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OBJECTIVE, MULTIPLISTIC, AND RELATIVE TRUTH IN DEVELOPMENTAL PSYCHOLOGY AND LEGAL EDUCATION

PAUL T. WANGERIN*

INTRODUCTION

Two thousand years ago, Protagoras, a teacher of lawyers, began what has since become one of the most enduring and painful philosophic debates in western civilization. "Man is the measure of all things," Protagoras insisted, arguing that everything is relative.¹ Since nothing in nature is fixed and certain, Protagoras urged, human beings must create their own meanings and truths. Plato claimed otherwise.² Some things, Plato argued, are fixed and certain. Truth itself has an objective meaning which does not vary from time to time or from place to place.

* Associate Professor of Law, John Marshall Law School. Many people have read this article and have made helpful comments. My principal debt in this context is to psychologists William Perry, Jane Loevinger, Patricia King, and Norma Haan. Richard Bernstein, a philosopher, also gave me several very helpful suggestions. In addition, a number of legal educators made useful comments, notably Jack Himmelstein, James Boyd White, Charles and Randall Kelso, Michael Josephson, and Stephen Young. Several of my colleagues, particularly Donald Beschle, have patiently listened to me talk about this essay for the last two years. Their remarks have been most valuable. Finally, over the last five years countless law students have spoken to me endlessly about what they felt happening to themselves as they passed through law school. My greatest debt is to them.

1. RELATIVISM: COGNITIVE AND MORAL 6 (J. Meiland & M. Krausz eds. 1982). Much of the following discussion of relativism is drawn from this outstanding group of essays. See also R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983); E. GELLNER, RELATIVISM AND THE SOCIAL SCIENCES 83-100 (1985) (a very readable discussion); R. KANE, FREE WILL AND VALUES (1985); OBJECTIVITY AND CULTURAL DIVERGENCE (S. Brown ed. 1984) (a series of essays that rejects the notion of cultural relativism); H. PUTNAM, REASON, TRUTH AND HISTORY (1981) (extensive critique of cognitive relativism); RATIONALITY AND RELATIVISM (M. Hollis & S. Lukes eds. 1982); RELATIVISM AND THE STUDY OF MAN (H. Schoeck & J. Wiggins eds. 1961); Kurtines & Gewirtz, *Certainty and Morality: Objectivistic versus Relativistic Approaches*, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT 3 (W. Kurtines & J. Gewirtz eds. 1984) [hereinafter Kurtines, *Certainty and Morality*]; Peterson, *Remarks on Three Formulations of Ethical Relativism*, 95 ETHICS 887 (1985); *Symposium: Is Relativism Defensible?*, 67 MONIST 293-482 (1984) (difficult series of essays by a number of philosophers). See generally A. OLDENQUIST, READINGS IN MORAL PHILOSOPHY (1965) (numerous discussions of relativism). An excellent discussion of the ideas of Plato and Protagoras in the context of legal education is Heffernan, *Not Socrates, but Protagoras: The Sophistic Basis of Legal Education*, 29 BUFFALO L. REV. 399 (1980).

2. See generally R. KANE, *supra* note 1, for an analysis of Plato's ideas on the concept of relativism. This book also contains an extensive bibliography on relativism.

According to Plato, human beings do not create meanings and truths. Rather, human beings discover truths that exist independently of human control.

For many centuries, Plato's arguments prevailed. To be sure, down through the centuries, some support always existed for relativism in connection with moral and ethical principles. However, by the late eighteenth century, Immanuel Kant's ideas reflected a strong philosophic consensus regarding the objective nature of truth.³

Notwithstanding the seeming victory in western thought of Plato's and Kant's views about the existence of objective truth, the nineteenth and twentieth centuries brought new vigor to proponents of Protagoras' competing idea of relativism. Surprisingly, however, scientists rather than philosophers brought about that resurgence. By the mid-nineteenth century, scientists had become increasingly able to demonstrate that most accepted truths about the physical universe were themselves constantly open to question and change. Long-accepted scientific truths stood exposed as false. Human knowledge was in a state of constant flux. Late in the nineteenth century, scientists announced the Second Law of Thermodynamics and its concept of entropy, which revealed that progression is always toward lack of organization. In the early twentieth century, scientists discovered relativity and the uncertainty principle in quantum physics.⁴ These three scientific discoveries suggested that human *knowledge* regarding the physical universe was not the only thing in a constant state of flux. The universe *itself* was in flux.

Gradual acceptance by modern scientists of this idea of flux in knowledge about physical truths—and of flux in the nature of the physical universe itself—encouraged modern philosophers to resurrect Protagoras' ancient theory of relativism.⁵ Early in the twentieth century, William James and John Dewey argued for a relativistic perspective.⁶ Later philosophers of science such as

3. See generally I. KANT, *THE CRITIQUE OF PURE REASON* (N.K. Smith ed. 1969).

4. See generally R. KANE, *supra* note 1, at 189-205; T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

5. "What, then, is truth?" Nietzsche asked in one of the boldest comments about relativism. "A mobile army of metaphors, metonyms, and anthropomorphisms—in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people . . ." *THE PORTABLE NIETZSCHE* 46-47 (W. Kaufmann ed. 1954).

6. See generally Kohlberg & Mayer, *Development as the Aim of Education*, 42 *HARV.*

Michael Polanyi⁷ and Thomas Kuhn⁸ brought even greater legitimacy to the relativistic perspective.

C. Behan McCullagh, a modern philosopher, provides an excellent definition of the modern perspective of relativism. This perspective claims:

- (i) that people's beliefs about the world are largely determined by their perceptual equipment—their eyes, microscopes and so on, by their conceptual systems and by their standards of rationality; (ii) that all these are known to have varied from culture to culture, and from time to time within our own culture; and (iii) that there is no independent way of deciding which set of determining factors (perceptual equipment, conceptual system and standard of rationality) will yield true descriptions of reality.⁹

“[W]e live in an incoherent and elemental flux,” James Boyd White recently wrote. “[N]o reasoning, no meaning is possible. . . . no earth or rock to stand or walk upon but only shifting sea and sky and wind”¹⁰

To be sure, many modern philosophers argue convincingly for the existence of some objective truth. Ronald Dworkin¹¹ and John Rawls,¹² for example, have little sympathy for a relativistic perspective. Furthermore, Allan Bloom's recent and widely read book, *The Closing of the American Mind*, is a sustained diatribe against relativism.¹³ Some modern philosophers, most notably Richard Bernstein, argue that the classic confrontation between the seemingly irreconcilable perspectives of relativism and objectivism can in fact be resolved.¹⁴ Nevertheless, one conclusion seems obvious. Although it is probably safe to say that the relativistic perspective has not gained widespread acceptance

EDUC. REV. 449 (1972) (extensive discussion of Dewey); Phillips, *Was William James Telling the Truth After All?*, 67 *MONIST* 419 (1984).

7. An excellent introduction to Polanyi's very difficult work is R. GELWICK, *THE WAY OF DISCOVERY* (1977).

8. See generally T. KUHN, *supra* note 4.

9. McCullagh, *The Intelligibility of Cognitive Relativism*, 67 *MONIST* 325, 327 (1984).

10. J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTERS AND COMMUNITY* 277-78 (1984).

11. See generally, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

12. See generally, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971).

13. See generally A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

14. See generally R. BERNSTEIN, *supra* note 1. One philosopher made the point in a beautiful metaphor. “[T]he battle over relativism . . . having continued with fluctuating intensity for several millenia, is probably more aptly conceived as a war of attrition rather than as a one-time fray.” Phillips, *supra* note 6, at 419.

among modern philosophers,¹⁵ nonetheless for the first time in two millenia relativism is not a discredited philosophic idea.

It was noted at the outset of this brief discussion of the ideas of relativism and objectivism that Protagoras was first a teacher, and second a teacher of lawyers. So too is James Boyd White, the "shifting sea" writer previously quoted.¹⁶ Teachers of lawyers, it is suggested, have special responsibilities when exploring with their students the nature of truth. Like all teachers, they must communicate with large numbers of students who frequently will hold widely diverse ideas. In addition, teachers should help students develop into skilled independent thinkers, that is, thinkers who do not simply accept another's definition of truth. Therefore, teachers who wish to teach well must themselves understand that a fundamental dispute about the objective or relative nature of truth exists and that the dispute undoubtedly affects their own teaching in subtle, but important, ways. First, teachers must understand that this fundamental dispute pervades the substantive component of their own special disciplines. Knowledge about their fields is in a state of flux. Second, they must understand that students may well look at and understand the nature of truth in ways very different from their teachers.

Law school teachers share with all teachers the responsibilities just described. However, law school teachers in the United States have additional duties which principally fall upon them because they teach their students to operate within the adversary system of justice.¹⁷ The existence of that system, it is suggested, creates enormous developmental difficulties for students.

This Article, which principally concerns the special responsibilities of law school professors, has three parts. After briefly discussing the work of John Dewey and Jean Piaget, Part I¹⁸ demonstrates that William Perry, a developmental psychologist, describes a cognitive development sequence in the intellectual abilities of young adults that can readily be used to catalogue the various developmental phases through which many law students

15. See Vallicella, *Relativism, Truth and the Symmetry Thesis*, 67 *MONIST* 452 (1984). Vallicella notes, however, that while relativism among philosophers tends to be a bad thing, relativism among social scientists is a good thing.

16. See *supra* text accompanying note 10.

17. Actually, legal educators have an additional special responsibility in this context, a responsibility brought about by the widespread use in law school classrooms of the so-called Socratic method of instruction. See generally Heffernan, *supra* note 1.

18. See *infra* text accompanying notes 23-140.

seem to pass. This Article uses both empirical and anecdotal data to link Perry's ideas to law school students. Perry describes intellectual movement in young people as movement toward gradual acceptance of multiplicity and relativism and then as movement toward commitment in relativism. This part of the Article also briefly compares Perry's scheme to Karen Kitchener's and Patricia King's ideas about the development of reflective judgment. Unlike Perry's sequence, Kitchener's and King's sequence suggests that intellectual movement in young adults is gradually toward the appreciation of objective truth. Finally, Part I discusses some cognitive developmental dangers that legal education poses for young adults.

Part II of this Article¹⁹ explores theories of moral development, as opposed to cognitive development. The theories principally discussed in this section are those of psychologists Lawrence Kohlberg and Norma Haan. Kohlberg describes moral development as the gradual movement through a series of stages toward ultimate appreciation of objective truth. Haan disagrees. She thinks development involves an increased ability to engage in what is essentially relativistic moral dialogue. Again, this Article uses empirical and anecdotal data to explore these different ideas regarding law students and lawyers.

Part III²⁰ links the dispute about objectivism and relativism to ideas put forward by radical critics in the fields of legal education and developmental psychology. In legal education, members of the Critical Legal Studies movement attack mainstream legal theory from the far left on the political spectrum. In developmental psychology, feminist psychologists similarly attack mainstream developmental theory. Both of these attacks are launched, it will be shown, from a platform of relativistic truth.

An important introductory point must be made in an Article like the present one, an Article directed at widely differing scholarly audiences. Some developmental theorists who read this Article may think that parts of its discussion are overly simplistic. These readers may well be correct. They should remember, however, that few legal educators know anything at all about developmental theory. Likewise, some legal educators who read this Article may think that other parts of it are overly simplistic. These readers may also be correct. They too, how-

19. See *infra* text accompanying notes 141-93.

20. See *infra* text accompanying notes 194-231.

ever, should consider that legal education is only one small part of the very large world of educational theory. Finally, philosophers who read this essay undoubtedly will shudder at oversimplifications it contains about the epistemological concepts of relativism and objectivism.²¹ They are correct to shudder. All of these readers should keep in mind, however, that legal educators, psychologists, and philosophers have themselves made such oversimplifications necessary. They have created the huge gulfs that exist between these various fields of scholarly activity. They have done so principally because they too often cloak their respective work in professional and mystic languages that exclude nonspecialists from understanding.²²

I. COGNITIVE DEVELOPMENT IN YOUNG ADULTS

Graham Gibbs, a British educational psychologist, describes a monumental purpose for higher education. "[T]he most important changes which take place as students develop are changes in the way learning is conceptualized and in the epistemological stance taken."²³ Gibbs makes a crucial point about what has come to be called developmental education theory,²⁴ a field of study initially dominated by John Dewey and Jean Piaget. "Working within a student's existing stage of [educational] development allows a certain limited scope for greater efficiency, but often only a broad reconceptualization of what a study task is about will provide scope for significant development."²⁵

21. I am grateful in particular to Richard Bernstein, a philosopher, for this observation.

22. The phrase is drawn from Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 223 (1984).

23. G. GIBBS, *TEACHING STUDENTS TO LEARN: A STUDENT-CENTRED APPROACH* 90 (1981).

24. Countless books and articles cataloguing the process of human development exist. A number of these contain extensive discussions of developmental sequences in late adolescents and young adults, that is, people the age of most law students. Some of these materials include: *CONSTANCY AND CHANGE IN HUMAN DEVELOPMENT* 359-444, 530-640 (O. Brim & J. Kagan eds. 1980); Arnstein, *Young Adulthood: Stages of Maturity*, in *NORMALITY AND THE LIFE CYCLE: A CRITICAL INTEGRATION* 109-44 (D. Offer & M. Sabshin eds. 1984). An excellent general summary of the developmental effect of higher education is Heath, *What the Enduring Effects of Higher Education Tell Us About a Liberal Education*, 47 J. HIGHER EDUC. 173 (1976). An article by Gutierrez, *Counseling Law Students*, 64 J. COUNSELING & DEV. 130 (1985), provides a limited discussion but an extensive bibliography. A good recent compilation of essays on developmental theories is *NEW DIRECTIONS IN EDUCATIONAL PSYCHOLOGY* (N. Entwistle ed. 1985).

25. G. GIBBS, *supra* note 23, at 90.

John Dewey²⁶ believed that the sheer mass of knowledge initially produced by the historical record and then continuously expanded by the ongoing process of scientific discovery foreclosed any realistic attempt to use the educational process principally as a means for transmitting knowledge from one generation to the next. Rather, Dewey argued, the educational process must concentrate primarily on training young people to think about knowledge. Such training allows members of the new generation selectively to acquire knowledge already possessed by others and, more importantly, to generate new knowledge. Dewey also believed that this process of education complemented modern, relativistic conceptions of knowledge itself. To Dewey, knowledge was always in a state of flux, always changing, developing, and contradicting the past. Therefore, any attempt to use the educational process primarily to impart knowledge, rather than to impart skills of acquiring, using, and creating knowledge, doomed itself to immediate obsolescence.²⁷

Unlike Dewey, who was primarily a philosopher, Jean Piaget was primarily a scientist.²⁸ Over a period of many years, Piaget painstakingly watched infants and young children as they grew physically and intellectually. Piaget concluded that growth in children was not the essentially random process that it was thought to be. Rather, growth in infants and small children proceeded in an orderly pattern through sequential developmental stages.

Piaget's ideas about the developmental sequence of children can be quickly summarized. From birth until about two years of age, Piaget observed, children think in a sensorimotor fashion, that is, their thinking is directly linked to immediate sensory experience. Between the ages of two and about seven, children develop pre-operational thought. Such thought principally involves increasing ability to use and to form symbols. Language, of course, is the most important aspect of symbolism. Starting at about age six, children become capable of concrete

26. The following discussion of Dewey's work draws heavily from Kohlberg & Mayer, *supra* note 6; see also Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924); Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441 (1986).

27. A somewhat different approach to this idea is discussed in M. BIGGE, *POSITIVE RELATIVISM: AN EMERGENT EDUCATIONAL PHILOSOPHY* 1-26 (1971).

28. Once again, this discussion draws heavily on Kohlberg & Mayer, *supra* note 6; see also M. EYSENCK, *A HANDBOOK OF COGNITIVE PSYCHOLOGY* 231-47 (1984).

operations. They then can understand the idea of change and can represent the transformation of concrete things. Piaget's fourth and last stage is formal operations, which children reach in early adolescence and develop through adulthood. This stage involves the ability to think about the transformation of abstractions. All children, Piaget concluded, go through each of these stages. More importantly, they all go through them in the same sequence.

All of the theories of developmental education discussed in this Article grew out of the ideas of Dewey and Piaget,²⁹ and all share some common ground. For example, all developmental educators believe that education should nourish students' natural interaction with a developing society or environment. In addition, all of these educators believe that the acquisition of knowledge involves active changes in patterns of thinking and progressions through ordered, sequential stages. Moreover, the developmental education tradition for all theorists stresses the essential link between cognitive and moral development. All developmental educators believe that the development of logical and critical thought finds its principal meaning in a broad set of moral values. At least one fundamental difference of opinion exists, however, among the various developmental educators. One group of theorists follows Dewey's lead regarding the ultimate uncertainty and relativism of all knowledge. This group suggests that development is the process of learning to live with uncertainty. The second group rejects the relativism aspect of Dewey's work. They argue that development in human beings involves progress toward the understanding and acceptance of universally applicable and objectively true principles.

