works of Lawrence Kohlberg, some of which are cited in note 2.

95. See Gilligan, supra note 1; NEIL NODDINGS, CARING, A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984); JACK & JACK, supra note 92; Cahn, supra note 6; Menkel-Meadow, Portia, supra note 6; Burton, supra note 59.
issues that pertain to the practice of negotiation raised at the outset; to consider how the picture might change if the focus of our teaching were to change. It is my belief that merely writing better rules will not suffice unless we change the understanding among practitioners of the role of moral judgment in their professional lives.

A. The Work of Moral Psychologists

Numerous psychology writings, and an increasing number of legal articles, have discussed the stages of development of moral judgment and the implications for formal education. These writings make a persuasive case for including moral judgment as a specific and legitimate topic when teaching students to analyze issues and to resolve problems requiring lawyer intervention.

The studies and writings of Lawrence Kohlberg are central to the current theories of the development of moral judgment. Kohlberg has identified what he refers to as stages of development in which different means of analyzing moral questions are demonstrated. In the earliest stages (One and Two) the infant/child responds to rules primarily because of the power of the rule maker. Individual interests and needs are the motivation, but the child has a developing sense of the need to respond to the dictates (i.e., rules) of an authority/power figure.

An individual reasoning at Stage Three considers the expectations and feelings of others with whom he has a relationship. He will try to adapt his behavior to garner approval from people who are important to him.

The Stage Four individual is essentially a rules-oriented moral reasoner. Rules, and adherence to rules, are central to this individual's conception of moral conduct and reasoning. This is, essen-

96. See supra note 94; Leming, supra note 2.
97. My purpose here is neither to defend nor to criticize Kohlberg's theories and methodologies. I merely make reference to his theories and their relationship to other views on the need for reform of legal education. For a very helpful summary of the teachings and theory of Lawrence Kohlberg, especially as related to legal education, see Willging & Dunn, The Moral Development of the Law Student: Theory and Data on Legal Education, 31 J. LEGAL EDUC. 306 (1981). See also Hartwell, Clinical Education, supra note 2, at 133-41; Richards, supra note 2, at 364-73.
98. See Hartwell, Clinical Education, supra note 2, at 135-36; Richards, supra note 2, at 367.
99. Hartwell, Clinical Education, supra note 2, at 136; Richards, supra note 2, at 367. I am quite consciously using the male pronoun in reference to Kohlberg. As discussed infra, his studies did not include female subjects. See infra note 112 and accompanying text.
100. Hartwell, Clinical Education, supra note 2, at 137; Richards, supra note 2, at 367.
tially, the law student that we create if we are successful in our efforts to teach him to think like a lawyer.

A Stage Five individual is still rule-oriented, but with a more critical perspective. Rules might be disregarded, for example, where a greater social good would thereby be achieved.\textsuperscript{101}

Stage Six represents a level of mature moral judgment that may only be an ideal. The individual at this stage is governed largely by his individually held moral principles which, in case of conflict, will overcome societal rules and norms.\textsuperscript{102}

My purpose here is decidedly not to attempt to explain or to defend Kohlberg's theories, or other models of moral development. There are many very useful and informative articles available in the fields of both psychology and law that have done this.\textsuperscript{103} From a variety of these readings, I have derived several themes which I feel justify, and indeed mandate, that the development of mature moral judgment be specifically included in the law school agenda:

1. Our typical law students are at an age where development beyond Stages 3 or 4 to 5 (or 6) is most likely.\textsuperscript{104}
2. Some studies indicate that significant further moral growth ends with the end of formal education.\textsuperscript{105}
3. Teaching legal analysis while ignoring or debasing moral issues thwarts the growth of moral judgment.\textsuperscript{106}
4. Many complexities of the lawyering profession are neglected by the dominant focus in the curriculum.\textsuperscript{107}

Although there appears to be some lingering debate on some of the features of Kohlberg's teachings, there is apparent acceptance of his view that the most mature levels of reasoning are attained when an individual is in his 20's and 30's (or later).\textsuperscript{108} Thus, it is unlikely that a significant number of our students will have achieved this prior to entering law school.

The fact that moral growth may be coextensive with formal education is explained by examining the manner in which moral develop-

\textsuperscript{101} Hartwell, \textit{Clinical Education}, supra note 2, at 138.
\textsuperscript{103} In his 1990 article Professor Hartwell states that "[a}s of 1983, there were approximately 5000 published articles dealing with moral development." Hartwell, \textit{Clinical Education}, \textit{supra} note 2, at 135 n.15.
\textsuperscript{104} Richards, \textit{supra} note 2, at 369; Willging & Dunn, \textit{supra} note 97, at 317-18.
\textsuperscript{105} Hartwell, \textit{Clinical Education}, \textit{supra} note 2, at 140; Willging & Dunn, \textit{supra} note 97, at 323.
\textsuperscript{106} Richards, \textit{supra} note 2, at 370.
\textsuperscript{107} \textit{See infra} Part V.C.
\textsuperscript{108} \textit{See Leming, supra} note 2, for a discussion of some of the revisions in Kohlberg's teachings in response to criticisms, and a discussion of the relative levels of moral maturity for college graduates and teachers. \textit{See also} Bennett, \textit{supra} note 2, at 47.
ment at the higher levels is believed to occur. Several writers have suggested that in order to develop beyond the stage 4 rules-orientation, a somewhat formal discussion process that has been called "moral discourse" must occur. The individual must learn to analyze critically the rule, its basis, its impact on society, and its impact on individuals. The dialog that produces this analysis can occur within an individual, but may be more likely if encouraged by, for example, a teacher or a mentor.