A. *William Perry's Stages of Intellectual Development*

William Perry spent more than fifteen years conducting a

29. A good summary of various conflicting and complementary developmental theories can be found in Rogers, *Theories Underlying Student Development*, in *STUDENT DEVELOPMENT IN HIGHER EDUCATION* 10 (D. Creamer ed. 1980). For a similar discussion and an extensive bibliography, see also *DEVELOPING EFFECTIVE STUDENT SERVICES PROGRAMS* 192-97 (M. Barr & L. Keating eds. 1985); R. WINSTON, T. MILLER, S. ENDER, & T. GUILLES, *DEVELOPMENTAL ACADEMIC ADVISING* 102-11, 175-79 (1984). See generally Drum, *Understanding Student Development*, in *DIMENSIONS OF INTERVENTION FOR STUDENT DEVELOPMENT* 14 (W. Morrill, J. Hurst, & E. Oetting eds. 1980); Widick, Knefelkamp, & Parker, *Student Development*, in *STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION* 75 (U. Delworth & G. Hanson & Assoc. eds. 1980).

longitudinal³⁰ study of the intellectual development of a group of young adults. During this time he repeatedly interviewed hundreds of undergraduates at Harvard University and Radcliffe College. Perry's 1970 report of his findings, *Forms of Intellectual and Ethical Development in the College Years: A Scheme*,³¹ which was revised somewhat in an article published in 1981,³² has become one of the most widely discussed and praised works of modern educational psychology.³³

30. A longitudinal study follows the same people over an extended period of time. A cross-sectional study examines different people at the same time. Both types of studies have intrinsic advantages and disadvantages.

31. W. PERRY, *FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME* (1970) [hereinafter *FORMS OF DEVELOPMENT*].

32. Perry, *Cognitive and Ethical Growth: The Making of Meaning*, in *THE MODERN AMERICAN COLLEGE: RESPONDING TO THE NEW REALITIES OF DIVERSE STUDENTS AND A CHANGING SOCIETY* 76 (A. Chickering & Assoc. eds. 1981) [hereinafter *Cognitive and Ethical Growth*]. Excellent secondary discussions of Perry's work include J. RICH & J. DeVITIS, *THEORIES OF MORAL DEVELOPMENT* 74-83 (1985) [hereinafter J. RICH]; R. SPRINTHALL & N. SPRINTHALL, *EDUCATIONAL PSYCHOLOGY: A DEVELOPMENTAL APPROACH* 380-83 (3d ed. 1981) [hereinafter R. SPRINTHALL]; Widick & Simpson, *Developmental Concepts in College Instruction* [hereinafter Widick], in *ENCOURAGING DEVELOPMENT IN COLLEGE STUDENTS* 27-59 (C. Parker ed. 1978) [hereinafter *ENCOURAGING DEVELOPMENT*]. For a recent critical discussion of Perry's work, see Kelly, Brown, & Foxx, *Dialectics of Social Adaptation and Individual Constructivism*, 110 *GENETIC PSYCHOLOGY MONOGRAPHS* 257, 282-86 (1985); see also Ryan, *Monitoring Text Comprehension: Individual Differences in Epistemological Standards*, 76 *J. EDUC. PSYCHOLOGY* 248 (1984) (comparison of Perry's scheme to Benjamin Bloom's taxonomy of various kinds of knowledge). Perry's own most recent work is a book review of a collection of essays by European educational psychologists. Perry, *Book Review*, 56 *HARV. EDUC. REV.* 187 (1986) [hereinafter Perry, *Book Review*].

33. Surprisingly, the work of David Hunt in this field has almost completely escaped attention in the context of the development of young adults. For a recent discussion of Hunt's work, see generally Khalili & Hood, *A Longitudinal Study of Change in Conceptual Level in College*, 24 *J. COLLEGE STUDENT PERSONNEL* 389 (1983) [hereinafter Khalili]. Hunt began his work by watching children as they progressed through Piaget's stages. Gradually, Hunt expanded to include analysis of older children, adolescents, and young adults. He eventually concluded that people develop by progressing through four levels. At stage 0.0, children act in an essentially unsocialized fashion. They resist and avoid external imposition. Ambiguity cannot be tolerated and information is processed in a very simple and concrete manner. As children become adolescents, Hunt observed that they gradually move to stage 1.0, in which they become concerned about socially acceptable ideas and manners. More importantly, they increasingly begin to process information into dichotomous categories such as right/wrong and good/bad. As these young people reach later adolescence, another stage, 2.0 in Hunt's terminology, emerges. Here individuals question and challenge absolutes and authority. They open themselves up to the ideas of others. Their tolerance for uncertainty and ambiguity increases. At this level, adolescents realize the importance of interdependence between themselves and their environment. Understanding of the self increases, as does willingness to accept imposition from the outside. For discussions of Hunt's work, see generally D. HUNT & E. SULLIVAN, *BETWEEN PSYCHOLOGY AND EDUCATION* (1974); D. HUNT, *MATCHING MODELS IN EDUCATION: THE COORDINATION OF TEACHING METHODS WITH STUDENT*

Perry's work, which is essentially unknown to legal educators, provides an extraordinarily perceptive psychological map of law students. Perry discovered that young adults go through nine sequential and distinct developmental stages. This discovery was, of course, pure Piaget. Perry then linked these nine stages of young adult intellectual development to Dewey's ideas about the ultimate uncertainty or relativism of all knowledge.³⁴

An important cautionary point must immediately be made about the following discussion. Most developmental psychologists believe, and most empirical data about college students seems to demonstrate, that developmental change in adolescents and young adults is ordinarily very gradual. College itself, for example, causes most students to progress no more than about one-half of a developmental step.³⁵ The following paragraphs suggest that development for law school students, at least development along the Perry scale, might be quite rapid, perhaps even an entire stage in a semester or two.

The first two positions in Perry's nine position developmental scheme involve a dualistic structure of knowledge, a dualism frequently seen in law school students.³⁶ The dualistic learner, according to Carol Widick and Deborah Simpson,³⁷ assumes that all information can be classified as either right or wrong and that uncertainty is an error of some sort. For the student at these positions,³⁸ learning is a matter of finding and knowing

CHARACTERISTICS (1971); R. SPRINTHALL, *supra* note 32, at 411-515; Miller, *Conceptual Matching Models and Interactional Research in Education*, 51 REV. EDUC. RES. 33 (1981).

34. Perry frequently discusses Piaget's work. See, e.g., W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 201-06.

35. See Loevinger, Cohn, Redmore, Sargent, Streich, & Bonneville, *Ego Development in College*, 48 J. PERSONALITY & SOC. PSYCHOLOGY 947 (1985) [hereinafter Loevinger, *College Ego Development*]; see also J. LOEVINGER, PARADIGMS OF PERSONALITY (1987) [hereinafter PARADIGMS]. See generally Schlaefli, Rest, & Thoma, *Does Moral Education Improve Moral Judgment? A Meta-Analysis of Intervention Studies Using the Defining Issues Test*, 55 REV. EDUC. RES. 319 (1985) [hereinafter Schlaefli]; Walker, de Vries, & Bichard, *The Hierarchical Nature of Stages of Moral Development*, 20 DEV. PSYCHOLOGY 960 (1984) [hereinafter Walker].

36. Perry defines dualism as:

Division of meaning into two realms—Good versus Bad, Right versus Wrong, We versus They, All that is not Success is Failure, and the like. Right Answers exist *somewhere* for every problem, and authorities know them. Right Answers are to be memorized by hard work. Knowledge is quantitative. Agency is experienced as "out there" in Authority, test scores, the Right Job.

Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 79.

37. Widick, *supra* note 32, at 27-59 (1978).

38. Position one is defined as:

The student sees the world in polar terms of we-right-good vs. other-wrong-bad.

right answers. Perry captures the essence of a student in position one in the following description.

Student *A* has always taken it for granted that knowledge consists of correct answers, that there is one right answer per problem, and that teachers explain these answers for students to learn. He therefore listens for the [teacher] to state which theory he is to learn.³⁹

All legal educators have had countless experiences with Student *A* in first year law school classrooms. In fact, sometimes it seems that most students in such classrooms have an invisible *A* burned into their foreheads. "[The] professor is lousy," these law students often think. "He keeps giving us all this conflicting stuff and won't tell us what we have to know."⁴⁰ Only a small dose of law school is needed, however, to move a student from Perry's position one to his position two. Perry provides the following model of the position two student.

Student *B* makes the same general assumptions [as Student *A*] but with an elaboration to the effect that teachers sometimes present problems and procedures, rather than answers, "so that we can learn to find the right answer on our own." He therefore perceives the [class] as a kind of guessing game in which he is to "figure out" which theory is correct⁴¹

Again, legal educators frequently encounter this kind of student. "I know that [person] knows what I should do," these students say repeatedly, "but she wants me to figure it out for myself."⁴²

It takes most law students only a few months to realize that uncertainty and indeterminacy indeed do exist. This realization leads them to Perry's position three, the first of his positions of "multiplicity."⁴³ According to Perry, students move to position

Right Answers for everything exist in the Absolute, known to Authority whose role is to mediate (teach) them. Knowledge and goodness are perceived as quantitative accretions of discrete rightnesses to be collected by hard work and obedience (paradigm: a spelling test).

W. PERRY, *FORMS OF DEVELOPMENT*, *supra* note 31, at 9 (footnote omitted); *see also id.* at 59-72.

39. *Id.* at 1.

40. This is an actual student quotation from a work in developmental psychology. Stonewater & Stonewater, *Developmental Clues: An Aid for the Practitioner*, 21 *NASPA J.* 52, 55 (1983) [hereinafter *Stonewater*].

41. W. PERRY, *FORMS OF DEVELOPMENT*, *supra* note 31, at 1.

42. *Stonewater*, *supra* note 40, at 55.

43. Perry defines multiplicity as: "Diversity of opinion and values is recognized as legitimate in areas where right answers are not yet known. Opinions remain atomistic without pattern or system. No judgments can be made among them so 'everyone has a

three when they accept "diversity and uncertainty as legitimate but still *temporary* in areas where Authority 'hasn't found The Answer yet.'"⁴⁴ Emphasis here is on the words "temporary" and "yet." The answer, though one exists, has not *yet* been found. Law school is full of this. Open questions exist in law. The law in a particular area is unsettled. Perhaps the clearest example of position three reasoning in law school involves students' views of the courses themselves. Early in the first term, for example, many law students come to accept confusion and uncertainty. They do so, however, believing that the confusion and uncertainty will be dissipated or even eliminated before the end of the term. This belief, in turn, is reinforced by things these first term students often hear from upperclassmen. "Don't worry about the confusion," these students hear from their predecessors. "It will all come together for you at the end." For these students, uncertainty is temporary; the answer has not *yet* been found.

According to Perry, students gradually move away from a dualistic view of knowledge and begin to think in a relativistic fashion at position four.⁴⁵ Position four is the second of Perry's two positions of multiplicity. Recall that, at position three, students accept the existence of multiple answers, but view that multiplicity as temporary. At position four, students realize that some multiplicity is indeed permanent. Here emphasis is on the word "some." Regarding *some* things, no answer exists, and none ever will. In short, at position four relativistic thinking exists as a special case, an isolated instance, permanent but limited in scope. This position includes what many psychologists and philosophers call moral relativism, that is, a belief that on ethical issues, although on no other issues, right answers do not exist.

right to his own opinion; none can be called wrong.'" Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 79-80.

44. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 9 (emphasis in original); *see also id.* at 89-94.

45. (a) The student perceives legitimate uncertainty (and therefore diversity of opinion) to be extensive and raises it to the status of an unstructured epistemological realm of its own in which "anyone has a right to his own opinion," a realm which he sets over against Authority's realm where right—wrong still prevails, or (b) the student discovers qualitative contextual relativistic reasoning as a special case of "what They want" within Authority's realm.

W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 9; *see also id.* at 95-108. In his 1981 revision of the theory, Perry divides position 4 into two parts, namely 4a and 4b. Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 84-87.

Law school provides many examples of position four reasoning. Quite commonly, for example, students describe a dramatic difference between several classes. "Thank goodness I understand torts," these students cry out. "Contracts is hopeless. Nobody can figure out anything there!" Contracts is, in this description, a special case, an anomaly. Furthermore, law students quickly learn that personal views on political, moral, ethical, and social policy matters differ quite widely. Everybody, these students come to believe, has a right to his or her opinion on these matters. In these contexts, no right answers exist.⁴⁶ Again, emphasis is on the phrase "in these contexts." Relativistic thinking at position four is a special case. "That professor is really clear on some stuff, but with some of the material, it seems like she just hasn't figured it out yet."⁴⁷

Everything comes apart for young adults at position five, according to Perry. Here students perceive "all knowledge and values (including authority's) as contextual and relativistic."⁴⁸ Here students subordinate dualistic, right/wrong functions to the status of a special case, in context. Uncertainty takes over almost completely. In effect, at position five, position four is reversed. Now, certainty is the rare special case, uncertainty the norm. In position five, according to Widick and Simpson,

all knowledge is seen as contextual and relativistic; at this point, concern with the nature of knowledge interacts with the student's personal life. The student seems to generalize relativistic assumptions to the realm of self and is faced with many vantage points from which to consider his or her own identity.⁴⁹

Note carefully that this is not a description of moral relativism.

46. Readers familiar with Ronald Dworkin's work will find this particular student-held view most troubling. See generally R. Dworkin, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985).

47. Once again, this particular quotation is drawn from a developmental work and not from a fictitious law student. Stonewater, *supra* note 40, at 55.

48. W. PERRY, *FORMS OF DEVELOPMENT*, *supra* note 31, at 9; see also *id.* at 109-33. Perry defines relativism as follows:

Diversity of opinions, values, and judgment derived from coherent sources, evidence, logics, systems, and patterns allowing for analysis and comparison. Some opinions may be found worthless, while there remain matters about which reasonable people will reasonably disagree. Knowledge is qualitative, dependent on contexts.

Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 80.

49. Widick, *supra* note 32, at 30.

At this position, everything, scientific facts as well as moral truths, is relative. Nothing can be known with certainty.

Perry is quite down to earth in his description of a position five student. Note how this student's ideas about uncertainty extend well beyond issues of morality.

Student *C* assumes that an answer can be called "right" only in the light of its context, and that contexts or "frames of reference" differ. He assumes that several interpretations of a poem, explanations of a historical development, or even theories of a class of events in physics may be legitimate "depending on how you look at it." . . . [H]e . . . supposes that the [teacher] may be about to present three legitimate theories which can be examined for their internal coherence, their scope, their fit with various data, their predictive power, etc.⁵⁰

A shock of recognition should now strike most legal educators.⁵¹ Perry's Student *C* is the model law student. Student *C*'s, or perhaps better said, multiplistic law students who are rapidly moving toward a Student *C* perspective, get the top grades in virtually all law school classes, edit the law reviews, win the moot court competitions, and graduate with honors. They are, it seems, what law teachers want all law students ultimately to become. In fact, Perry's description of Student *C* is an essentially perfect description of a law student taught to think like a lawyer.

Unlike legal educators, who seem to think of multiplicity or relativism as the end of the developmental line, most developmental psychologists view these positions as merely intermediate steps in the overall process of development. For example, Jane Loevinger's ego development theory places the relativistic stage of conscientiousness very near the middle of her multistage sequence.⁵² The same is true in the work of Broughton,⁵³ in that

50. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 2.

51. Several writers on legal education have discussed the change that comes about in law students in language that can be read through a Perry filter. For example, it is common for legal education writers to note that law students come to see various sides of a problem. See, e.g., F. ALLEN, LAW, INTELLECT AND EDUCATION 72-73 (1979); Erlanger & Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11, 30 (1978) [hereinafter Erlanger].

52. J. LOEVINGER, EGO DEVELOPMENT: CONCEPTIONS AND THEORIES 20-22, 24-25 (1976). In her early work Loevinger frequently discusses Perry's ideas. See, e.g., *id.* at 126-33. She provides a chart showing how her various stages generally correspond to Perry's. *Id.* at 109. See generally J. LOEVINGER, SCIENTIFIC WAYS IN THE STUDY OF EGO DEVELOPMENT (1979). Recently, however, she seems to be moving away from Perry.

of Labouvie-Veif,⁵⁴ in the writings of a group of psychologists who believe that stages beyond Piaget's formal operations exist,⁵⁵ and in the reflective judgment theory of Professors Kitchener and King.⁵⁶

B. *Empirical Data on Law Students*

Throughout this discussion of the first five positions in Perry's nine position developmental scheme, references have been made to anecdotal experiences seemingly representative of those shared by many legal educators. Unfortunately, no formal studies of law students' intellectual developmental have been found that employ any of the now commonly used standardized tests for evaluating the cognitive development of undergraduates.⁵⁷ Fortunately, however, a number of formal empirical

Currently, she suggests that little or no ego development occurs in the college years. See Loevinger, *College Ego Development*, *supra* note 35.

53. Broughton, *The Development of Concepts of Self, Mind, Reality and Knowledge*, in *NEW DIRECTIONS FOR CHILD DEVELOPMENT* No. 1: *SOCIAL COGNITION* 75-100 (W. Danner ed. 1978). Although Broughton's levels of development sound similar to Perry's, Broughton seems to have been unfamiliar with Perry's work.

54. Labouvie-Vief, *Dynamic Development and Mature Autonomy: A Theoretical Prologue*, 25 *HUM. DEV.* 161, 166 (1982).

55. *BEYOND FORMAL OPERATIONS* 217-38, 258-62, 320-25, 340-56 (M. Commons, F. Richards, & C. Armon eds. 1984); see also *BEYOND FORMAL OPERATIONS II: COMPARISONS AND APPLICATIONS OF ADOLESCENT AND ADULT DEVELOPMENTAL MODELS* (M. Commons, J. Sinnott, F. Richards, & C. Armon eds., in press) [hereinafter *BEYOND FORMAL OPERATIONS II*]; *BEYOND FORMAL OPERATIONS III: MODELS AND METHODS IN THE STUDY OF ADOLESCENT AND ADULT THOUGHT* (in press) [hereinafter *BEYOND FORMAL OPERATIONS III*].

56. See Kitchener & King, *Reflective Judgment: Concepts of Justification and Their Relationship to Age and Education*, 2 *J. APPLIED DEV. PSYCHOLOGY* 89 (1981); see also materials cited *infra* note 100.

57. For an example of one such standardized test, see the Scale of Intellectual Development discussed in Erwin, *The Scale of Intellectual Development: Measuring Perry's Scheme*, 24 *J. COLLEGE STUDENT PERSONNEL* 6 *passim* (1983). Another test is the Measure of Epistemological Reflection, discussed in Baxter-Magolda & Porterfield, *A New Approach to Assess Intellectual Development on the Perry Scheme*, 26 *J. COLLEGE STUDENT PERSONNEL* 343 *passim* (1985), and yet another is the Measure of Intellectual Development described in *MEASURING STUDENT DEVELOPMENT* 69-74 (G. Hanson ed. 1982). The Reflective Judgment Interview is described in Kitchener & King, *supra* note 56, at 104-05, and in Schmidt & Davison, *Helping Students Think*, 61 *PERSONNEL & GUIDANCE J.* 563 (1983); see also D. WINTER, D. MCCLELLAND, & A. STEWART, *A NEW CASE FOR THE LIBERAL ARTS: ASSESSING INSTITUTIONAL GOALS AND STUDENT DEVELOPMENT* 27-36 (1981) (discussion of the Test of Thematic Analysis and the Analysis of Argument Test). See generally Mines, *Measurement Issues in Evaluating Student Development Programs*, 26 *J. COLLEGE STUDENT PERSONNEL* 101 (1985).

These tests generally show that students graduate from college just as they begin Perry's relativistic stage of development. A good review of the literature and a summary of many studies is Brabek & Welfel, *Counseling Theory: Understanding the Trend Toward*

studies have been conducted on law students which cast at least indirect light on their intellectual development.

In one of the law student studies, Alfred Smith and his colleagues at the University of Texas apparently did not know of Perry's work when they conducted a large scale study of the thinking processes of almost one thousand first year law students. Smith, who published his results and conclusions as *Cognitive Styles in Law Schools*,⁵⁸ hypothesized that two distinct styles of information processing exist, monopathic and polypathic. Monopaths assume that there is a correct way to get facts, to sort and interpret them, and to apply them.⁵⁹ The monopath also thinks that the world is fundamentally unambiguous and changeless, a "stable, static, redundant world, with nothing new under the sun . . ."⁶⁰ Smith's monopaths clearly are Perry's dualistic thinkers. Conversely, Smith's polypaths think the world has many possibilities, all of them ambiguous and ever changing. The polypath's world is unpredictable, changeable, dynamic, and indeterminate.⁶¹ Clearly, Smith's polypaths are either Perry's multiplistic or his relativistic thinkers. After reviewing all of his data, Smith concluded that first year law students were somewhat more polypathic than the theoretical midpoint. However, a considerable number of students, perhaps fully one-third of them, were monopathic.⁶²

Eclecticism from a Developmental Perspective, 63 J. COUNSELING & DEV. 343 (1985); see also Brabek, *Longitudinal Studies of Intellectual Development During Adulthood: Theoretical and Research Models*, 17 J. RES. & DEV. IN EDUC. 12 (1984) [hereinafter Brabek, *Longitudinal Studies*]; Welfel & Davison, *The Development of Reflective Judgment During the College Years: A 4-Year Longitudinal Study*, 27 J. COLLEGE STUDENT PERSONNEL 209 (1986) (describing an as yet untested paper/pencil test). Data from a college age sample evaluated in light of David Hunt's four step theory of intellectual development is discussed in Khalili, *supra* note 33.

58. A. SMITH, *COGNITIVE STYLES IN LAW SCHOOLS* (1979).

59. *Id.* at 5.

60. *Id.* at 7.

61. *Id.*

62. Some of Smith's findings are a bit surprising. For example, Smith found that no correlation existed between his measures of legalism and intolerance of ambiguity (these measures being methods for differentiating between polypaths and monopaths), and Law School Admissions Test (LSAT) scores. Furthermore, only a very tiny correlation existed, and a positive one at that, between his authoritarianism measure and LSAT scores. High LSAT scores correlated with high authoritarianism scores. In short, students with high LSAT scores were not necessarily more polypathic than students with low LSAT scores.

Smith also discovered, again somewhat surprisingly, that first year students at widely different types of law schools scored just about the same on all three of his measures. Sampled schools ran from the highly regarded national law school at the University of Michigan to the relatively unknown regional law school at the University of Detroit. On the intolerance of ambiguity measure, no statistically significant difference existed between

Another study of law school students generated similar data. James Hedegard, who seems to have been unaware of both Perry's and Smith's work, distributed to a large number of law students the Course Perceptions Questionnaire (CPQ), which sought information on how students evaluated many aspects of their classes and teachers.⁶³ One of the things measured by the CPQ was classified on what Hedegard called the "right answer index."⁶⁴ Students were asked to indicate whether their teachers conveyed the sense that right answers to legal questions existed or whether their teachers conveyed the sense that legal questions had multiple legitimate answers.⁶⁵ Low scores on the CPQ's right answer index, which indicated that right answers do not exist, suggest that students perceive their teachers and themselves as thinking in what Perry would call multiplistic or relativistic patterns. Conversely, high scores on this index—right answers do exist—suggest what Perry would call dualistic thinking. The mean score on Hedegard's index was 7.17 with 2 being the lowest possible score (most relativistic) and 12 being the highest (most dualistic). Actual scores ranged as low as four and as high as ten. These law student scores confirm Alfred

students at national or regional schools. In addition, only a very small positive correlation existed between the type of school attended—regional or national—and scores on the authoritarianism and legalism measures. To be sure, students at national schools tended to score somewhat lower on the legalism measure. However, at some of the regional schools sampled, students had scores on this measure that were comparable to those of students at the national schools. Furthermore, on the authoritarianism measure, students at one national school scored quite high whereas students at another tended to score quite low. *Id.* at 90-105.

63. Hedegard, *The Course Perceptions Questionnaire: Development and Some Pilot Research Findings*, 1981 AM. B. FOUND. RES. J. 463 [hereinafter Hedegard, *Course Perceptions*].

64. *Id.* at 474.

65. One of the questions used to create the right answer index was: "When . . . [the instructor asks] a question in class, . . . [the instructor is] ——— looking for a particular right answer." The possible answers for the blank area were: nearly always, usually, sometimes, infrequently, and almost never. *Id.* at 507 n.63. A second question used for the same purpose was:

Some instructors treat their areas of law as though problems had definite, specific solutions. Others treat their areas of law as though there are numerous problems, each with desirable and undesirable features. Where, on this dimension, would you place your emphasis?

Stress		Stress
specific	1 2 3 4 5 6 7	alternative
solutions		solutions

Id. at 530 n.43.

Smith's previously described findings that a wide range of intellectual perspectives exist among law students.⁶⁶

Two additional points must be made about Hedegard's study. First, it and a related study conducted by Professors Erlanger and Klegon⁶⁷ indicate that law school itself causes at least some intellectual transformation in young adults. This result is not surprising. These studies suggest that as students move through law school, they rapidly develop an increased ability to see various sides of an issue and increased tolerance for

66. See *supra* notes 58-62 and accompanying text. Hedegard makes no attempt to conceal his belief that students who think that no right answers exist have a better picture of the world of law and legal education. Hedegard, *Course Perceptions*, *supra* note 63, at 514. Ronald Dworkin, however, might disagree. See generally Dworkin, *supra* note 46. Because of Hedegard's clear bias, his data must be considered suspect.

Most students who have completed the first few weeks of law school speak the language of multiplicity and relativism. They do so, in major part, because first year law teachers spend inordinate amounts of time trying to rid students of dualistic—right/wrong, good/bad—kinds of thinking. Dualistic speech is mocked in class. However, multiplistic and relativistic talk by law students is often cheap. If pressed, many such students will acknowledge that one argument or one perspective out of the many that have been advanced or defended is in fact the right one. This perspective, the students insist, is the better view or the modern rule. Of course, belief by law students that a better view or a modern rule exists reflects dualistic thinking.

Such beliefs may also reflect, however, an even more troubling aspect of law school learning. A vast number of right answers do exist in law. On many legal points, for example, and in many jurisdictions, the law and the rules are completely settled. No uncertainty exists on these points at all. Furthermore, a considerable portion of law school training must involve the simple learning of these rules and laws. Roscoe Pound, a famous legal theorist of the New Deal era, graphically made this point more than half a century ago. "Kipling says that a sailor must know his ropes awake or asleep, drunk or sober. So also a lawyer must know certain things no matter what his condition or what type of professional activity he undertakes." Pound, *What is a Good Legal Education?*, 19 A.B.A.J. 627, 630 (1933). In a sense, therefore, law school requires dualistic thinking. Co-existing with this requirement of dualism for law students, however, is the overwhelmingly multiplistic and relativistic manner of the process of legal analysis itself. As students learn that process of analysis they see that every set of facts has two or more interpretations. Every dispute, they learn, has more than one side. Every legal theory has a counter theory and every policy a contradictory one. This is relativism in its essence.

Great stress frequently occurs for undergraduates as they make this transition. But law school makes the transition even more difficult. Although law students must constantly confront multiplicity and relativism, simultaneously they must retain some aspects of dualism because many right answers exist in the law. In a sense, therefore, their developing intellectual lives become schizophrenic. Many writers have commented about the serious psychological problems encountered by law students. See generally, e.g., Elkins, *Rites de Passage: Law Students Telling Their Lives*, 35 J. LEGAL EDUC. 27 (1985) [hereinafter *Rites*]. This essay contains virtually the only reference in the legal education literature to William Perry's work. Unfortunately, the reference here is extremely brief. *Id.* at 29. The essay itself, however, contains many fascinating excerpts from law students' diaries.

67. See Erlanger, *supra* note 51.

ambiguity.⁶⁸ In short, in Perry's terminology, law students show rapid movement toward multiplicity and relativism. This finding seems to conflict with data developed at the undergraduate level, which suggested that the movement between levels is very slow. Second, as noted earlier in connection with anecdotal experience, Perry's relativistic thinkers seem to get the top grades in law school.⁶⁹ Hedegard's data directly confirm this point. Hedegard, who compensated for LSAT scores,⁷⁰ discovered that a direct positive correlation existed between low scores on the right answer index (low scores indicating multiplistic or relativistic thinking) and above average grades in law school.⁷¹

C. *Pain and Anxiety in Law Students*

Perry bluntly says that the transition between dualistic and relativistic thinking is the most difficult instructional moment faced by students.⁷² Thus, the foregoing observations about the

68. *Id.* at 30; Hedegard, *supra* note 63; *see also* Hedegard, *Causes of Career-relevant Interest Changes Among First-Year Law Students: Some Research Data*, 1982 AM. B. FOUND. RES. J. 787, 817; Hedegard, *The Impact of Legal Education*, 1979 AM. B. FOUND. RES. J. 791, 835-37.

69. *See supra* text following note 51.

70. Hedegard compared law students with similar LSAT scores in order to reduce the LSAT variable. Hedegard, *supra* note 63, at 500-01.

71. *Id.* A complex study of almost 1000 law students done in the 1950s adds at least some credence to this observation. Ramsey, *A Subcultural Approach to Academic Behavior*, 35 J. EDUC. SOC. 355 (1961). Ramsey placed law students in three clusters based on the students' backgrounds. Cluster three, essentially a group of upper middle-class students, had made relatively poor college grades, much worse, for example, than cluster one students, who were hard-driving students from the middle and working classes. In law school, however, despite the fact that cluster three students' grades remained below those of cluster one students, the gap narrowed significantly. Ramsey suggests that this occurred because cluster three students possessed greater flexibility in the manipulation of ideas, i.e., these students were more relativistic. *Id.* at 372. Another study of law students, Reich, *Strong Vocational Interest Blank Patterns Associated with Law School Achievement*, 39 PSYCHOLOGICAL REP. 1343 (1976), revealed that students who finished the first year of law school in the top one-half of the class tended to favor professional or artistic occupations on a standardized vocational test given to them before they began school. These occupations, the study indicated, called for substantial flexibility in thinking. Students who finished the year in the bottom half of the class in this study tended to favor business or commercial occupations on the same test. These occupations, it was suggested, did not require a high degree of flexibility.

72. W. PERRY, *FORMS OF DEVELOPMENT*, *supra* note 31, at 210; *see also* Perry, *Book Review*, *supra* note 32, at 193.

Perry writes that teachers must interact with students moving toward relativism. Though he is speaking of undergraduate teachers, his words have direct applicability for legal educators.

Where knowledge consisted of facts in a single frame of reference, the teacher's primary duties were to make the facts clear and to so correct his students in

difficulty for law students of making the transition between dualistic and relativistic thinking cast a whole new light on one of the most commonly observed and frequently discussed aspects of modern legal education in the United States. Virtually every discussion of law school learning eventually turns to descriptions of the painful experience of the first months or year in law school. "Anxiety, fear, pain, and suffering are part of legal education," writes James Elkins, a well-known legal educator.⁷³ Law students are, he continues, "unhappy, dissatisfied, disaffected, disengaged, [and] alienated."⁷⁴

Professor Elkins frequently quotes law student diaries. His students, who continually wrote about the pain of uncertainty in law school, sound much like Perry's students.

Upon entering law school one finds that he cannot be so sure of things anymore. To a new student it is a great big illusion. Law school is another world. . . .

. . . .

When will the enlightenment come? When will I be able to see where all of this is taking me?

. . . .

respect to the right and wrong of each fact as to allow of no error. The student, in turn, collected correct facts and procedures. Where knowledge is contextual and relative, the teacher's task is less atomistic as the student's is more integrational. The good teacher becomes one who supports in his students a more sustained groping, exploration, and synthesis. His acts of evaluation must subtend more than discrete rights and wrongs, and extend through time to assist discrimination among complex patterns of interpretation.

W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 211. Perry also describes what can happen if teachers are not sufficiently aware of how their students are developing. Again, Perry could easily have been talking about legal educators in this reference to a senior undergraduate student who had been struggling terribly with an English course in which the teacher insisted on belief in, of all things, relativism. Any attempt by the student to take a position and defend it was met by the teacher's response that the argument was over simplified. Perry's student said:

It seems to me that a great deal of success or a great deal that, that will determine success, any factor that determines success must be the ability to take a position, to articulate one side of one issue, because you can't—because it's foolish to, to take both sides. It would destroy *your* position, no matter how much you sympathize or see. It seems to me that much that I've been forced to do here, this taking of two sides at once, just suspends my judgment. There is value in it; of course there's a value in, in seeing any perspective, or any particular facet of, of a problem. But there's also a value in, in being able to articulate one side more than another.