The first two reasons for attending to the issue of moral growth in our law school curricula are, in themselves, fairly persuasive. The third and fourth are, I believe, compelling. When we teach our students not to consider the moral content of a "legal" problem, not to be derailed by personal morality in their quest to "think like lawyers," we are affirmatively thwarting further development of their moral judgment. I believe there is ample evidence that, indeed, this is what has gone on in the typical law school curriculum for a very long time. Consequently, we cannot excuse ourselves from the business of moral education by claiming that it is not our job; we are teaching by omission and by the specific direction to disregard certain "irrelevant" impulses.

B. Feminist Perspective on Moral Development and the Role of the Lawyer

Carol Gilligan has questioned and criticized the methodologies of Kohlberg and other psychologists for omitting women's experiences and voices from their studies. Despite the differences in some of their conclusions, however, the emerging voices of feminist writers concerned with women's moral development are in harmony with the

109. Leming, supra note 2, at 247; Bennett supra note 2, at 56-60; Hartwell, Experiential Teaching, supra note 2; Richards, supra note 2, at 370.
110. In his overview of the revisions in Kohlberg's work, James Leming summarizes the moral discussion approach. "The important conditions necessary to stimulate stage advance with the moral discussion approach are: (1) Exposure to situations posing problems and contributions for child's current moral structure; (2) exposure to next highest stage; and (3) an atmosphere of openness and exchange." He goes on to say that "[s]tudent stage change will be most pronounced in those groups in which the teacher uses skilled Socratic probing. Also, while no change will occur without any one of these elements, it is not essential that the teacher supply them if the students supply them themselves." Leming, supra note 2, at 247.
111. Bennett, supra note 2, at 48-54. Himmelstein, supra note 7, at 516 states: "Another premise is that much in legal education fails to foster, and may even demean, a professional vision sensitive and responsive to the human dimensions of 'legal' reality." See also Menkel-Meadow, Portia, supra note 6; Richards, supra note 2, at 361. These are by no means the only sources of criticism of the inadequacy of our current system of law training.
112. Gilligan, supra note 1, at 5-23.
themes of the moral psychologists and law teachers who espouse their teachings. Both recognize the need to attend to the teaching of moral judgment and conduct in legal education.113

There are some strikingly similar themes that emerge from many of the critics who actually support the call for greater moral content in our teaching. Many women feel dissonance in their role as a lawyer because of a perception that it requires abandonment of their own ethic of care;114 the elevation of a standard of “justice” over the standard of “care” has disserved a vast segment of the population of both lawyers and clients;115 and strict application of rules without adequate regard for context is misguided and inadequate for achieving fair and sound solutions to complex problems.116 I feel that it is possible to acknowledge both the legitimate criticisms and, at the same time, the valuable contributions of both of these perspectives on moral development.

The studies and writing of Carol Gilligan led to the development of the notion of a different moral perspective called a “voice”.117 In her writings, Gilligan identifies two separate clusters of norms and interests that tend to be articulated in response to questions involving ethical and moral dilemmas. The one she identifies with the “male” voice is called “Justice,” which includes a concern about objective rules and application of the rules to situations without consideration of relationship factors.118 She criticizes many of the psychological studies of moral development because they used only male subjects in their studies and consequently derived a development scale that is skewed; one in which the stages of development in moral reasoning by boys and men is presented as the prototype of moral development.119 Gilligan identifies the ways in which some girls and women analyze moral

113. Compare NODDINGS, supra note 95; Goldfarb, supra note 3; Menkel-Meadow, Portia, supra note 6 (feminist writers advocating changes in legal education to include moral judgment); with Bennett, supra note 2; and Hartwell, Experiential Learning, supra note 2, at 522 (describing his methodology, Hartwell states: “I would hope that my teaching—in which I do not consciously advocate either Kohlberg or Gilligan, but instead, to the limits of my own moral consciousness, support all student responses—would encourage growth on either or both of these dimensions.”)

114. JACK & JACK, supra note 92, at 95-123; Menkel-Meadow, Portia, supra note 6. Compare to Hartwell, Clinical Education, supra note 2, at 133-41.

115. See, e.g., Feminist Discourse, supra note 6 (discussion between Gilligan and Menkel-Meadow); Cahn, supra note 6; Hartwell, Clinical Education, supra note 2, at 139; JACK & JACK, supra note 92, at 95-99 passim.

116. See, e.g., Goldfarb, supra note 3; Cahn, supra note 6, at 27-29 passim; Hartwell, Clinical Education, supra note 2; Richards, supra note 2, at 371.

117. Gilligan, supra note 1. In one of her articles, Professor Menkel-Meadow traces briefly the history of this aspect of feminist scholarship. Menkel-Meadow, Portia, supra note 6, at 39-45 & n.8.

118. Feminist Discourse, supra note 6, at 44, 47-48 (remarks of Carol Gilligan).

119. Id. at 45-49; Gilligan, supra note 1, at 5-23 passim.
issues that would gain them a lower rank on a moral development scale such as Kohlberg's. She describes the ways in which women and girls in her studies express concerns about relationships, contexts, and fairness to others, and tend to have difficulty applying strict rules to dictate outcomes. She labels these interests "Care" interests, and I am using the term to encompass these same concerns. In describing women's responses to the question of abortion, for example, Gilligan describes the different moral voice she hears in their words:

... I was comparing women with theory. I said this voice is different from the voice that has been ascribed in the psychology of moral development, in moral philosophy, and in the legal and political system which was sitting all around my work. The way in which women were talking about the moral problem in abortion did not fit the public discussion of abortion in this county. ... They asked, in effect whether it is responsible or irresponsible, moral or immoral, to sustain and deepen an attachment under circumstances in which you cannot be, for whatever reason, responsible, and in which you cannot care? ...

... To enter the legal system, therefore, women had to act as though they did not know things that they felt they knew and that they did not in a sense understand issues of connection which could not be represented within the adversarial-rights model which pitted one life against the other.

The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer either simply about justice or simply about caring; rather, it is about bringing them together to transform the domain.

Although some have criticized her approach for essentially accepting the imposition on women of a male-imposed standard of "Care," other feminist writers have applauded her identification of a different "female" perspective. Critics have argued, and Gilligan herself acknowledges, that it is overly-simplistic to assume that the ethic of Care predominates in all women, any more than the ethic of

120. Gilligan, supra note 1, at 18; Marcus et al., supra note 6, at 48.
121. See, e.g., Gilligan, supra note 1, at 28-32.
122. Marcus et al., supra note 6, at 38-39, 45. These observations are in accord with the conclusions of another group of authors who note that the actual negotiating behaviors of male and female attorneys are not significantly different when viewed as representations of either the Care or Justice orientations. Burton et al., supra note 59, at 228, 229. In part, they attribute this to the perceived need for female attorneys to conform to the norm in order to be effective: "Female interviewees believe that they are most effective when they are Competitive, and that they need to behave in a Competitive manner in order to be Effective negotiators." Id. at 247 (capitalization in original). This possibility seems to be supported by an observation from Gilligan and Attanucci's work that asks whether "it is possible that the focus on justice represents efforts by the students to align themselves with the perceived values of the institution they are entering." Carol Gilligan & Jane S. Attanucci, Two Moral Orientations, in Mapping the Moral Domain 73, 83 (Carol Gilligan ed., 1988).
123. For summaries of some of the reactions to Gilligan's work, both critical and supportive, see Burton et al., supra note 59, at 206-10; Menkel-Meadow, Portia, supra note 6, at 40-42 and notes 8, 9 & 10.
Justice predominates in all men. More women express care-related concerns than do men, and more women express care-related, rather than justice-related, moral reasoning. I think that a particularly important point is how some of the women represented in these studies express their Care related perspectives. Many of them articulate concerns about relationships, feelings of others, and context, only then to dismiss these responses as being wrong. These women and girls have apparently "learned" that their instinctive ethic is not the right or mature one.

In the legal profession, there is a clash awaiting any would-be-professional whose personal moral perspective is more Care than Justice dominated. She will need to learn to sublimate her concerns about others with whom she comes in contact and stick to a rules based advocacy. The discomfort that this conflict produces has been documented, studied, and written about. Many women (and men with similar moral perspectives) express their dissatisfaction with the professional norms that seem to require that parts of their self be buried, hidden, and silenced. Jack and Jack describe ways in which lawyers may cope with this dissonance: develop a professional and a personal self, totally subdue the natural care orientation, or, perhaps for some, design a practice which allows them to give voice to the care concerns while maintaining a professional demeanor.

Other writers, such as Phyllis Goldfarb in a work entitled *Theory Practice Spiral*, underscore the deficiency of teaching students rules without context. She relates the theories of feminism to the practices of clinical education in order to demonstrate that both are firmly grounded in the concept of contextual ethics and morality. Context, she maintains, is necessary to give students the opportunity to develop insights about the deficiencies in the legal rules that are supposed to be neutral.

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125. *Id.*
126. Gilligan says "I had noticed that while girls at about ten or eleven years of age seemed to be quite outspoken and fairly sure of themselves, by nineteen they had developed an acute tendency toward self-doubt and self-questioning. There was a kind of ... disbelief in their own ability to talk about reality." She also discusses the discrepancy between what a girl has learned others mean by "fair" and her own way of reasoning, which by others' definition is not fair. Marcus et al., *supra* note 6, at 40, 43.
127. *Id.* at 55; JACK & JACK, *supra* note 92, at 99-105.
129. JACK & JACK, *supra* note 92, at 98-120, 281-86. See also Willging & Dunn, *supra* note 97, at 315.
131. *Id.* at 1657-67.
In her discussion of contextual learning and teaching, Goldfarb describes a process that looks very much like the moral discourse discussed above, except that she adds the dimension of acting rather than merely discussing. Her theses seems to be somewhat consistent with the Kolbergian view of the importance of role in resolving moral dilemmas and in achieving moral growth, but she seems to take this theory a step further and require role assumption (clinical practice) rather than mere role playing.132

Like Goldfarb, Nel Noddings in Caring, A Feminine Approach to Ethics and Morality,133 stresses the danger in an approach to education that emphasizes only rules without other (moral) content. Like Goldfarb, she seems to espouse a view of moral growth that is, in part, consistent with Kohlberg. Also like Goldfarb, she is not content to end the responsibility of the educator with mere discussion: "Everything we do then, as teachers, has moral overtones. Through dialogue, modeling, the provision of practice, and the attribution of best motive," we nurture the ethical ideal.134

It is striking to me that the current state of legal education and the profession’s conception of ethics are inconsistent with both the feminist and the moral psychologist perception of mature moral judgment. A strict adherence to rules is a stage that Kohlberg would describe, I believe, as Stage Four reasoning. More mature judgment would be represented by Stages Five and Six, where rules are considered, but are not always strictly applied.135 When a greater societal or other good will be achieved by abandoning the rules, and little corresponding harm would result, a more mature practitioner might forgo a rule-based response.136

132. Id. at 1662-67.
133. NODDINGS, supra note 95.
134. Id. at 179.
135. See Willging & Dunn, supra note 97, at 314-15.
136. In a memorable example from literature, two representatives of the criminal justice system are engaged in a battle of determination that seems to demonstrate the clash between stage 4 and stage 5 reasoning. Bob Ewell, a character who was responsible for beating his own daughter and the wrongful conviction, and subsequent death, of Tom Robinson, a man who had befriended her, had been found dead with a knife in his ribs. Bob Ewell was killed while he was attacking the two children of the lawyer who had represented the defendant, Tom Robinson. Sheriff Tate is unwilling to let the death of Bob Ewell be classified as a homicide because he knows that the responsible party, Arthur Radley, is a painfully recluse individual who would suffer unbearably through the spectacle of a trial. In confronting Atticus Finch, the prototype of the good and moral lawyer, he declares his determination to prevent the matter from going to trial.