Id. at 141. Perry observes that the teacher had helped the student move to a relativistic perspective but was thereafter blocking the student from making further development.

73. Elkins, *Rites*, *supra* note 66, at 28-29; see also Elkins, *The Pedagogy of Ethics*, 10 J. LEGAL PROF. 37 (1985) [hereinafter Elkins, *Pedagogy*].

74. Elkins, *Rites*, *supra* note 66, at 28.

Nothing makes sense.⁷⁵

. . . .
As the semester draws nearer and nearer to a close, the pressure is becoming more and more unbearable. I can't understand why I'm so uneasy and scared. I don't feel like I know anything. But I know that this can't be true.⁷⁶

. . . .
Law deals with the particular, not the general; the relative, not the absolute⁷⁷

Other law students at the University of Wisconsin recorded similar thoughts.

I haven't felt adequately prepared. I've gone over the material but I just haven't felt prepared. I don't have command of the material yet. . . . My undergraduate classes had right and wrong answers; here there are several ways to look at a problem. . . . This is a little disturbing.

. . . .
I really think that not knowing what's going on this whole [sixteen] weeks is really going to be rough. Psychologically, not knowing that[,] you know it really tears you apart. You can be intelligent and prepared but if you don't know that you are prepared you go into a test pessimistically. You may not do well on the exam because you are more scared than most other people are, and you can't really be rational when you are scared. . . . You really destroy motivation by this uncertainty. I'll tell you the truth, honest to God, it's wearing me down. . . . I really don't have much confidence and it is really rough 'cause I don't know what I am doing.⁷⁸

Empirical studies of law students confirm the link between pain and anxiety in law students, and Perry's description of the pain of intellectual development. James Hedegard's data revealed, for example, that a considerable increase in anxiety levels and psychological distress occurred as students moved through the first year in law school.⁷⁹ "This distress," Hedegard wrote in words that could have been drawn directly from Perry's writings, "may be an inevitable price for the serious questioning of one's deeply ingrained beliefs, in law school or anywhere

75. *Id.* at 34.

76. *Id.* at 39.

77. *Id.* at 54.

78. Comment, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201, 1206-07 (ellipses in original); see also Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 639-40 (1978) (study of a small number of students at Yale Law School).

79. Hedegard, *supra* note 68, at 835.

else.”⁸⁰ Other psychologists⁸¹ and several legal educators have made similar observations. Professor Watson, a psychiatrist and a law school teacher, wrote that “[o]ne of the greatest sources of anxiety in first year students is brought on by the shattering of [the] illusion [of certainty] under the incessant attrition of case method teaching.”⁸² Professor Patton, another law school

80. *Id.* at 865. Empirical data suggests that law students develop along similar intellectual paths as other graduate students. *See, e.g.,* Bratton, *A Study of Dogmatism Among Selected Professional Groups in Louisiana*, 37(4-B) DISSERTATION ABSTRACTS INT'L 1872 (1976) (lawyers in this small sample neither more nor less dogmatic than other professionals); Lee, *Communication and Cognition: Differences Among Students in Journalism, Law and Business*, 38(7-A) DISSERTATION ABSTRACTS INT'L 37739 (1978) (little difference in the tolerance of ambiguity by law, business, and journalism students). One additional study deserves special mention here. It contains a cross-cultural study of law students. Fouad, Hansen, & Arias-Galicia, *Multiple Discriminant Analyses of Cross-Cultural Similarity of Vocational Interests of Lawyers and Engineers*, 28 J. VOCATIONAL BEHAV. 85 (1986). The interests of the student engineers were similar across culture. Not so, however, with the student lawyers; dramatic differences existed.

81. A number of studies confirm the existence of stress in law students. The most important of these, and perhaps the only one that contains empirically valid data, is Benjamin, Kazniak, Sales, & Shanfield, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225. This study suggests that stress in law students, which clearly exceeds stress in other students, may be a function of excessive workloads, high student/faculty ratios, and the denigration in law school of interpersonal skills. *Id.* at 248-51. Several of these studies clearly indicate that stress is directly related to issues of uncertainty. In one such study, Archer & Peters, *Law Student Stress*, 23 NASPA J. 48, 51 (1986), more than half of the 367 students in the study emphasized that lack of feedback regarding grades during the semester produced the most stress. One-quarter of the students traced the stress to use of the Socratic method. *See also* Heins, Fahey, & Leiden, *Perceived Stress in Medical, Law and Graduate Students*, 59 J. MED. EDUC. 169 (1984). *But see* Hamilton, Pepitone, Arreola, Rockwell, Rockwell, & Whitlow, *Thirty-five Law Student Suicides*, 11 J. PSYCHIATRY & L. 335, 342 (1983) (suggesting that suicide rate for law students is lower than the average population in the same age group); *see also* O. MARU, RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE (2d ed. 1986) (contains references to many of these studies); Beck & Burns, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 J. LEGAL EDUC. 270 (1979); Dubin, *The Role of Law School in Balancing a Lawyer's Personal and Professional Life*, 10 J. PSYCHIATRY & L. 57 (1982); Gutierrez, *supra* note 24.

Antonia Abbey conducted a most interesting study that describes stress in law students. Abbey, Dunkel-Schetter, & Brickman, *Handling the Stress of Looking for a Job in Law School: The Relationship Between Intrinsic Motivation, Internal Attributions, Relations with Others, and Happiness*, 4 BASIC & APPLIED SOC. PSYCHOLOGY 263 (1983). Abbey found that students with intrinsic motives for studying—that is, where activity is an end in itself and has its own rewards—were considerably happier than students who studied for extrinsic reasons such as career advancement or money. Abbey also noted in this study something that she sensed at a workshop, although admittedly it did not show up in the empirical data. Whereas many first year students were pursuing law for intrinsic reasons, third year students focused only on living well and paying off loans. *Id.* at 274-76.

82. Watson, *Reflections on the Teaching of Criminal Law*, 37 U. DET. L.J. 701, 703 (1960).

teacher, reports similar findings.⁸³ He asked law students to think back about the first year in law school and remember what stood out most in any way. The most frequent responses according to Patton were that students remembered being "confused, afraid, [and] uncertain."⁸⁴ One of Professor Patton's students said, "[I]t can make you feel quite lonely because you have nothing to grasp. . . . It's as if you are forced into quite a different world and you have to . . . sort of learn to flounder again"⁸⁵

Hedegard's comment about the price paid for serious questioning, "in law school or anywhere else,"⁸⁶ raises a crucially important and intriguing point. The previously quoted law student statements⁸⁷ about stress, as well as developmental theory and empirical studies, suggest that much of the apparently endless discussion by legal educators about pain and anxiety in beginning law students often misses the most important point. Contrary to what many think, it may well be that the legal part of legal education plays a far smaller role in causing anxiety and pain in law students than does the education part. The education part of legal education, and not the legal part, forces students to move from dualistic to multiplistic and relativistic thinking. Simultaneously, the education part of legal education insists that students retain certain aspects of dualism. The pain of lost certainty, the anxiety of indeterminacy, and the fear of the unknowable, may not be unique to legal education. Rather, this pain, anxiety, and fear may be a function of the developmental growth brought about by further education. Thus, any student who studies a subject taught in the same manner as law may experience enormous intellectual pain.

D. Beyond Relativism to . . . Commitment(?)

According to William Perry, the last four positions in the nine stage cognitive development sequence of young adults involve various stages of "Commitment."⁸⁸ These stages advance students beyond the relativism of position five. Com-

83. Patton, *The Student, the Situation and Performance During the First Year of Law School*, 21 J. LEGAL EDUC. 10 (1968).

84. *Id.* at 27.

85. *Id.* at 17.

86. *See supra* text accompanying note 80.

87. *See supra* text accompanying notes 75-78, 85.

88. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 9-10, 134-53. Perry's definition of "Commitment" is this: "(upper case C) An affirmation, choice, or decision (career, values, politics, personal relationship) made in the awareness of Relativism

mitments are affirmations. "[I]n all the plurality of the relativistic world . . . one affirms what is one's own."⁸⁹ Vocation choices are one area in which commitments provide a source of affirmation. "This year," a college junior told Perry, "I began to channel my thoughts more in line. . . . I guess nearer graduation I'm more interested in what I'll do afterwards."⁹⁰ This student continued:

I've done some thinking about what kind of law I'm going into, and where I'm going to practice, and where I want to go to law school. I'm not absolutely certain about that, but I'm fairly certain I'm going into law and I'm very certain I'm going to practice at home. But I'm not certain what kind of law I'm going into.⁹¹

Students initially apprehend the necessity of orienting themselves in a relativistic world through some form of commitment at position six.⁹² They do this because reason itself has failed them.

The structures of Relativism . . . do provide, by definition, wide opportunity for the exercise of reason. . . . But there is a limit. In the end, reason itself remains reflexively relativistic, a property that turns reason back upon reason's own findings. In even its farthest reaches, then, reason alone will leave the thinker with several legitimate contexts and no way of choosing among them—no way, at least, that he can justify through reason alone. If he then throws away reason entirely, he retreats to the irresponsible in Multiplicity ("Anyone has a right to his opinion"). If he is still to honor reason he must now also transcend it; he must affirm his own position from within himself in full awareness that reason can never completely justify him or assure him. In affirming his values, reason may help, but it will not in itself convince him that these values are better than any others; he must commit himself through his own faith. . . .

(distinct from lowercase *c* of commitments never questioned). Agency is experienced as within the individual." Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 80.

Perry's ideas about commitment are similar to statements by philosophers who defend the underlying idea of relativistic truth. Professor McCullagh has noted, for example, that believing "that" is not possible because everything is not knowable. Believing "in," however, is a matter of trust. McCullagh, *supra* note 9, at 338.

89. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 135.

90. *Id.* at 141.

91. *Id.*

92. "The student apprehends the necessity of orienting himself in a relativistic world through some form of personal Commitment (as distinct from unquestioned or unconsidered commitment to simple belief in certainty)." W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 10. See generally *id.* at 134-52.

[H]e must commit himself or abrogate responsibility.⁹³

Perry's positions seven, eight, and nine involve a continuum rather than distinct steps.⁹⁴ At position seven, students actually make an initial commitment in some area.⁹⁵ At position eight, students experience the implications of commitment and explore the subjective and stylistic issues of responsibility. Position nine in Perry's scheme is a bit surrealistic. Here the student "experiences the affirmation of identity among multiple responsibilities and realizes Commitment as an ongoing, unfolding activity through which he expresses his life style."⁹⁶ Stage nine of commitment concludes Perry's developmental cycle.⁹⁷

93. *Id.* at 135-36 (footnote omitted).

94. *Id.* at 10; *see also id.* at 153-76.

95. *Id.* at 10. This is different from position six, where students simply apprehend the necessity of making a commitment. *Id.*

96. *Id.*

97. In a somewhat tongue-in-cheek manner, Perry summarizes his entire developmental sequence in one of his short essays by saying that people make four discoveries in life. When very young, children discover that there are authorities and that those authorities know what they are doing. Teenagers make the second discovery, namely that the authorities do *not* know what they are doing. College age students later discover that nobody, including themselves, knows what is going on with any degree of certainty and that reasonable people will differ enormously about virtually every important issue. Finally, young adults make the fourth discovery that, despite uncertainty, life must proceed. Therefore, choices must be made despite the inability to choose with certainty. Perry, *Sharing in the Costs of Growth*, in *ENCOURAGING DEVELOPMENT*, *supra* note 32, at 267-69 [hereinafter Perry, *Sharing*].

In his revision to the basic scheme, Perry provides the following detailed chart of the various stages and of transitions between stages. This chart, of course, is somewhat more complex than the four discoveries just described.

Position 1: Authorities know, and if we work hard, read every word, and learn Right Answers, all will be well.

Transition: But what about those Others I hear about? And different opinions? And Uncertainties? Some of our own Authorities disagree with each other or don't seem to know, and some give us problems instead of Answers.

Position 2: True Authorities must be Right, the others are frauds. We remain Right. Others must be different and Wrong. Good Authorities give us problems so we can learn to find the Right Answer by our own independent thought.

Transition: But even Good Authorities admit they don't know all the answers *yet!*

Position 3: Then some uncertainties and different opinions are real and legitimate *temporarily*, even for Authorities. They're working on them to get to the Truth.

Transition: But there are *so many* things they don't know the Answers to! And they won't for a long time.

Position 4a: Where Authorities don't know the Right Answers, everyone has a right to his own opinion; no one is wrong!

Transition: But some of my friends ask me to support my opinions with facts and reasons.

(*and/or*)

Transition: Then what right have They to grade us? About what?

An important and controversial aspect of Perry's positions six through nine must now be emphasized. All four of these positions involve "commitment in relativism."⁹⁸ Commitment must occur, according to Perry, not because people come to believe in the objective truth of ideas or principles, but because no such objective truth exists. Life nevertheless must proceed.⁹⁹

The idea of commitment in relativism sets Perry quite distinctly apart from other theorists of cognitive development in young adults. Most importantly, it sets him apart from Karen Kitchener and Patricia King, the principal developers of the important developmental theory of reflective judgment.¹⁰⁰

Position 4b: In certain courses Authorities are not asking for the Right Answer; They want us to *think* about things in a certain way, *supporting* opinion with data. That's what they grade us on.

Transition: But this "way" seems to *work* in most courses, and even outside them.

Position 5: Then *all* thinking must be like this, even for Them. Everything is relative but not equally valid. You have to understand how each context works. Theories are not Truth but metaphors to interpret data with. You have to think about your thinking.

Transition: But if everything is relative, am I relative too? How can I know I'm making the Right Choice?

Position 6: I see I'm going to have to make my own decisions in an uncertain world with no one to tell me I'm Right.

Transition: I'm lost if I don't. When I decide on my career (or marriage or values) everything will straighten out.

Position 7: Well, I've made my first Commitment!

Transition: Why didn't that settle everything?

Position 8: I've made several commitments. I've got to balance them—how many, how deep? How certain, how tentative?

Transition: Things are getting contradictory. I can't make logical sense out of life's dilemmas.

Position 9: This is how life will be. I must be wholehearted while tentative, fight for my values yet respect others, believe my deepest values right yet be ready to learn. I see that I shall be retracing this whole journey over and over—but, I hope, more wisely.

Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 79.

98. Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 79.

99. James Boyd White, a well-known legal educator trained in both law and literature, captured this idea perfectly in a watery metaphor. "When we discover that we have in this world no earth or rock to stand upon but only shifting sea and sky and wind . . . ," White wrote, inadvertently echoing Perry's description of commitment in relativism, "the mature response is not to lament the loss of fixity but to learn to sail." J. WHITE, *supra* note 10, at 278. An exceptionally provocative review of White's book is Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 *YALE L.J.* 209 (1984).

100. See Kitchener & King, *supra* note 56. See generally King, Kitchener, & Wood, *The Development of Intellect and Character: A Longitudinal-Sequential Study of Intellectual and Moral Development in Young Adults*, 10 *MORAL EDUC. F.* 1 (1985); Schmidt & Davison, *Helping Students Think*, 61 *PERSONNEL & GUIDANCE J.* 563 (1983)

Kitchener and King describe a seven stage developmental sequence for young adults, the first four stages of which distinctly resemble Perry's first four positions of dualism and multiplicity. As Perry does, Kitchener and King put a stage of relativism at the fifth position.¹⁰¹ The last two steps in the Kitchener and King theory,¹⁰² however, dramatically differ from the last four positions in Perry's developmental sequence, positions which he calls commitment in relativism. As the following definition of Kitchener's and King's stage seven indicates, the end of this developmental sequence involves belief in the existence of objective truth.

There is an objective reality against which ideas and assumptions must ultimately be tested. Despite the fact that our knowledge of reality is subject to our own perceptions and interpretations, it is nevertheless possible, through the process of critical inquiry and evaluation, to determine that some judgments about that reality are more correct than other

(an excellent summary of the reflective judgment theory and a comparison of it to Perry's scheme; also contains many helpful teaching suggestions). Several recent works by Kitchener and King are currently in press. See, e.g., King, Kitchener, Wood, & Davison, *Relationships Across Developmental Domains: A Longitudinal Study of Intellectual, Moral and Ego Development*, in *BEYOND FORMAL OPERATIONS II*, *supra* note 55; Kitchener & King, *The Reflective Judgment Model: Ten Years of Research*, in *BEYOND FORMAL OPERATIONS III*, *supra* note 55.

101. The following chart describes the first five stages in the Kitchener and King system. The chart is drawn from Brabek, *Longitudinal Studies*, *supra* note 57, at 19-20.

Assumptions [A]bout Reality

[Stage 1:] There is an objective reality which exists as the individual sees it. Reality and knowledge about reality are identical and known absolutely through the individual's perceptions.

[Stage 2:] There is an objective reality which is knowable and known by someone.

[Stage 3:] There is an objective reality, but it cannot always be immediately known, even to legitimate authorities. It is possible to attain knowledge about this reality, but our full knowledge of it is as yet incomplete and therefore uncertain.

[Stage 4:] There is an objective reality, but it can never be known without uncertainty. Neither authorities, time or money[,] nor a quantity of evidence can be relied upon to [lead ultimately] to absolute knowledge.

[Stage 5:] An objective understanding of reality is not possible since objective knowledge does not exist. Reality exists only subjectively and what is known of reality reflects a strictly personal knowledge. Since objective reality does not exist, an objective understanding of reality is not possible.

102. Professor Brabek provides this definition of the Kitchener and King stage six: "An objective understanding of reality is not possible since our knowledge of reality is subject to our own perceptions and interpretations. However, some judgments about reality may be evaluated as more rational or based on stronger evidence than other judgments." *Id.* at 20.

judgments.¹⁰³

In short, absolutely contradicting the essence of Perry's underlying epistemological stance, Kitchener and King believe that cognitive development in young adults ultimately moves toward belief in the existence of objective truth.¹⁰⁴

103. *Id.*

104. In a fascinating recent study, Seymour Epstein and Nancy Erskine noted that the process of personal development in human beings resembles the process of development in scientific theories. Epstein & Erskine, *The Development of Personal Theories of Reality from an Interactional Perspective*, in D. MAGNUSSON & V. ALLEN, *HUMAN DEVELOPMENT: AN INTERACTIONAL PERSPECTIVE* 133-46 (1983). In a tour de force, these psychologists compare William Perry's scheme of intellectual development to Thomas Kuhn's analysis of the process of scientific invention. Both of these theories, according to Epstein and Erskine, put acceptance of relativism at center stage. Scientists in a particular era, according to Kuhn, tend to share a common paradigm that consists of a theory or model for interpreting data and conducting research. As long as there is an accepted working model, scientists can go about normal science. This aspect of the scientific process runs parallel to Perry's picture of dualistic thinking. Everything here fits comfortably into a pattern or paradigm. Scientific discovery occurs, however, according to Kuhn, as the controlling paradigm stimulates new research. Anomalies are uncovered that cannot be assimilated. Gradually the paradigm breaks down. Before it breaks down completely, however, scientists make desperate attempts to shore it up. This stage of scientific discovery, according to Epstein and Erskine, closely resembles Perry's stages of multiplicity. Kuhn notes that the period after the breakdown of a paradigm consists of random, unfocused scientific efforts. During such periods, scientists feel enormous pain, anxiety, and despair. In short, scientists go through Perry's period of relativism.

Perry himself said something similar in his most recent essay. Perry, *Book Review*, *supra* note 32. He noted that the process of developing developmental theories is like the process of psychological development itself. Initially, he and others thought of development in static and dichotomous terms. In a sense, he acknowledges, this was dualistic thinking. Now, however, psychologists think of development in a contextual and relativistic fashion.

That professors and theorists should be caught up in something like dualistic thinking should not be surprising. In fact, an interesting empirical study indicates that substantial numbers of university teachers think dualistically. In a fascinating book, *ACADEMIC CULTURE AND FACULTY DEVELOPMENT* (1979), Mervin Freedman analyzed college faculty in light of William Perry's developmental scheme. Freedman and his colleagues interviewed 91 faculty members at a large state university. The interviews covered such matters as the process of education, the nature of knowledge, and the teachers' own philosophy of teaching. Freedman identified five stages of faculty development, stages which closely track Perry's nine positions.

Freedman found 9% of his overall faculty sample to be at stage 1. (Interestingly, Group II of the sample, which consisted of "Natural Science and Professional-Applied" teachers, came in higher, at 11%.) "Knowledge is seen," Freedman says of these stage one faculty members, "in absolute terms, as unproblematic facts." *Id.* at 97.

Their view[s] of students, grading procedures and the like are relatively undifferentiated. There are right and wrong procedures and judgements, and they may be easily catalogued. Grading reflects the degree to which students know right from wrong information. Their opinions are rather dogmatic and are distinguished by their lack of complexity, and their presentation tends to preclude argument and alternative points of view. For this kind of professor the world is

E. Commitment in Law Schools?

Regardless of whether one accepts Kitchener's and King's view of the existence of objective truth or Perry's view of the

divided into areas of good and bad by some authority, usually a particular reference group.

Id. Moving to the next developmental stage, Freedman put 21% of his faculty sample into stage 2. (Fully 43% of the natural science and professional-applied teachers fit in here.) Freedman notes that teachers at stage two have increased distance vis-a-vis stage one teachers from conventional reference groups. For these teachers, knowledge is more complex.

Although the aim continues to be the acquisition of facts by students, these faculty members are interested in helpful techniques. The nature and source of knowledge are clear, but one must find the right methods for presenting them. They still see people in monolithic good and bad terms, but now they are willing to try to explain their behavior—usually in terms of simple causal relationships—for example, between behavior and social class or behavior and childhood experience. These professors have had some experience with diverse opinions, with views contrary to their own, and so they articulate their situation better.

Id. at 98. "Nonetheless," Freedman states about this second group of faculty, "the certainty of right action as derived from authority is never in doubt." *Id.* Freedman found that about one-third of the university teachers in his sample were at his two relativistic stages in the developmental sequence. At his stage three, teachers have an "appreciation of human variousness." *Id.* At stage four, teachers have a sense of freedom and relativity in social roles. Furthermore, these stage four teachers really see things from the student's side. *Id.* at 98-99. Stage 5 faculty in Freedman's analysis, the stage which corresponds to Perry's post-relativism stages of commitment in relativism, garnered only about 26% of the sampled faculty.

In THE UNIVERSITY TEACHER AS ARTIST, *infra* note 168, Joseph Axelrod picks up where Freedman's data leave off. In this extraordinary book, Axelrod attempts to describe what it is that makes up good teaching in higher education. To do this he draws portraits of four prototypical teachers. Beginning with what he calls the principles and facts prototype, Axelrod moves on to describe the instructor-centered teacher. Both of these prototypes seem related to Freedman's stage one and two dualistic faculty members. Axelrod's description of the student-as-mind prototype follows, which links this prototype to Freedman's relativistic teachers. Axelrod calls his final prototype the student-as-person teacher. In a crucial passage Axelrod describes the difference between these last two prototypes. As he does so, he graphically paints a picture of a Freedman stage five teacher.

Professor Persey [the student-as-person prototype] and Professor Minter [the student-as-mind prototype] share a fundamental assumption. They both believe that a teaching philosophy must be grounded in a theory of human development, a theory of how human beings achieve their fullest powers of humanity. Each defines *humanness* in his own way. Professor Minter, as we have seen, defines it in terms of rational development; he believes that a university can and ought to keep the two developmental cycles in the student separate—progress in academic matters on the one hand, and progress in matters of student life on the other. Professor Persey defines *humanness* in terms of the whole person; he believes that the two cycles should not be kept separate, that each cycle should work to support the other. He believes, further, that it is the responsibility of every faculty member to help in that process.

Id. at 32-33. Professor Axelrod notes that Professor Persey, the student-as-person prototype, uses many different techniques for developing students' humanness. One of the most effective of such techniques involves insisting that students discuss their classwork with nonclass friends. The reasons given for using this particular technique should have a famil-

necessity for commitment in relativism because of the nonexistence of objective truth, one fact can scarcely be disputed. Law school education appears essentially devoid of any emphasis on ideas like commitment, personal values, or feelings.¹⁰⁵ Scott Turow, who described his first year as a law student at Harvard in an important book,¹⁰⁶ puts this point best. "Too much of what goes on around the law school and in the legal classroom seeks to tutor students in strategies for avoiding, for ignoring, for somehow subverting the unquantifiable, the inexact, the emotionally charged, those things which still pass in my mind under the label 'human.'" ¹⁰⁷ Turow quotes another law student's reaction to a fourth week argument in class that had almost completely avoided emotional appeals or personal feelings. "I don't care," said this woman to Turow,

if [the teacher] doesn't want to know how I *feel* . . . I *feel* a lot of things . . . and they have everything to do with the way I *think* . . . I don't want to become the kind of person who tries to pretend that my feelings have nothing to do with my opinions. It's not *bad* to feel things.¹⁰⁸

This classmate and others, said Turow, felt that they were being "cut away from themselves" by law school.¹⁰⁹

James Elkins' law students at West Virginia also found themselves being cut away from an important part of themselves.¹¹⁰

Law school is not the ultimate. I have always wanted to be a lawyer but that is not all. I am here only to get some tools. Law will not be my life. I may practice law to make a living but I will not live it.¹¹¹

iar ring to readers familiar with Perry's descriptions of the post-relativism stages of young adult development.

When a student takes the initiative and starts a discussion at home about a novel he's reading for my class, something subtle happens to him. He makes a commitment. Assuming, of course, that he sparks some interest in his mother or father or wife or girl friend—then he is making a commitment that goes way beyond his commitment to me. He commits himself to the book at hand, and he commits himself to literature.

Id. at 35-36.

105. See generally the leading article on this point, Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971).

106. S. TUROW, *ONE L* (1977).

107. *Id.* at 297.

108. *Id.* at 92.

109. *Id.*

110. See Elkins, *Rites*, *supra* note 66, at 32-41; Elkins, *Pedagogy*, *supra* note 73, at 48.

111. Elkins, *Rites*, *supra* note 66, at 49.

. . . .
 I am simply unwilling to submit to a lifetime which is dominated by the pettiness and soulless contempt for human feeling that is so rampant in law school. If legal practice is like law school, I'll do something else. There is a time to walk away from things. No matter how much you have invested, or how hard you work to get where you are at [sic], there comes a times [sic] when the game is no longer worth the candle and the sorrow you feel in giving up is infinitely less than the pain from going on. It's like peace with honor.¹¹²

. . . .
 We are so willing to sacrifice ourselves, our values—to become a person [of] whose characteristics we are as yet unaware. The mere fact that we don't know where our professional development is leading us does not stop us from advancing full speed. Rather than harmlessly spinning our wheels, we are driving at breakneck speed over unfamiliar and dangerous roads. I fear there is no return.¹¹³

Somewhat surprisingly, empirical studies of law students do not directly confirm the representativeness of the individual experiences just described. Formal empirical studies by Hedegard,¹¹⁴ Erlanger and Klegon,¹¹⁵ Katz and Denbeaux,¹¹⁶ and Thielens,¹¹⁷ for example, indicate that essentially no change occurs in law students' levels of ethics or cynicism as a result of law school. A related study by Stark, Tegeler, and Channels provides similar results.¹¹⁸ To be sure, Pipkin, Stokes, and Spangler found data to support the hypothesis that law school reduced students' sense of idealism and increased their level of cynicism.¹¹⁹ Pipkin later backed away from his earlier observations and suggested that law "students' ethical and attitudinal

112. *Id.* at 50. The student who wrote these words was a veteran of the war in Vietnam.

113. *Id.* at 52.

114. *See supra* note 68.

115. *See* Erlanger, *supra* note 51.

116. *See* Katz & Denbeaux, *Aleration or Elaboration: Does Law School Instill Cynicism?*, unpublished manuscript discussed in American Bar Association, *Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education of the American Bar Association* 32 (1980) [hereinafter ABA, *Report*].

117. *See* Thielens, *The Influence of the Law School Experience on the Professional Ethics of Law Students*, 21 J. LEGAL EDUC. 587 (1969).

118. *See* Stark, Tegeler, & Channels, *The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin*, 37 J. LEGAL EDUC. 409 (1987) [hereinafter Stark].

119. Pipkin, Stokes, & Spangler, *Contingencies in the Development of Cynicism*

dispositions are largely impervious to legal education."¹²⁰ Perhaps, however, Pipkin and these other researchers spoke too soon, or somehow conducted studies that did not tap the reservoir of resentment that Scott Turow¹²¹ and other law students describe.

Some evidence for the latter possibility exists. In a recent study, Audrey Schwartz discovered that seven months in law school significantly decreased law students' likelihood of wanting to work for social change. The environment of law school, she concludes, is not conducive to significant socialization.¹²² Paul Miller describes an empirical study that he conducted in the 1960s in an attempt to discover why some law students drop out of law school.¹²³ Miller employed the Myers-Briggs Type Indicator (MBTI), a commonly used psychological test for determining personality types.¹²⁴ Among many other things that it can do, the MBTI can classify people as thinking or feeling types. Feeling types, about 50% of undergraduate students, tend to emphasize personal values and commitments. Conversely, thinking types, again about 50% of the undergraduate total, tend to favor analysis and reason. Miller administered the MBTI to a large group of law students at four different schools. He discovered that thinking types were significantly over-represented in law school (74%) in relation to the overall under-

Among Law Students, (1976), unpublished manuscript discussed in ABA, *Report*, *supra* note 116, at 69.

120. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 267 (footnote omitted).

121. See *supra* text accompanying notes 106-09.

122. Schwartz, *The Paper Chase Myth: Law Students in the 1970's*, 28 SOC. PERSPECTIVES 87 (1985).

123. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460 (1967); see also Chretien & Chretien, *Reconsidering Non-Traditional Factors in Law School Admissions*, 11 S.U.L. REV. 31, 35-39 (1985) (particularly in reference to the study by Hills and Raine).

124. The MBTI has also been used to gather as yet unpublished data about other people in the legal profession. See G. MACDAID, M. MCCAULEY, & R. KAINZ, *ATLAS OF TYPE TABLES* (in press) (copy on file with author). Lawyers and judges who have been scored on the MBTI tend to fall into patterns similar to law students. See also Phillips, *Entrepreneurs in Law: A Personality Perspective* (1984), unpublished manuscript available from the Center for Applications of Psychological Type, Gainesville, Florida (copy on file with author).

An important aspect of the MBTI and of cognitive type theory in general must now be noted. Type theorists believe that personality type is an inherent characteristic of human beings, similar in a sense to a person's fingerprints. It does not change. This idea, of course, is diametrically opposed to fundamental aspects of developmental theory. Developmental theorists argue that massive changes and developments occur in a person's personality as a function of intellectual and moral growth.

graduate population (54%). More importantly, Miller found that a significant correlation existed between personality type and dropping out of law school. Feeling types were considerably more likely to drop out of law school than thinking types. In fact, of the thinking type students identified by the MBTI as dependable and practical with a realistic respect for facts, who absorb and remember great numbers of facts, and who emphasize analysis, logic, and decisiveness, only 6.7% dropped out of law school.¹²⁵ However, of the feeling type students identified by the MBTI as "concerned chiefly with people, who [value] harmonious human contacts, [and who are] friendly, tactful, sympathetic, and loyal,"¹²⁶ fully 28% dropped out of school. Miller's data clearly suggest that feeling type students, that is, students interested in personal values and commitments, find little support in law school.¹²⁷

To be sure, only a handful of students drop out of law school because of its unfriendliness toward feelings, values, and commitments. Another empirical study, however, suggests that even those law students who remain in school and eventually graduate may ultimately pay a serious price for the law school environment's denigration of these intangible, emotion-based ideas. In a recent study of lawyers' mechanisms for coping with stress, Suzanne Kobasa discovered, somewhat to her surprise, that the lawyers who best deal with stress are those who have the greatest sense of personal commitment.¹²⁸ "Commitment," she writes, "is defined as the ability to believe in the truth, importance, and interest value of what one is doing."¹²⁹ Kobasa also concluded that alienated lawyers, that is, lawyers who possess feelings that are the opposite of commitment, "feel apathetic and

125. Miller, *supra* note 123, at 466.

126. *Id.*

127. Another group of law students, or, perhaps better said, the same group of students differently described, may also suffer extraordinary consequences. As noted earlier, Professor Ramsey has grouped law students into three clusters. See Ramsey, *supra* note 71. Cluster two students, a small group not earlier described, are still developing, seeking, and realizing their potentialities. Their final values are not yet crystallized. These students' search for a new identity in the endless law school mirage of uncertain values, according to Ramsey, may sow the seeds of "cultural schizophrenia." *Id.* at 370. Ramsey also uses a metaphor similar to those used throughout this Article. "Outwardly calm waters of casualness and studied carelessness frequently belie tempests underneath." *Id.*

128. Kobasa, *Commitment and Coping in Stress Resistance Among Lawyers*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 707 (1982).