"I never heard tell that it's against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what he did, but maybe you'll say it's my duty to tell the town all about it and not hush it up. Know what'd happen then? All the ladies in Maycomb includin' my wife'd be knocking on his door bringing angel food cakes. To
A critic of the dogmatic nature of legal education has stated that "[a]n ethics of rules is a minimalist ethics which undermines moral discourse."\textsuperscript{137} The focus on rules and substantive content was the legacy of Oliver Wendell Holmes and Christopher Columbus Langdell, according to Professor Elkins.\textsuperscript{138} This fundamental distrust and devaluation of "morals," and the emphasis on the scientific and analytic teaches students a way of reasoning that leaves the moral component deliberately unheeded.\textsuperscript{139} Again, it seems significant to me that, like the feminist writers discussed above, Professor Elkins advocates the inclusion of another component—moral discourse—in legal education.

I feel that it is not essential to resolve the issues raised in the conflict between the Kohlberg view of development and the Gilligan view. The similarities in their views, especially with respect to the need for moral discourse, are more important than the differences. Both stress the need for recognition of competing values and interests and the need to provide students with a mechanism for resolving the dissonance that these competing interests create. Both see the achievement of mature moral judgment and conduct not in the blind application of rules, but in the ability to utilize rules and other means of resolving moral issues. Both see these issues as complex and textured, arising from context rather than from sterile facts.

The serious harm that has been done to the legal profession—to clients, lawyers, and to societal interests—which has resulted from an apparent disregard of care-based interests, cannot fully be gauged. It can be understood, in part, from various anecdotal accounts. There are accounts of the lawyers who left the profession because of the tension between personal morality and professional norms; there are accounts of lawyers who continue to practice, albeit somewhat disaffectedly, for the same reasons.\textsuperscript{140} There are, of course, numerous accounts of lawyers who can, and routinely do, justify contributing to results which are unfair, unjust, and undesirable because they believe that their duty requires that they disregard care-based concerns.\textsuperscript{141}

\textsuperscript{137} Elkins, \textit{supra} note 10, at 20.
\textsuperscript{138} Id. at 32-34.
\textsuperscript{139} Id. at 28-31.
\textsuperscript{140} See \textit{Jack & Jack}, \textit{supra} note 92, at 110-20. The authors describe a range of responses for lawyers who feel the tension between role identification, which is associated with a rights perspective, and care concerns.
\textsuperscript{141} Id. at 99-110.
Ironically, neither Care nor Justice has been well served by our education practices.

C. Legal Education and Moral Growth

At this point I want to look more closely at what we are teaching our students about moral judgment and how that varies from the models suggested in the literature on moral development. In our efforts to train our students to think like lawyers, we tend to emphasize legal principles and rules and quantitative facts. Feelings, emotions, and care-based responses are usually seen as clouding our ability to reason analytically. Both with respect to specific issues (impeaching the truthful witness) and with respect to ultimate outcomes (e.g., the tortfeasor is resolved of liability and the victim is uncompensated for her loss), we are trained to consider neither our own moral responses nor the feelings of the witness or the victim. This process of isolation from feeling and emotion is to occur regardless of whether the feelings are "negative" (e.g., uneasiness about cross-examining a truthful witness), or "positive" (e.g., empathy and concern for the victim).

The basis and justification for our training is embodied in the Canons of Ethics which is fundamental to our understanding of our role as lawyers. Our function, we are told, is that of an advocate; we are not responsible, nor are we to be blamed, when the system fails to produce a fair result. It is the system that we are consistently taught to blame, rather than ourselves, when justice is not done, when fairness does not result, or when someone is hurt.

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142. See, e.g., Elkins, supra note 10, at 14-19; Willging & Dunn, supra note 97, at 335-40.
143. In a critique of some of Kohlberg's views, particularly his lack of emphasis on the emotions, John Martin Rich states that "[a] . . . way to determine whether a person has developed a moral concept is by observing if inappropriate emotions are expressed in certain moral situations. Inappropriate overt emotions can be considered morally callous or a case of moral deficiency." John Martin Rich, Morality, Reason and Emotions, in Modgil & Modgil, supra note 2, at 212.
144. In an ABA publication on the adversary system, the following is part of what is labelled "A Classic Description and Defense of the Adversary System": "It is a fundamental principle of the lawyer's canons of ethics that he may not state to the judge or jury that he personally believes in the innocence of his client . . . . These rules concerning the lawyer's conduct in court are not only important in themselves, but also for the spirit that lies back of them. They make it clear that the lawyer is present, not as an individual with all of his likes and dislikes, beliefs and disbeliefs, but as one who plays an important role in the process of social decision." Lon Fuller, The Adversary System, in Readings on Adversarial Justice: The American Approach to Adjudication, 47, 49 (Stephen Landsman, ed. 1988).
145. See Jack & Jack, supra note 92, at 100-02; Professor Elkins states: "One who believes that professional morality is a matter of compliance with a disciplinary code fails to ask what it means to be a good lawyer. To ask this question requires that one look more closely at whether a good person can do what lawyers do in
The attorney representing a child in a foster care placement case. The attorney's role is understood to be an advocate for the child's wishes (the child is over 7 and presumed capable of expressing her wishes). The child wants to remain in foster care with her aunt. The attorney knows that part of the reason for this desire is that the aunt has not been sending the child to school. This fact has not been discovered by the judge or the child welfare agency caseworker making the recommendation. The attorney has been clearly told what the system expects of her: she is not to volunteer this information and is to advocate what the child wants.\textsuperscript{146} Attorneys, who are stage 4 reasoners according to the Kohlberg scale, and who typify what Jack & Jack refer to as maximum role identification, would have no difficulty accepting the limitations and requirements of this role, and in screening out their own personal concerns and assumptions about whether they were helping or hurting their young client by advocating her wishes.

It is important to emphasize that the attorney's ultimate decision—here, to advocate exactly what her young client wants—may be precisely the same whether she reasons at stage 3, 4, 5 or 6. It is the reasoning process, but not necessarily the outcome, that progresses in these stages.\textsuperscript{147} Further, it may be that the "rule" that dictates this particular outcome was, at some point, the product of someone's stage 5 or 6 reasoning.\textsuperscript{148} The point here is not that the right or wrong re-

\begin{itemize}
\item[\textsuperscript{146}] The role of the attorney in representing the child in New York State in a variety of proceedings is to advocate the child's expressed wishes, although that role is at times ambiguous. In a case involving an "older" child the attorney would be bound by the attorney-client privilege. By substituting a more legalistic role for the older paternalism (or maternalism) that had previously informed the role of child advocate, Children's Rights Advocates have sought to provide the kinds of substantive and procedural protections to children that were constitutionally mandated for adults. See N.Y. Fam. Court Act \textsection{} 241 and Practice Commentary by Douglas J. Besharov (McKinney 1983).
\item[\textsuperscript{147}] See Hartwell, \textit{Clinical Education}, supra note 2, at 138-39.
\item[\textsuperscript{148}] According to Willging and Dunn, the Stage 5 reasoner will critically examine the social utility of laws and rules out of a sense of obligation to protect the rights and welfare of all. Willging & Dunn, \textit{supra} note 97, at 315. The Stage 6 reasoner makes decisions "on the basis of individually-derived principles of moral behavior and social justice," based on values such as justice and fairness. \textit{Id.} at 315. It is quite possible that an individual in either of these groups might reason that a lawyer, as advocate for a minor who has reached the age of reason, should abide by the client's desires, rather than substitute her own values and judgments for those of the client. This reasoning might be especially powerful if the client is likely to face very severe consequences, such as loss of freedom, incarceration in a prison or prison-like environment, or separation from home and family. Thus, the more advanced moral reasoner might have rejected a "best interest of the child" standard for defining the role of the attorney, in favor of an advocacy-based standard.
\end{itemize}
suit is being achieved, but that we are depriving our professionals of the capability of reaching a level of maturity at which they can reason for themselves to the "right" result.\textsuperscript{149} If their reasoning and judgment stop at the point of determining what the rules require, we are training them to follow bad rules as well as good ones (or rules that, in particular cases, produce bad results).\textsuperscript{150}

I would like to return to the question of negotiation ethics and to examine how a more mature moral reasoner might analyze these issues. In the negotiation example discussed earlier\textsuperscript{151} involving the death of the child, the defense lawyer who has used his opponent's ignorance of the law and the facts is essentially "blameless" under the Code because he did not affirmatively create the mistaken beliefs.\textsuperscript{152} The Code does not require that he correct the mistakes. For our students, unfortunately, knowledge of the rule may prevent their further inquiry: should such conduct be tolerated; should there be a written statement of understanding that would bind the parties; or should deception, in whatever guise, be forbidden in negotiation? The student

\textsuperscript{149.} In the above example, that was derived from the experience of one of my students who was involved in the representation of a child in a foster-care review proceeding, she expressed her discomfort with the requirement that she abide by the client's wishes in this case. Nonetheless, out of a sense of duty to "follow the rules," she did so without raising any question with her supervisor. I urged her to raise her questions, not because I was in disagreement with the rule, but because she was. She would have benefitted from considering what reasoning had led to the articulation of a seemingly inappropriate result. Also, by considering carefully the responses to her queries, she might have either accepted the rule as yielding the "right" result, or she might have discovered a means to a better outcome.

\textsuperscript{150.} An example of a situation where the result may well differ, depending on the stage of moral development one has reached, was revealed in the reasoning of a New York judge in a criminal case. Eight people were tried for needle possession, a drug offense, arising from their efforts to distribute clean needles to addicts. The Manhattan judge who acquitted them reasoned, in part, as follows:

\begin{quote}
This court is satisfied that the nature of the crisis facing the city, coupled with the medical evidence offered, warranted the defendants' actions.

This court is also satisfied that the harm the defendants sought to avoid was greater than the harm in violating the statute. Hundreds of thousands of lives are at stake in the AIDS epidemic. 

The distinction, in broadest terms, during this age of the AIDS crises, is death by using dirty needles versus drug addiction by using clean needles. The defendants' actions sought to avoid the greater harm.

On the basis of her reasoning, the judge found that the necessity justification in the state penal law absolved the defendants of criminal liability. Ronald Sullivan, Needle-Exchangers had Right to Break Law, Judge Rules, N.Y. Times, June 26, 1991, at B1, B3.
\end{quote}

\textsuperscript{151.} See supra notes 49-51 and accompanying text.

\textsuperscript{152.} In the strict Code analysis of the defense attorney's conduct, most of his conduct is not a violation of the Rules. See Bellow & Moulton, supra note 12, at 595-97. The attorney for the plaintiffs has probably violated several provisions, to the detriment of his own clients. Id. at 591-95.
may never reach these questions when she is taught that the rule permits the attorney, with knowledge of the mistakes, to remain silent: this is not considered to be a "misrepresentation."

In class discussions of this hypothetical, this is precisely the place where the majority of my students both begin and end the analysis. They often become confused, and even somewhat irritated, when I try to push them to respond to questions about whether the rule is good, makes sense, or should be changed. They are, at least at the outset, comfortable with responses such as "that's the fault of the other attorney and the clients should sue him for malpractice." On the other hand, those students who feel great discomfort with the result of the plaintiffs getting an unreasonable award cannot articulate a rationale for their assertions that the defendant's attorney should simply offer more money. They are not entirely comfortable with the fact that they might need to inform the client that they could have secured a lower settlement, but chose to offer more money. Both groups of students have been short-changed by our failure to provide them with the opportunity to develop a satisfactory way to analyze this very difficult problem.\(^{153}\)

There are some examples to be found where the student is asked or required to go beyond the rule and to explore the competing tensions, including emotional tensions, that may make the application of the rule seem unjust, immoral, or personally unacceptable. Two educators who have drawn on Kohlberg's work to develop curricula that utilize the discourse model to promote the development of more mature moral judgment are Steven Hartwell and David Richards.