129. *Id.* at 708.

powerless in the face of stressful life events."¹³⁰

F. "Escape" and the Adversary System

Notwithstanding the severe damage to developing students that can be done in law school by the failure of legal educators generally to address issues of values, feelings, and commitments,¹³¹ an even more dangerous, cognitive developmental trap may exist for law students. According to William Perry, arrival by young adults at the stages of multiplicity and relativism does not automatically generate onward movement toward commitment. Arrival at that stage, Perry believes, can also lead to "escape."¹³² Escape is, in effect, a backward movement on the developmental scale. It is also, to use a word employed by both Perry and Suzanne Kobasa, a form of alienation. Escape occurs when a student exploits the opportunity for detachment offered by Perry's relativistic positions four and five and thereafter denies responsibility for making important intellectual decisions.

One of the most dangerous forms of escape, Perry believes, is "escape into commitment."¹³³ Here commitment is sought as an escape from development, not as a forward step. Commitment here reflects a desire to return to dualistic thinking. "The hope seems to be," Perry writes, "that through intensity of focus, all ambivalences will be magically resolved."¹³⁴ In connection with his discussion of escape into commitment, Perry quotes an undergraduate student who sounds like countless law students.

If I could find something that I really liked—ah, take some interest in my courses—I enjoy doing them, but I really don't get into them, like, say, I'd get into a football game. If I could get into a course like that, and enjoy it, I think that's the thing I'd want to stay with the rest of my life. That's what I'm looking for. Maybe I'll have to make myself feel that way, I don't

130. *Id.*

131. See *supra* text accompanying notes 105-30.

132. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 177-200. Perry's thumbnail definition of escape is: "Alienation, abandonment of responsibility. Exploitation of Multiplicity and Relativism for avoidance of Commitment." Perry, *Cognitive and Ethical Growth*, *supra* note 32, at 80; see also *id.* at 91-92. Interestingly, other psychologists have also detected evidence of backward movement along developmental lines. See, e.g., Loevinger, *College Ego Development*, *supra* note 35. See also generally E. FROMM, ESCAPE FROM FREEDOM (1941); E. HOFFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS (1951).

133. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 196.

134. *Id.*

know.¹³⁵

Another of Perry's students brings home the escape point even better. "The only people I know who are successes are people who really throw themselves completely into what they're doing."¹³⁶ This student was talking about law students.

One aspect of American legal education, or, better said, one aspect of the American legal system, deserves special mention in the context of Perry's developmental idea of escape into commitment. The adversarial system of justice is at the heart of virtually all lawyering practice in the United States. According to the theory of this system, the clash of adversaries produces truth and justice.¹³⁷ Since that is so, lawyers in an adversarial system do everything possible, within the confines of rules of professional conduct, to advance their own clients' positions. An independent third party ultimately evaluates both sides' arguments and then decides the issues. Given the nature of the adversarial system, individual lawyers practicing within its confines have no direct responsibility personally to seek truth and justice. The system itself, rather than the individual lawyers, bears that responsibility.

In a recent essay, Anthony Kronman, one of modern legal education's most thoughtful writers, inadvertently explored the problem just described.¹³⁸ Kronman describes how law school itself can encourage escape from intellectual development.

The indifference to truth that all advocacy entails is likely, it seems to me, to affect the character of one who practices the craft for a long time and in a studied way. Because it requires its practitioner to think of truth as, at most, an instrumental good, not as something valued for its own sake, advocacy encourages what can only be described as a kind of cynicism regarding efforts to discover and to state the truth about the wide range of human matters with which the law is concerned. I believe that the process of becoming an advocate is likely to make someone more cynical about truth-seeking: not, of

135. *Id.* at 196-97.

136. *Id.* at 197.

137. A number of studies have been conducted of the truth-determining efficacy of the adversarial system. Several of these studies are described in Sheppard & Vidmar, *Adversary Pre-trial Procedures and Testimonial Evidence: Effects of Lawyer's Role and Machiavellianism*, 39 J. PERSONALITY & SOC. PSYCHOLOGY 320 (1980). A somewhat different approach is taken in Stark, *supra* note 118. These writers think that the reaction to the adversary system may be a function of individual personality traits. *Id.* at 419-20.

138. Kronman, *Foreward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981).

course, about all forms of truth-seeking, since there is no reason to think that a training in advocacy changes anyone's beliefs about, say, the efforts of physicists and astronomers to understand the structure of the physical world; but more cynical about attempts to discover the truth concerning the manifold forms of human conduct that the law, in one way or another, purports to regulate. By "cynicism" I mean an attitude that questions the *worth* of such attempts to discover the truth and is inclined to see them as pointless exercises that cannot be justified by any genuine or respectable human need. The cynicism of the advocate is not the product of his having attempted to discover the truth about human affairs and failed; rather, it is the product of his having become accustomed to disregard the question of truthfulness as irrelevant to the practice of his craft. It is easy to believe that efforts to state the truth about man's moral and social life are illusory and vain; the professional attitude of the advocate, as it hardens into a habit, tends to confirm this belief and to augment its power.¹³⁹

For Perry, commitment in relativism, rather than escape into commitment, signals the way past relativism. "[Y]ou have to operate within a certain set of rules, a certain set of principles," a junior student told Perry, after acknowledging that nothing could be known with any certainty,

or you're going to lose your self-respect. You still have to recognize that all these things that you learn, all these odd things about yourself and other people are potential tools for destruction or construction, and that you've got to be very careful in the way you utilize each one of them. They are things that you, that's one way of perceiving them, that you are, you are capable of using them. You don't go around turning on compassion and turning it off like a water faucet. You, you can use it. People . . . people just aren't conscious enough of their roles, that's all. They don't, don't try. There's such a thing as being too self-conscious, but, but you've got to be able to see the effects you're having on other people, and the effect other people have on you. And you've got to be careful about how you use all these things you've developed. And most people aren't. I'm certainly not careful about how I use things, but a recognition of your own qualities and what effect they can have on other

139. *Id.* at 964-65. Kronman's thought that cynicism about the truth-seeking efforts of astronomers and physicists may not develop in law students raises a troubling issue. In light of the progress of modern science, and in light of the work of Thomas Kuhn and Michael Polanyi in connection with modern debates in the philosophy of science, cynicism and skepticism about just those things might also appropriately develop. See *supra* notes 4 & 7.

people is very important.¹⁴⁰

Note carefully an important but subtle aspect of the words just quoted. This student clearly was speaking of something far different than intellectual development alone. This student has connected intellectual growth and moral growth.

II. STAGES OF MORAL DEVELOPMENT IN YOUNG ADULTS

Elaborate developmental theories have been proposed in recent years to explain moral as well as intellectual growth in young adults.¹⁴¹ Without doubt, Lawrence Kohlberg's pioneering work in this area has had the greatest general impact. Kohlberg's ideas have been so far-reaching that even some legal educators have discussed them, albeit usually in a rather superficial manner.¹⁴² Considerably less well-known to legal educators than Kohlberg's work, however, is other work in the field of moral development. For example, only a few law school professors have written about the moral development work of Carole Gilligan,¹⁴³ and then virtually always in the context of feminist theories. Moreover, Norma Haan's recent attempt to find common ground between Kohlberg's ideas and Gilligan's has completely escaped attention in the legal education literature.¹⁴⁴

140. W. PERRY, FORMS OF DEVELOPMENT, *supra* note 31, at 161 (ellipsis in original).

141. The following works, particularly the first one, are excellent starting points for analysis in this context. See Miller, *Ways of Moral Learning*, 94 PHILOSOPHICAL REV. 507 (1985). Miller, a philosopher, provides a very readable guide to various theories of moral development in the fields of philosophy, anthropology, and developmental psychology. Perhaps the best recent summaries of the psychological literature are J. RICH, *supra* note 32; and R. HERSH, J. MILLER, & G. FIELDING, MODELS OF MORAL EDUCATION: AN APPRAISAL (1980) [hereinafter R. HERSH], with this later work being the stronger one but a bit dated. See also H. ROSEN, THE DEVELOPMENT OF SOCIOMORAL KNOWLEDGE (1980) (puts the literature of developmental psychology into a larger context); M. SIEGAL, CHILDREN, PARENTHOOD AND SOCIAL WELFARE IN THE CONTEXT OF DEVELOPMENTAL PSYCHOLOGY 18-44 (1985) (same).

142. See, e.g., Dickinson, *Moral Development Theory and Clinical Legal Education: The Development of Professional Identity*, 22 U.W. ONTARIO L. REV. 183 (1984). Dickinson's article is the only work in the legal education literature that discusses both Perry and Kohlberg. Unfortunately, most of the treatments of Kohlberg's work in the legal education literature are quite dated. See, e.g., Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359 (1981) (cites none of Kohlberg's post-1973 work).

143. See, e.g., Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

144. See *infra* text accompanying notes 169-192.

A. Lawrence Kohlberg and the Stages of Moral Development

After many years of interviewing adolescents and young adults, Lawrence Kohlberg¹⁴⁵ theorized that moral growth or development occurs in a series of six sequential stages or steps.¹⁴⁶ This is, of course, pure Piaget. Kohlberg describes his moral development system's stages one and two as pre-conventional moral reasoning, his stages three and four as conventional moral reasoning, and his stages five and six as post-conventional. Kohlberg, like Piaget, insists that the sequence is invariant, that people must go through each individual level before reaching the next, and that movement is always upward.¹⁴⁷

There seems to be widespread agreement among psychologists who study moral development, with the exception of Jane Loevinger,¹⁴⁸ that higher education promotes at least some upward movement in the moral development of young adults.¹⁴⁹ Admittedly, however, that upward movement is probably quite small. Furthermore, standardized tests of moral development,

145. See generally 1 L. KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); 2 L. KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984); Colby, Kohlberg, Gibbs, & Lieberman, *A Longitudinal Study of Moral Judgment*, in 48 *MONOGRAPHS SOC'Y RES. CHILD DEV.* (1983) [hereinafter Colby]; Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* (T. Lickona ed. 1976). Excellent secondary discussions of Kohlberg's work can be found in R. HERSH, *supra* note 141; *MORAL DEVELOPMENT, MORAL EDUCATION AND KOHLBERG* (B. Munsey ed. 1980); J. REIMER, D. PAOLITTO, & R. HERSH, *PROMOTING MORAL GROWTH* (2d ed. 1983) [hereinafter J. REIMER]; J. RICH, *supra* note 32, at 87-98; R. SPRINTHALL, *supra* note 32.

146. Kohlberg was heavily influenced by the writings of William Perry. 1 L. KOHLBERG, *supra* note 145, at 398-99, 409-12, 432.

147. This summary was drawn directly from R. HERSH, *supra* note 141, at 120-26.

148. See Loevinger, *College Ego Development*, *supra* note 35; see also J. LOEVINGER, *PARADIGMS*, *supra* note 35. Loevinger believes that only minimal movement occurs.

149. See generally Schlaefli, *supra* note 35; Walker, *supra* note 35; Kitchener, *Longitudinal Study*, *supra* note 35.

A number of books contain useful discussions about how teachers can promote moral growth. See R. HERSH, *supra* note 141, at 135-49 (an outstanding step by step approach); *MORAL EDUCATION: THEORY AND APPLICATION* (M. Berkowitz & F. Oser eds. 1985) [hereinafter *MORAL EDUCATION*]; J. REIMER, *supra* note 145; R. SPRINTHALL, *supra* note 32, at 362-67, 409-15.

Much of the debate in the literature describing methods for promoting moral development revolves around what is usually called the plus one idea. Kohlberg originally believed that teachers should confront students with issues at a stage equal to the students' own, plus one. Although Kohlberg has moved away from that teaching idea somewhat in his later work, the approach is still frequently described. See, e.g., R. SPRINTHALL, *supra* note 32, at 208; Haan, *Processes of Moral Development: Cognitive or Social Disequilibrium?*, 21 *DEV. PSYCHOLOGY* 996, 1005 (1985) [hereinafter *Processes of Moral Development*].

of which several exist,¹⁵⁰ indicate that most college age students fall somewhere between Kohlberg's stages three and four.¹⁵¹

In a recent essay, G.M. Dickinson, a member of the education faculty at the University of Western Ontario, described Kohlberg's ideas in the context of lawyering activity.¹⁵² Choosing not to use the now classic Heinz hypothetical—should Heinz steal a drug he cannot afford to save his dying wife?—Dickinson instead describes a hypothetical situation in which a lawyer receives confidential information from a client that the client murdered several small children and buried their bodies. The lawyer is aware from newspaper accounts that these children have been missing for weeks and that their parents are distraught. Dickinson provides a composite descriptions of a lawyer's possible responses to this dilemma in the context of Kohlberg's six levels of moral development.¹⁵³

150. Of the various test instruments designed to measure moral development, the two most widely used are Kohlberg's and Colby's Moral Judgment Interview (MJ), A. COLBY, J. GIBBS, & L. KOHLBERG, *THE ASSESSMENT OF MORAL JUDGMENT: STANDARD FORM SCORING MANUAL* (1979); and the Defining Issues Test (DIT), J. REST, *DEVELOPMENT IN JUDGING MORAL ISSUES* 289-96 (1979); see also Gibbs, Widaman, & Colby, *Construction and Validation of a Simplified, Group-Administerable Equivalent to the Moral Judgment Interview*, 1982 *CHILD DEV.* 895 (comparison of the DIT, the MJ, and the Sociomoral Reflection Measure). One additional test, the Ethical Reasoning Inventory, is discussed in Page & Bode, *Inducing Changes in Moral Reasoning*, 112 *J. PSYCHOLOGY* 113 (1982) [hereinafter Page].

151. See *NEW DIRECTIONS FOR HIGHER EDUCATION: RETHINKING COLLEGE RESPONSIBILITIES FOR VALUES* 38 (M. McBee ed. 1980) (summary of the data).

152. See Dickinson, *supra* note 142.

153. *Id.* at 186-87, 191-92. Unfortunately, Dickinson's descriptions of the possible responses clearly indicate a bias in favor of the upper Kohlberg stages. Any test instrument based on these descriptions, therefore, would be fatally flawed. Test takers would notice the bias and tend to provide answers that would please the testers. Better descriptions of the possible responses eliminate that bias. For example, the following possible responses to the Heinz hypothetical carry no hidden bias.

Stage 1. He should not take it because he would unquestionably be arrested and put in prison since he broke the law.

Stage 2. He should not take it because someone else discovered and owns the drug and so has absolute authority over it.

Stage 3. He should not take it because following the law is imperative to prevent confusion and chaos caused by bad people.

Stage 4. He should not take it because the law is necessary for order in society and prevents arbitrary decisions by individuals.

Stage 5. He should not take it because the law is essential to protect basic human rights against deliberate violation by others.

Walker, *supra* note 35, at 962.

This description, of course, does not contain a reference to stage six. As will be noted below, Kohlberg in his later work has abandoned his claim for the existence of that stage. See *infra* text accompanying note 154. The most concise description of Kohlberg's original

Kohlberg's Stage	Possible Responses to the Dilemma	Cognitive Characteristics
1. Punishment Orientation	Conform to Code of professional conduct for fear of official censure by the Law Society, for fear of civil suit for damages by the client, for fear of physical reprisals by the client.	Orientation to punishment, reward and to physical and material power which are valued in their own right rather than as merely underpinning a respected moral order (see stage 4).
2. Hedonistic Orientation	Conform according to economic considerations. Fear of loss of clientele, loss of licence. Disclose information to achieve money reward.	Instrumental relativist orientation. Hedonistic concern for satisfaction of one's own needs primarily. Reciprocity exists but only out of concern for self-gain rather than loyalty, gratitude, or justice.
3. Good Boy Orientation	Conform to professional norm to avoid unofficial or "social" censure by one's professional colleagues. Avoiding what is perceived as "unlawyerly" conduct.	"Good-boy" orientation. Good behavior is that which pleases others and gains their approval. Stereotypical images of what is majority or natural behavior.
4. Law and Order Orientation	Conform to Law Society's prescriptions or Authority that ought to be obeyed for its sake. Professional duty is defined in the Rules of Professional Conduct and it is the lawyer's duty to obey.	Law and order orientation. Emphasis on authority, fixed rules, maintaining social order. Doing one's duty and respecting authority and social order for its own sake.
5. Social Contract	The rules of solicitor-client privilege are societally derived standards of behavior essential to the operation of the English system. It is the individual client's "right" to be able to speak to his lawyer without fear of his words being used against him. Conform to the rules but if they are bad[,] i.e. little social utility, move to change them but according to the rules' provision for change.	Social contract legalistic orientation. Right action defined by societally agreed standards as well as general individual rights. Constitutional and democratic emphasis. If the law is bad, change it but via legal process and according to rational consideration of social utility. The official morality of the American government and Constitution.
6. Orientation to Universal Ethical Principles	Act to avoid self-censure. Human dignity and avoidance of suffering of parents supersedes societally derived rule relating to legal rights of a confessed murderer.	Orientation to universal ethical principles. Right action is defined by Choice of lesser decisions of conscience in accord with universal principles of justice, of reciprocity and equality of human rights, and of respect for dignity of human beings as individuals[.]