Professor Hartwell has written about his use of the DIT in the curriculum that he developed, which is specifically designed to teach moral judgment.\(^{154}\) In his course, he uses the DIT to gauge the students' progressions. He acknowledges that there are some legitimate criticisms about the methodology used by Kohlberg in developing his scale, including those voiced by the feminists described earlier. Another criticism is that the higher stage that Kohlberg identified is not representative of a universal morality, but rather of a western libertarian ideal.\(^{155}\) Notwithstanding these issues, Hartwell maintains that the methods he employs are effective in teaching moral judgment as

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\(^{153}\) In advocating ethical discretion, Professor Simon suggests that the ethical practitioner should simply correct the mistaken understanding of the law—ie, that the contributory negligence of the plaintiffs would bar recovery—and then proceed with the negotiation. I take it that if the mistake were by the attorney for the more powerful entity, or if there were reasons to believe that the adversary's conduct was unfair or dishonest, the correction might not be required. See Simon, \textit{supra} note 14, at 1991.

\(^{154}\) \textit{See} Hartwell, \textit{Experiential Teaching, supra} note 2.

\(^{155}\) \textit{Id.} at 513 & n.32.
documented by the students' progressively higher DIT scores.\textsuperscript{156} He attempts not to "consciously advocate either Kohlberg or Gilligan, but instead, ... to support all student responses ..." in an effort to encourage their growth.\textsuperscript{157} Although Hartwell relies on the DIT to substantiate his effectiveness, and is somewhat critical of methodologies that are not as specifically grounded, in large measure I am in agreement with his views on the value of Kohlberg's theories. One does not need to resolve the issue of the correct definition of the progression and stages of moral development to recognize the need to include moral judgment in the law school curriculum.

Professor David Richards describes the role of moral conflict or dissonance in triggering the type of discourse that will lead to further moral development. In an excellent synthesis of the work of various moral philosophers he explains:

> Ethical reasoning depends on certain kinds of cognitive as well as emotional capacities, including the complex verbal and intellectual skills required to universalize, including the imagination required to think of oneself (if an agent) as being the others affected by one's act.\textsuperscript{158}

Richards describes the teaching method he employs to create this necessary conflict or dissonance in order to prod his students to examine their own beliefs and the applicable legal and ethical rules more closely. Richards does not reserve this technique for a specialized course on "Law and Morality"; he uses this discourse method in his first year course in Criminal Law.\textsuperscript{159}

The process of discourse, as described by Richards and Hartwell (and others),\textsuperscript{160} can lead to greater recognition and identification of issues that impact on moral choice. This process, which is intended to engage the students in an examination of their legalistic reactions by asking them to examine the problem from a different role or context, is not unlike the teaching methods espoused by feminists like Goldfarb and Noddings.\textsuperscript{161}

There may be an objection to portions of my analysis that seem to confuse issues of morals and morality with terms such as feelings and

\begin{itemize}
  \item \textsuperscript{156} Id. at 527-28.
  \item \textsuperscript{157} Id. at 522.
  \item \textsuperscript{158} Richards, \textit{supra} note 2, at 363.
  \item \textsuperscript{159} Id. at 371.
  \item \textsuperscript{160} Professor Bennett discusses a wonderful excerpt from \textit{Huckleberry Finn} where Huck is struggling with a moral choice. Huck's choice is whether to do what is "right" and "just" according to both law and the conventional morality of the time and turn in his friend and companion Jim, who is an escaped slave, or to do what his emotions tell him to do, which was to protect Jim, an act he believed must be wicked, since it defied both law and social norms. Bennett describes his discourse (which leads Huck to protect Jim) as one of advanced moral reasoning. Bennett, \textit{supra} note 2, at 56-58. In his analysis of this moral struggle, Bennett describes Huck's progression through Kohlberg's stages. \textit{Id.} at 58-60.
  \item \textsuperscript{161} See \textit{supra} notes 130-34 and accompanying text.
\end{itemize}
emotion. What do feelings and emotions have to do with moral judgment? The writings of Packer, Willging and Dunn, Bennett, Kohlberg, and many feminists such as Gilligan, Noddings, and others explain that moral growth depends not merely on cognitive development, but on the development of social perspectives that unavoidably engage the emotional. According to Willging and Dunn (quoting in part from Kohlberg),

[an] indispensable skill which is prerequisite to full moral reasoning is the development of social perception in the form of "role-taking." Kohlberg measures the progressive development of such skill by examining the level at which the person sees other people, interprets their thoughts and feelings and sees their role or place in society.\(^{162}\)

In a quote from Kohlberg, they explain that "the experiences that promote such change have a fairly strong emotional component. . . . [T]he emotion that triggers and accompanies rethinking."\(^{163}\)

In the Richards article cited above, the connection between the emotional and moral are also obviously acknowledged.\(^{164}\) Of course, the feminist view of moral development, which includes Care related interests, necessarily entails the influence of emotions, as the Care concerns discussed are generally identified with emotions. Thus, the process of engaging students in the type of discourse that may lead them to heightened moral development necessarily involves an emotional and feeling component.

There have been numerous efforts, noted particularly in the writings of clinical educators, to integrate an emotional or feeling context into the development of skills in order to improve those skills. While these efforts may have started with the agenda of producing more effective practitioners, not more moral practitioners, it is conceivable that both goals will be attained. For example, Professor Gary Goodpaster has written about his program of interviewing and clinical training to enhance client counselling skills.\(^{165}\) He has advocated greater attention to the "emotional and psychological growth" of students in order to enhance their ability and skill in dealing with people

\(^{162}\) See Willging & Dunn, supra note 97, at 316.