Unfortunately, Dickinson's essay does not reflect the considerable evolution in Kohlberg's ideas over the years. In recent work, for example, Kohlberg and his colleague Anne Colby have dropped stage six from the sequence¹⁵⁴ because they have been

position is a chart reproduced in R. HERSH, *supra* note 141, at 124-26 (1980). This chart contains reference to stage six.

154. See Walker, *supra* note 35, at 962. Ironically, although Kohlberg has now

unable to find any empirical evidence for its existence in their cross-cultural studies. In addition, Kohlberg and Colby now argue that substages exist at all levels. Moral judgments at substage *A* tend to stress external considerations or literal interpretations of roles, duties, and rules, and tend to be unilateral and particularistic rather than generalized or universal. Judgments at substage *B*, however, involve greater universality and generalization. They involve a deeper understanding of the spirit, rather than the letter, of the rules.¹⁵⁵

In the context of its impact on legal education, the most important evolutionary aspect in the Kohlberg theory, and the one most overlooked by legal scholars, involves Kohlberg's initial classification and then repeated reclassification of people who engage in what he calls relativistic moral reasoning.¹⁵⁶ In his initial 1957 research, Kohlberg identified a high school age adolescent who had reached what Kohlberg thought to be an exceptionally high level of moral development for his age.¹⁵⁷ Kohlberg considered this student, whom he dubbed Case 65, a model high school student. Case 65 possessed outstanding academic and leadership qualities. Kohlberg eventually classified this student as a stage four reasoner, a very high classification for a high school student. When Case 65 was interviewed as a college sophomore, however, he seemed to have regressed back-

dropped stage six from the sequence, he speculated in the mid-1970s that a stage seven existed, a "cosmic" perspective that people only gained in old age. See H. ROSEN, *supra* note 134, at 87-88.

155. See generally 2 L. KOHLBERG, *supra* note 145, at 183-205. In an abstract way, these substages resemble aspects of what some psychologists call cognitive style. Some individuals, this second group of psychologists believes, are field independent, that is, they are particularly good at impersonal and analytic tasks. They also have the ability to isolate discrete elements within an experience. In a sense, field independent individuals resemble Kohlberg's substage *A*. Conversely, field dependent individuals take a global approach and tend to be more humanistic in their thinking. They favor a personal approach. In a sense, therefore, field dependent people resemble people at Kohlberg's substage *B*. For a brief description of the literature of cognitive styles, and a few references, see Townsend & Ede, *Cognitive Styles of Law Students: Prosecution and Defense*, 57 *PSYCHOLOGICAL REP.* 762 (1985).

An important point must be made, however, when the ideas of cognitive style theorists and developmental psychologists are compared. Developmental psychologists believe that people evolve through a series of stages. The personality thus changes. Cognitive style theorists, however, think that field dependence and field independence are inherent characteristics in people that do not change over time.

156. In Perry's terminology, relativism in the context of moral reasoning alone is multiplicity.

157. The following discussion is drawn from 2 L. KOHLBERG, *supra* note 145, at 472-79. See also Colby, *supra* note 145, at 72-73.

wards to stage two. The student had become in fact a college aged Raskolnikov. Just before the Kohlberg college interview, for example, Case 65 had shamelessly stolen something from a close friend in order to wake up that friend to the horrors of the world.

Case 65 presented Kohlberg with an extraordinary problem. Crucial to Kohlberg's theory is the idea of irreversible upward progression in development. Moral regression cannot occur. Case 65 threatened that basic tenet. After extensive debate, Kohlberg and his colleagues concluded that Case 65 had not in fact regressed in college at all. Rather, he had progressed upward from his stage 4 high school status to a new stage, stage 4.5. Kohlberg's stage 4.5 is "[t]he stage of personal and subjective morality. What is right is based on emotion and intuition, and conscience is seen as arbitrary and relative, as are ideas such as duty and moral right."¹⁵⁸ Of course, as this definition demonstrates, Kohlberg's relativistic stage 4.5 seems very similar to Perry's multiplistic position 4.

Evolution of the Kohlberg theory in the context of relativism (Perry's multiplicity) did not end, however, with the creation of stage 4.5. In recent years stage 4.5 has itself been dropped,¹⁵⁹ because Kohlberg's researchers have identified relativistic thinking in young people who are just moving between stages three and four. In light of this recent discovery, Kohlberg and his colleagues have concluded that relativism can exist at all levels and can serve a transitional function anywhere along the developmental scale.¹⁶⁰

Ironically, after he graduated from college, Kohlberg's Case 65 went on to law school and then to a flourishing legal practice. However, no further moral development has occurred for him. Even today, according to latest reports, Case 65 remains locked at stage four. Similarly, the only other lawyer interviewed by Kohlberg has never progressed beyond stage four. This suggests two intriguing questions. Could it be that law school itself hinders development beyond stage four? Could it be that law students and lawyers, immersed as they are in rules and laws, come to see stage four as the end of the moral developmental line, just

158. R. KELSO & C. KELSO, *STUDYING LAW: AN INTRODUCTION* 522 (1984).

159. See generally Colby, *supra* note 145, at 112.

160. As a result of these recent developments, Case 65's college interview has been once again reclassified. This interview, Kohlberg and Colby now believe, like Case 65's high school interview, reflects stage four reasoning.

as they may come to see Perry's multiplicity and relativism as the end of the intellectual developmental line?

Kohlberg himself seems to recognize that moral development for law students may end at stage four when he speculates about what happened over the years to Case 65:

[Case 65] lays the responsibility for fair and just outcomes at the feet of the system of law—the procedures of law, juries, and judges. This neat division of responsibility between himself as a lawyer and the justice system allows him to say he can cope. . . .

. . . .

While the role of lawyer involves a high level of job responsibility . . . , it divorces the responsibility for defense from that for the fairness of the outcome of a trial, responsibility which is placed on the court system, instead. In addition, . . . the role of lawyer clearly defines toward whom one should . . . act strategically.¹⁶¹

Several empirical studies confirm the accuracy of Kohlberg's speculations and demonstrate that many law students indeed do not move beyond Kohlberg's stage four. In one study, Professors Tapp and Levine used open-ended questions to stimulate discussion among law students about moral reasoning.¹⁶² They compared the responses of law students to responses of college students, teachers, and prison inmates. They discovered that law students tended to reason at about the same levels as the other three groups and rarely higher than Kohlberg's stage four.¹⁶³ In another study, Professors Willing and Dunn used James Rest's Defining Issues Test to place first year law students on Kohlberg's scale.¹⁶⁴ These researchers also concluded that most law students do not move beyond Kohlberg's level four.¹⁶⁵ Perhaps the most important study in

161. 2 L. KOHLBERG, *supra* note 145, at 475, 479.

162. Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974).

163. *Id.* at 25-26.

164. Willing & Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306 (1981) (reviews considerable empirical research).

165. Willing and Dunn also found no increase in moral reasoning level after students took a course in legal ethics. *Id.* at 355. This finding, however, should not be taken as a blanket condemnation of such courses' ability to promote development. Studies conducted at the undergraduate level have demonstrated that significant increases in moral reasoning can occur if students are exposed to an ethics course. *See generally* Page, *supra* note 150.

this context, however, is a study of almost two hundred lawyers by Lawrence Landwehr.¹⁶⁶ He found that about 7% of them were at Kohlberg's stage 3, over 90% of them were at stage 4, and only about 2% of them were at stage 5. In a normal cross-section of the adult population, somewhere between 30% and 50% of the tested individuals would be at stage 4.¹⁶⁷ In short, stage four reasoning on the Kohlberg scale is tremendously over-represented among lawyers.¹⁶⁸

166. Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 L. & PSYCHOLOGY REV. 39 (1982); see also Muntz, *Opinions of Divinity and Law Students on Social Class*, 34 J. EDUC. SOC. 221, 229 (1961) (law students are almost wholly lacking in egalitarian ideology); Willock, *Getting on with Sociologists*, 1 BRIT. J.L. & SOC'Y 3 (1974) (lawyers tend to be more conforming than sociologists).

167. Landwehr, *supra* note 166, at 44-45.

168. David Bryden's recent study of the legal reasoning skills of law students also suggests, although indirectly, that a considerably large number of law students do not move beyond Kohlberg's stage four. See Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479 (1984). Bryden hypothesized that legal education ought to instill in students certain specific kinds of reasoning skills. One of these skills, functional analysis, involves searching for and identifying the ideas, policies, and purposes that lie behind particular rules of statutory or common law. *Id.* at 481. In a very rough sense, Bryden's functional analysis corresponds to reasoning at Kohlberg's post-conventional stages five and six. In both functional analysis and these upper stages of moral reasoning, the purpose behind a rule far transcends the rule itself in importance. Furthermore, in both functional analysis and the upper stages of moral reasoning, the rule itself can be circumvented, or even disobeyed, if doing so better serves society's overall interests (stage five) or is more consistent with a universal principle (stage six). Bryden's data on law students' functional analysis ability proved somewhat disappointing. He discovered that a considerable number of graduating law students made little or no attempt to engage in that kind of lawyering skill. For these students, therefore, the rule rather than the rule's rationale controlled.

Another recent empirical study also deserves mention in this context. Douglas McFarland collected data on the image that law students have of an ideal law school professor. McFarland, *Students and Practicing Lawyers Identify the Ideal Law Professor*, 36 J. LEGAL EDUC. 93 (1986). McFarland grouped students' responses into three prototypical law school teachers. (Unfortunately, McFarland seems to have been unfamiliar with Coplin & Williams, *Women Law Students' Descriptions of Self and the Ideal Lawyer*, 2 PSYCHOLOGY OF WOMEN Q. 323 (1978) [hereinafter Coplin], a work that also discussed ideal images in legal education.) McFarland's data reveal that more than a third of the beginning law students identified the "socratic trainer" as ideal. McFarland, *supra*, at 98. In effect, students who identified this type of teacher as ideal indicated that they wanted abstract reason and intellect to control their own lives. By the end of their law school careers, however, very few third year law students described the socratic trainer as ideal. In fact, for that prototype teacher the third year students had substituted as ideal an anti-socratic practitioner image. These prototypical teachers, according to McFarland, principally express interest in the nuts and bolts of the rules and laws themselves. These teachers, of course, seem to be operating at Kohlberg's stage four. For McFarland's students at least, stage four teachers gradually became the runaway winners in the ideal teacher race. *Id.*

An additional facet of McFarland's data deserves special mention. Conspicuously absent from that data is any suggestion that as students move through law school they may

There can be little doubt that lawyers and law students do not stand up well when measured on the Kohlberg scale. To be sure, the Kohlberg studies involving lawyers may confirm the accuracy of the many nonlawyers' beliefs that lawyers care only about the rules of law and nothing about more fundamental values. But these Kohlberg oriented studies of law students and lawyers may also suggest that Kohlberg's scale of stages simply does not work when applied to legally trained individuals; some other system may be needed to evaluate law students and lawyers.

B. *Moral Dialogue*

When Norma Haan began her work studying the moral development of adolescents and young adults, Lawrence Kohlberg's ideas strongly influenced her.¹⁶⁹ In fact, Haan par-

be drawn toward a caring person image as the ideal law school teacher. The percentage of students who identified the caring teacher as ideal remained constant—about one-third—throughout the three year period. This is quite ironic. Of the several kinds of law teachers described by McFarland, only the caring teachers actually interacted with students on a personal level. Conversely, McFarland's socratic trainers cared only about developing intellectual skills in students. Furthermore, McFarland's anti-socratic practitioners concentrated almost exclusively on providing students with information about particular substantive fields.

Another recent study by McFarland examines images that law school teachers have of themselves. McFarland, *Self-Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232 (1985). Law school teachers, he suggests, tend to fall into one of three categories; the caring liberal arts teacher, the teaching lawyer and activist, and the "touch humanist scholar." *Id.* at 248. McFarland suggests that one of the principal reasons why so much acrimony may exist in law schools regarding teaching itself is because these different kinds of law school teachers simply do not know how to talk to each other. *Id.* at 257-60.

McFarland's various prototypes are surprisingly similar to teacher prototypes described by Joseph Axelrod in his extraordinarily provocative and helpful book, *THE UNIVERSITY TEACHER AS ARTIST* (1973). Axelrod tries to describe what makes up good teaching in higher education. To do this, he draws up picture prototypes of four different master teachers. One of these is a "principles and facts teacher" and one is an "instructor-centered teacher." Axelrod also describes a "student-as-mind teacher" and a "student-as-person teacher." These last two are remarkably similar to McFarland's socratic trainer and caring person. *Id.* at 42-43; *see also infra* note 104.

For other excellent books containing descriptions of teachers in higher education, see S. ERICKSON, *THE ESSENCE OF GOOD TEACHING* (1984) (a systematic attempt to explain what good teachers do); O. MILTON, *ALTERNATIVES TO THE TRADITIONAL* (1972) (describing how often little real learning occurs in higher education); O. MILTON, *ON COLLEGE TEACHING* (1978) (describing the complete transformation in teaching style that occurred when a 25 year veteran teacher finally asked himself what he wanted students to learn in a particular course that he was teaching).

169. The following discussion is drawn from N. HAAN, E. AERTS, & B. COOPER, *ON MORAL GROUNDS: THE SEARCH FOR PRACTICAL MORALITY* (1985) [hereinafter N. HAAN, *ON MORAL GROUNDS*]; Haan, *Processes of Moral Development*, *supra* note 149.

anticipated with Kohlberg in some of his early studies. Notwithstanding her basic Kohlberg orientation, however, Haan's independent research increasingly raised troubling concerns. She was bothered, for example, by the apparent necessity of educational sophistication and chronological maturity as accompaniments to Kohlberg's advanced stages of development. In addition, Haan's later research indicated to her that a distinct cultural factor played a role in the achievement of Kohlberg's upper stages of reasoning. High level Kohlberg reasoners, she noticed, seemed to be disproportionately from white, middle, or upper middle-class backgrounds. Finally, influenced by the work of Carole Gilligan,¹⁷⁰ Haan sensed in Kohlberg's work a certain link between high level development on the Kohlberg scale and gender. Males seemed to predominate at Kohlberg's higher levels.

Haan was particularly troubled that Kohlberg's theory seems to require moral activity to occur in a highly individualistic and an essentially judicial or judge-like fashion. Although Kohlberg's approach probably is not so stark as Haan contends, his approach does have an individualistic and judicial feel to it.¹⁷¹ For Kohlberg, moral principles exist independently of the

170. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) [hereinafter *DIFFERENT VOICE*].

171. For example, in his later work, Kohlberg frequently talks of a just community as a forum in which young people can best develop their sense of morality. In such a community, students themselves are largely responsible for making moral choices. Making moral choices promotes development. Haan agrees. She calls for the opportunity by students to participate in "actual and important moral experience," to be moral decision makers, and not just to talk about decision making.

Ironically, many law schools have had in place for years mechanisms through which students can participate in making moral choices. These mechanisms are legal clinics or other supervised practice opportunities. Many of these other opportunities involve students working in the legal departments of various government agencies. Unfortunately, clinical programs are at best stepchildren in American legal education. Although most legal educators now view such programs as worthwhile, they do so only because the programs are a good mechanism for giving students training in certain practical skills. At virtually all schools, therefore, clinical programs and faculty take a backseat to traditional substantive law courses such as contracts, criminal law, or income taxation. In short, at most law schools, clinical experiences for students are considered a necessary evil.

Developmental theory completely turns the tables on the debate over the place of clinical experiences in the law school curriculum. Under the developmental theories of Perry, Kohlberg, or Haan, actual experience best promotes movement toward the highest levels of development. Therefore, clinical experiences in law schools actually are higher level developmental tools than substantive law courses. This should not be surprising. Knowledge never really occurs in classrooms. However, it constantly occurs in supervised practice settings and is the essence of the practice experience. In such practice, therefore, students quickly realize that they must orient themselves in a relativistic world through commitment (Perry's position six). Furthermore, in supervised practice, students can make

people involved in the making of a moral choice. These princi-

initial commitments (position seven) and then can actually experience the implications of those commitments (position eight). Finally, some very skilled practice instructors may even be able to help students begin to realize that life itself as a practicing lawyer has meaning only if it involves an ongoing, unfolding series of commitments. Practice experiences also promote moral development in young law students, whether that development is along the lines described by Kohlberg or those proposed by Haan. Clinics involve students in repeatedly making nonhypothetical, irreversible moral choices. They personify, therefore, what Kohlberg tries to encourage with the just community idea and what Haan calls for in her statement about actual and important moral experience.