\(^{163}\) Id. at 317. In the same vein, M.J. Packer provides an interesting view of moral conflict in a study of subjects engaged in a game "The Prisoner's Dilemma." After a lengthy account of various incidents that transpired during several groups' participation in the game, Packer discusses the reactions of the players to conflicts that arose. These conflicts were perceived by the players to have moral and fairness aspects. One of the conclusions is that the response to conflict of this type is emotional. The emotional then triggers a more analytic and cognitive process. Martin J. Packer, The Structure Of Moral Action, 135-37 (1985).

\(^{164}\) Richards, supra note 2, at 370-71.

in law situations. Although his focus is on enhancing skills, he obviously appreciates the larger ramifications of his work:

The position the law authorizes and often requires lawyers to occupy in the life-space of a person undergoing a law-related crisis can be psychologically critical to that person's future... The social role of the attorney together with the emotional, psychological, and legal needs of the client combine to give the attorney enormous personal power to influence the client's choices regarding the future. Whether or not this power is exercised, the fact that the attorney possesses it means that the client will be affected by what the attorney does or does not do with this power to influence a client...

Consequently, while I write principally of skills and techniques of interaction with others, my ultimate focus is beyond "skill" and "technique," which ring so calculated and technical. It is on that spirit that goes beyond all techniques, the open, human and facilitative response of one in a position to help another who can put that aid to use.

Professors John Barkai and Virginia Fine have also described a curriculum designed to provide "empathy training" to law students in order to improve students' interviewing and counselling techniques. Again, the focus is on improving technique and effectiveness rather than on developing moral judgment. However, the authors make passing reference to benefits to the profession in terms of both ethical conduct and public perception. The focus in their article is on the client's feelings rather than those of the attorney. It seems to me, however, that this type of program represents a recognition of the need for emotion not to be shut out of the lawyering process.

VI. CONCLUSION

In the conversation cited above between Professor Gilligan and Professor Menkel-Meadow, the latter spoke of Hilary, an individual in one of Professor Gilligan's books. Her comments about Hilary's analysis of the moral issue is very much to the point of what I understand to be the process of moral discourse and development discussed by Bennett, Richards, and others. Hilary is, apparently, conflicted about what to do when she sees an opposing lawyer fail to use a document properly in order to assist his case. Professor Menkel-Meadow states:

Hilary is faced with the dilemma of the two voices, of the two ways in which she has been trained. That ethic of care which is within her prompts her to see the needs of the other lawyer's client, and some part of her wants to reach out and help. The more traditional critique of that problem is to point out that

166. Id. at 6-7.
167. Id. at 9-10.
169. Id. at 506-07.
170. Id. at 510-16.
171. Marcus et al., supra note 6, at 55.
our legal system suppresses the truth and that Hilary wants the truth to come out so that a better decision can be reached. But I think Hilary takes it a step further. It is not just the truth that matters to her. It is the fact that she experiences some care for the plight of the party on the other side. She is imprisoned in the role of an advocate who has been told that her role is to be a zealous advocate for her client and that she would be stepping beyond that role if she were to reach out and help the party on the other side by either telling the lawyer about that document or herself submitting the document. . . . Hilary's account led me to speculate on what our code of ethics as lawyers might look like if Hilary herself had created it.¹⁷²

This, in some sense, brings me full circle. The dilemmas that are inherent in the negotiation process are very like what Hilary was facing. My efforts to teach my students how to resolve these dilemmas, as described earlier in this Article, have not been wholly satisfactory. I believe that a more radical transformation in both legal education and legal ethics will be required if we hope to achieve significant improvements in the ethical standards of the legal profession. I wonder, with Professor Menkel-Meadow, what the codes of ethics might look like if Hilary (and Huckleberry Finn) had created them. However, it seems to me that the problem is that we probably lose our Huckleberry Finns in the process of legal education, and we train our Hilarys to act like the rest of us, no matter how conflicted they might feel about their lawyerly conduct.

Like Goldfarb, I believe that the moral judgment that we need to allow our students to develop can most effectively be taught in context, and this means in a practice setting like the law school clinic. As Kohlberg has said "principled moral reasoning is limited to mature adults who 'have the experience of sustained responsibility for the welfare of others and the experience of irreversible moral choice which are the marks of adult personal experience.'"¹⁷³ I am aware of the limitations of this approach. Like the limitations noted with respect to Professional Responsibility courses, the strides that may be made in clinical teaching are in danger of being more than off-set if the overall curriculum is not responsive to these issues. First of all, clinical education does not reach all students. Additionally, while students in clinical courses tend to be very engaged in their learning, there may be a failure to generalize from the work on a specific category of cases to an approach in their non-clinical and post-graduation lawyering processes. To the extent that clinics tend to be offered in public interest and poverty law areas, the moral judgment students learn to exercise there may seem inappropriate or irrelevant to their practice outside the clinic. With these limitations in mind, I offer the following observations about certain clinical methods that I believe have value

¹⁷². Id.
¹⁷³. Willging & Dunn, supra note 97, at 318 & n.42, citing Kohlberg. (emphasis is Kohlberg's).
in promoting the development of moral judgment in students, particularly as applied to the context of negotiating settlement of disputes.

Typically, students enter clinical courses because of a genuine interest in learning what lawyers' work is really like. Consequently, they invest a great deal of time and thought in their tasks whether these involve research, writing, analysis, advocacy, or interacting with others (clients, witnesses, attorneys, and judges). The experiential aspects of both acting in role—as the attorney charged with handling the case—and role modeling seem to make strong and memorable impressions. Students pattern their behavior on these experiences whether personal (role-taking) or vicarious (role-modeling).

In teaching students about negotiation I have utilized methods that I believe contain the elements identified by others as necessary to, and supportive of, growth of moral judgment. What Professor Richards identifies as cognitive dissonance occurs at several levels. First, in the seminar discussion of hypothetical problems involving settlement, scenarios that raise questions of fairness—both as to process and as to outcome—provoke discussion of what the rules of ethics require and permit. The students are then usually able, with some prompting, to move beyond that discussion to a more aspirational level—what the rules and practices should look like. As noted previously, I believe the in-class discussion is a necessary and useful step to elicit attitudes and feelings about moral issues, but is not a good or reliable indicator of conduct.

The students' observations of actual settlement negotiations provide the basis for a more difficult and sensitive analysis of the practical problems encountered in putting theory into practice. Because the students are, by that time, aligned with the attorneys representing the defendants, they do identify with those needs and interests. At the same time, however, plaintiffs in these personal injury cases frequently have serious injuries and present sympathetic cases for recovery. The fact that the students are aligned in interest with the defendant, who is usually operating from a position of power, but are simultaneously sympathetic to the position of the plaintiff, creates a tension (often an emotional tension) that makes it difficult for them either casually to accept the "negotiator as zealous advocate" model or to endorse a negotiator as an arbiter of justice model. Not surprisingly, they tend to vary their views and acceptance of tactics and out-

174. See Hartwell, Experiential Teaching, supra note 2; Richards, supra note 2; and discussion supra notes 154-61 and accompanying text.
175. See discussion supra Part II.B.
176. See supra notes 49-51 and accompanying text.
comes depending on the specific factors in each case. In our
discussions we try to identify those factors that influence our attitudes
about the propriety of negotiation conduct. It is often difficult to artic-
ulate specific rules of conduct which can be uniformly and satisfac-
torily applied in each case to produce both a process and an outcome
that is fair to both sides. There are many cases where, for example,
the rule that we need not voluntarily disclose facts and evidence that
are harmful to our client [Hilary's problem] would yield an unfair out-
come. This may be because, as in Hilary's case, the attorney for the
plaintiff has done an inadequate job of fact investigation or legal anal-
ysis. Where the fairness of the process and result are discordant, we
discuss whether that is personally acceptable, and whether the system
must accept such discord.

The next phase of our negotiation training requires the students to
engage in settlement negotiations in both hypothetical and actual
cases. Frequently, the students are required to role play a settle-
ment discussion in one of their actual cases. This requires that one of
the students working on the case switch sides and represent the oppo-
nent. By placing the student in the role of advocate for the opposing
party, I hope to sensitize the student more fully to the justice and fair-
ness issues from that party's perspective. Usually I assign the student
who seems least impressed with the opponent's case to play the role of
her attorney. I am often struck by the vigorousness of the negotiating
that takes place in that exercise.

Others have noted, and I certainly concur in this, that discussions
about the morality of our rules and practices can be useful only in a
supportive and non-judgmental atmosphere. The clinic seminar,
with the low enrollment and strongly developed working relation-
ships, is an appropriate format for discussion involving sometimes in-
tense personal feelings. Students have been systematically
encouraged to express their views and feelings about all aspects of
their clinical experiences, and have come to accept that viewpoints
with which they disagree may, nonetheless, be valid.

Being non-judgmental does not require that one be non-committal.
I believe that it is often important that students understand my views
on issues, particularly difficult issues. I do not believe that it is over-
bearing or manipulative to be candid in expressing my feelings about
moral issues; indeed, I think it is destructive and manipulative at

177. Although this is, in a sense, what Professor Simon advocates, it is important to
give them the means to do this in a principled, rather than merely an ad hoc
manner. See supra notes 89-91 and accompanying text.

178. According to Willing and Dunn, “[a]dult moral development demands substan-
tial attention to the emotional, role-taking . . . which in turn require experiences
in . . . making nonhypothetical irreversible moral choices.” Willing & Dunn,
supra note 97, at 318 (emphasis added).

179. See Noddings, supra note 95, at 178-79, 186.
times not to do so. I strive not to impose my views in a dogmatic manner, although I realize that the inevitable imbalance in power may cause students to give greater weight to my opinions than to those of their colleagues. Consequently, I attempt to place my views in a context where opposing views on both ends of a spectrum are also described. For example, my students know that I consider misrepresentations about evidence, applicable law, or availability of witnesses to be improper. They also know that a strict application of the rules of ethics does not necessarily forbid all such misrepresentations. We discuss views by some commentators that might classify some such misrepresentations as permissible "bluffing" or "puffing." I do not attempt to persuade them that my ethical choices are the only correct ones, but I do try to explain why I feel compelled to conduct myself in a manner that satisfies me.

While there may be risks in revealing my personal ethics, I believe that there are greater risks in not doing so. I do not want to leave students with the sense that nothing is right and, consequently, nothing is wrong. I do not want merely to reveal what I perceive to be the serious deficiencies of the rules of ethics and then offer no means of resolving ethical issues. I believe that it is essential that students understand that when one makes moral choices, there may be ramifications that one must be prepared to accept. Ultimately, I want them to understand the concept of professional responsibility in a way that is different from merely staying within the confines of the rules and thereby absolving themselves of the consequences of their conduct. I want them to understand that a professional must be ready to accept the consequences of her conduct, and must make her decisions based on an appreciation of what those consequences are likely to be.

In conclusion, I believe that it is clear that legal educators must take responsibility for the moral content of legal education. Ideally, this will not be limited to courses in professional responsibility or to clinical teaching. If we are to avoid giving the students a message about the marginal importance of moral judgment, we must avoid marginalizing its place in the curriculum. According to Nel Noddings, "So long as our critical skills and the exercises presented to develop them are confined to 'P's and Q's' and 'P implies Q' our schools will have the absurd appearance of a giant naked emperor. We need to look with unclouded eyes on what we are doing."180 We need to affirm our students' sense that law is not just about rules. "[The teacher] cannot nurture the student intellectually without regard for the ethical ideal unless she is willing to risk producing a monster . . . ."181 To better prepare our students to take on the responsibility of the profession and to safeguard the care and justice aspects of the law, we must

180. Id. at 186.
181. Id. at 178-79.
seek to develop, rather than thwart, their ability to engage in sound moral reasoning.