Notwithstanding the extraordinarily important role that practice or clinical experiences should play as a developmental tool in legal education, such experiences by themselves cannot be expected to help law students move beyond moral and intellectual relativism. Some help should also be provided by classroom instruction, albeit instruction that might be modified dramatically from that which currently occurs in most law schools. In connection with Perry's theory, for example, certain classroom changes might be made. As noted earlier, expressions by students of values, feelings, and beliefs may well be masks for dualistic thinking. Thus, contrary to what some humanistic educators seem to think, all expressions by law students of feelings and values should not necessarily be warmly received. Dualistic thinking, especially when disguised in language of feelings and values, must be rooted out, perhaps by rigorous use of the case method. However, teachers who help students move out of dualistic reasoning must never suggest that values or beliefs have no place in the world of lawyers. Rather, they must concentrate exclusively on exposing the diversity of values and feelings among various students and the potential conflicts among the student's own values and feelings.

Some changes in legal education might be more dramatic. Traditional methods of classroom education in law school simply cannot do all of the developmental jobs that legal education must accomplish. The case method, for example, seems poorly equipped to help students move to Perry's commitment positions, to Kohlberg's post-conventional reasoning stages, or to Haan's upper levels of moral dialogue. The problem method, as that method is usually employed, seems little better. Both of these methods are ill suited because they look principally to the past and deal inordinately with resolution of disputes through some variation of the litigation process. Discussions of moral values and commitment choices seem out of place in both of these contexts. The past facts exist. They cannot be re-created according to some better moral system. Furthermore, the process of litigation in this country is controlled by the adversary system. As noted earlier, that system seems at best to co-exist in a tenuous way with traditional conceptions of moral behavior.

Perhaps the best solution lies in a major restructuring of the upper division law curriculum. This might take two forms. First, the emphasis in upper division classes would shift away from dealing with past facts and toward dealing with future facts. Creation of the future necessarily involves making moral choices. Students in the upper division of law school, therefore, might continually be confronted by exercises in which they had to advise clients regarding future choices. "What should your client do to avoid or anticipate a future dispute?" "How can we make sure past mistakes do not happen again?" Such questions might become the dominant ones in the upper division. The second aspect of the restructuring of the upper division curriculum could involve shifting the focus away from litigation and litigation type dispute resolution, and toward dispute resolution by negotiation and compromise. Litigation in an adversary system creates at best moral ambivalence. Negotiation and compromise, however, necessitate making moral choices. Furthermore, if Norma Haan is correct, the highest levels of moral dialogue consist of advanced skills of negotiation and compromise. Stressing those things in the upper division of law school, therefore, could be an extraordinarily powerful developmental tool.

ples are objectively true. In effect, Kohlberg argues that moral development occurs as people learn how to understand those objectively true moral principles and thereafter apply them to specific situations.

Haan completely disagrees.¹⁷² Kohlberg's description of moral development, Haan ultimately concludes, does not reflect the way people actually make moral choices. According to Haan, something completely different occurs, which she describes as an "interactional" formulation.¹⁷³ People make moral choices through a process of engaging in dialogues with other affected individuals.

Although Haan's theory shares many characteristics with Kohlberg's, most notably a stage or developmental approach, it is in many ways radically different. Unlike Kohlberg's, Haan's theory readily allows emotion to serve as a choice-making mechanism. Furthermore, Haan's theory emphasizes action and moral dialogue to a far greater extent than does Kohlberg's. "Dialogue is the form of all moral activity," Haan writes, "and dialogue is action."¹⁷⁴ Finally, Haan's approach concentrates almost entirely on processes that people use for resolving specific moral dilemmas. Reference to large scale moral principles is avoided. Kohlberg's system, however, seems to encourage attempts to find universally applicable solutions to moral dilemmas.

Haan believes that people gradually develop moral choice making abilities through a continuum of five levels.¹⁷⁵ At Haan's level one, which is similar in some ways to Kohlberg's stage one, "others force me/I force them."¹⁷⁶ Life is viewed as "A versus B."¹⁷⁷ "I have unqualified rights to secure my own good"¹⁷⁸ is the motto of this level.

Level two on Haan's continuum, which is again similar to Kohlberg's stage two, should also seem familiar to legal educators who have watched students learn to cope with law school. Law students often begin to recognize, usually in the second or

172. Haan frequently discusses the differences between her theory and Kohlberg's. See, e.g., N. HAAN, ON MORAL GROUNDS, *supra* note 169, at 50-72.

173. *Id.* at 38-41.

174. *Id.* at 68.

175. All of the following descriptions and quotations are drawn from a chart that Haan provides of the five-stage sequence. *Id.* at 62-64.

176. *Id.* at 64.

177. *Id.* at 62.

178. *Id.* at 63.

third semester, that other students also have rights. Emphasis here is on the word "also." At Haan's level two, interests other than one's own must be considered. Haan's phrase, "I have a right to secure my own good as others do,"¹⁷⁹ captures the essence of this level. At this stage, people "[t]rade to get what self wants; sometimes others must get what they want."¹⁸⁰ Countless law students say similar things. "I'll give you my notes, if you give me yours." "I don't have any choice but to trust you on that point. You wouldn't cheat me, would you?" In effect, at this level people take "blind chances on others' good faith."¹⁸¹

Emphasis on self-interest diminishes as people reach Haan's level three. Again not surprisingly, Haan's description of this level sounds like Kohlberg's description of his stage three. At this level, according to Haan, individuals assume that most people, including themselves, have or should have good faith. Acting on that fundamental assumption, level three individuals recognize reciprocity. Thus, they deal with others of good faith and simply shun those rare persons who exhibit bad faith.

Haan's descriptions of levels two and three of moral development sound much like what goes on in most law school study groups. In some groups, self-interest controls. People study together only to advance their own interests. However, in some study groups, self-interest is thought to be identical with other's interests. "All of us will do better on our exams if we cooperate," students in this latter group conclude.

Haan believes that a major developmental breakthrough takes place when people move to level four. Movement to this level occurs, she argues, because people gradually come to realize that level three's fundamental assumption about the essential goodness of oneself and most others is unrealistic. All people, including oneself, act in bad faith from time to time. "Others (and myself) can be culpable."¹⁸² "All persons fall from grace."¹⁸³ Mindful of the shortcomings of all individuals, people making moral decisions at Haan's level four agree to common rules and regulations to protect their mutual interests. Reciprocity still controls. "I commit myself to the common struc-

179. *Id.*

180. *Id.* at 62.

181. *Id.* at 63.

182. *Id.*

183. *Id.*

tured exchange,” Haan writes about people functioning at this level, “so I deserve the same considerations and privileges as others receive from common practices.”¹⁸⁴ In a sense, of course, this description of Haan’s level four is similar to the rule-based mechanism of moral choice making described as Kohlberg’s stage four. Structured exchanges, rules, and regulations take the place of case by case determinations.

Haan’s level five, the last one on her continuum, reiterates the importance of reciprocity and describes moral dialogue as the forum in which moral choices are made. At this level, Haan breaks completely from Kohlberg. Objectively true principles do not exist. Rather, everything is in flux. “I have human vulnerability, weaknesses and strengths as a moral agent,” Haan says of a person acting at level five, “but I have responsibility to myself, others, and our mutual interest to require that others treat me as a moral object. If I don’t, the moral balance will be upset.”¹⁸⁵ Using language that sounds like William Perry’s description of his ninth and last position of intellectual development—life as a series of ongoing, unfolding commitments—Haan says of a person acting at level five: “[W]e are a part of each other’s existence.”¹⁸⁶ Haan admits, and in doing so again echoes Perry, that her view of social interchange will trouble people who hope for absolute or objective truth in their lives. “[E]veryday life leads to compromises, temporary injustices that are rectified later, and choices between the lesser of evils.”¹⁸⁷ People must develop “awareness and forgiveness of human fallibilities and complexities.”¹⁸⁸

“What exactly develops in moral development?,” Haan asks in a crucial passage. “It seems not to be moral understanding.”¹⁸⁹ Haan’s understanding of moral development differs from Kohlberg’s high-level developmental stages. High-level moral development may be “tolerance for conflict and the skills of conflict resolution that allow tension to be endured long enough for disputants to draw on their past experience, invent possibilities, and mutually determine the legitimacy of one another’s self interests to reach mutual resolution of their dis-

184. *Id.* at 64.

185. *Id.* at 63.

186. *Id.* at 64.

187. *Id.* at 70.

188. *Id.*

189. Haan, *Processes of Moral Development*, *supra* note 149, at 1006.

cord.”¹⁹⁰ Clearly, this is multiplicity or relativism.

The kind of moral activity just described is not at all what Kohlberg describes as occurring at his upper stages of moral development. A critical point must now be made. Haan’s highest level moral activity is a precise description of what most lawyers do on a daily basis. This connection is made clear in the following passage:

[M]oral action is thought to be a two step process of identifying the pertinent moral, personal, and objective elements of particular situations and then separating the wheat from the chaff; consequently final actions are likely to be found that “fit” the actors and the situation. When this process is shared among participants, they are more likely to achieve moral balances and enact them. However, all situations are new, so in some degree moral solutions are always created.¹⁹¹

If, in the foregoing quotation, the word “legal” had been substituted on several occasions for the word “moral,” most readers would think that the words were those of a lawyer or legal educator rather than of a developmental psychologist.¹⁹²

An enormous schism that divides the various schools of developmental psychology can now be clearly seen. Lawrence Kohlberg does not accept multiplicity or relativism as the underlying epistemological stance that climaxes moral development,¹⁹³

190. *Id.*

191. N. HAAN, ON MORAL GROUNDS, *supra* note 169, at 69-70.

192. Several additional theories of moral development, somewhat different from both Kohlberg’s and Haan’s, must be noted here, if only briefly. All share with Haan the idea of making moral choices in the context of the specific environment surrounding a particular moral problem. In a sense, therefore, these theories fall into the relativistic camp. James Rest, best known for his development of the Defining Issues Test, which is frequently used to place people on the Kohlberg scale, recently theorized that moral decision making involves four interrelated activities. First, individuals must interpret the dilemma. Then they must formulate a plan for dealing with it. Next, the plan is evaluated. Finally, the original or a modified plan is implemented. Rest, *The Major Components of Morality*, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT, *supra* note 1, at 24-36. Rest, like Haan, does not look for universally applicable moral principles. Another group of psychologists, sometimes referred to as contextualist theorists, have similar ideas. Moral choices are only made in context. For many references to this body of work, see Zimmerman, *Social Learning Theory: A Contextualist Account of Cognitive Functioning*, in RECENT ADVANCES IN COGNITIVE DEVELOPMENTAL THEORY (C. Brainerd ed. 1983). Another group of psychologists is interested in an idea that is sometimes referred to as values clarification. These psychologists also promote a relativistic perspective. See B. CHAZAN, CONTEMPORARY APPROACHES TO MORAL EDUCATION 50-55, 131-33 (1985).

193. This aspect of Kohlberg’s work is discussed in considerable detail in Liebert, *What Develops in Moral Development?*, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT 177, *supra* note 1; see also Kurtines, *Certainty and Morality*, *supra* note 1, at 3; see also Boyd, *The Rawls Connection*, in MORAL DEVELOPMENT, MORAL

nor do Professors Kitchener and King, the originators of the cognitive development theory of reflective judgment. These theorists insist that certain universally applicable and objectively true ideas and principles do exist. For them, development involves movement toward acceptance of that fact. Thus, they follow in the tradition of Plato. Conversely, William Perry for the cognitive development psychologists and Norma Haan for the moral development psychologists believe that objective truth does not exist and that development principally involves the ability to live with that uncomfortable fact. In a sense, therefore, they follow in the tradition of Protagoras.

III. LEGAL EDUCATION AND DEVELOPMENTAL PSYCHOLOGY: A DEVELOPMENTAL PERSPECTIVE

Something very similar to the previously described schism about relative and objective truth in the world of developmental psychology also divides the world of current legal education. Roger Cramton, a prominent spokesperson for mainstream legal education,¹⁹⁴ has repeatedly and strongly argued against relativism in legal education. "Modern dogmas entangle legal education," Cramton wrote several years ago in an influential essay, "a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism. . . ."¹⁹⁵ Cramton explains why moral relativism (Perry's multiplicity) is so dangerous in the law school environment.

If all law and truth are relative, pressing one's own views on others would be arrogant and mischievous. But if there is really something that can be called truth, beauty or justice—even if in our finiteness we cannot always agree on what it is—then law school can be a place of searching and creativity that aspires to identify and accomplish justice. If ethical relativism reigns supreme, law will become even more complex and detailed, and finally boring, and law school will merely be a

EDUCATION AND KOHLBERG, *supra* note 145, at 185-213; and J. REIMER, *supra* note 145, at 80, for discussions linking Kohlberg's work to the modern philosophic tradition of John Rawls.

194. Until recently, Cramton was the long time editor of the JOURNAL OF LEGAL EDUCATION. Cramton also was the principal author of the American Bar Association's extraordinarily influential 1980 report on legal education; see ABA, *Report*, *supra* note 116.

195. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 262 (1978) [hereinafter *The Ordinary Religion*]; see also Cramton, *Beyond The Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987).

dull and unpleasant place on the gateway to a supposedly learned profession. At least the scientist, even if he is an ethical relativist, has something new to discover about the world of nature. If truth and justice have no reality or coherence, what does the lawyer have to do? And why should a trade school—for that is what it would be—occupy space on the university campus?¹⁹⁶

For Cramton, who represents the mainstream in modern legal educational theory, law school educators should first help to identify objective truths and then train students to bring them to bear upon human made law and legal institutions. The mainstream, however, is not the only stream.

A. *Critical Legal Studies*

For more than a decade, the usually calm world of American legal education has been dramatically upset by a small group of very controversial legal educators, members of the Critical Legal Studies movement (CLS). Although few in number, CLS proponents have had a disproportionately large impact in legal education circles. This is principally because large numbers of “Crits,” as they are called, are concentrated at two of this country’s most elite law schools, Harvard and Stanford.

The CLS movement, although difficult to describe in general terms, springs from three roots, all of which rely on multiplicitic or relativistic beliefs.¹⁹⁷ One of the roots is the American legal realism tradition of the 1920s and 1930s. Members of that tradition argued that formalistic legal reasoning inevitably concealed subjective value choices. Thus, according to the realists, legal reasoning could never generate outcomes in controversial disputes independent of the political or economic ideology of the judge. For the realists, justice could never have an objective meaning.

The second root of CLS is a modern European technique of literary criticism called deconstruction, which seeks to demonstrate that words and texts lead down a blind alley. Deconstruction denies that any particular mode of linguistic signification

196. Cramton, *The Ordinary Religion*, *supra* note 195, at 263. Cramton’s comment about the ethical relativist scientist’s belief in the truth of certain physical phenomena suggests that Cramton himself is unaware of the extent to which ideas about relativism have pervaded the world of science and the philosophy of science.

197. The following discussion is principally drawn from *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984).

can achieve hegemony and that interpretation is merely an endless exercise in unbounded free play. Epistemological indeterminacy controls.

The last root of the CLS movement in modern legal education is the critical theory of early twentieth century European political philosophers. This theory, which built heavily upon the work of Karl Marx, attempted to expose the oppressive aspects and contradictions supposedly inherent in capitalistic society. A crucial element of critical theory, and now seemingly of the CLS movement, is the Marxist idea of historical contingency. This idea, according to CLS advocate Mark Tushnet, establishes that "all knowledge is a social product and thus that knowledge can have no transcendent validity."¹⁹⁸ Another proponent of the CLS approach states the contingency idea as follows:

Up to a point we can reason about these [value] conflicts and even hope to change each other's minds, for the disagreements turn to some extent on matters of fact and experience. But when all reasoning and argument are over, there will be reasonable and well-informed people on both sides of each controversy.¹⁹⁹

Clearly, critical legal theory insists that truth is multiplistic or relative; thus, the underlying epistemological perspective of the CLS movement is aligned with Perry's and Haan's perspectives. This argument, heretofore undetected by CLS proponents, is made clear by Joseph Singer's recent attempt to justify the CLS approach.²⁰⁰ Singer tells a story about his own college days, a story which perfectly tracks William Perry's developmental scheme. Singer describes how he became a close friend in college of a person whose political beliefs were very different from his own. Endless discussions ensued, yet no resolutions were reached, even after four years of debate. Singer then describes how, as a result, he was forced to give up one of the

198. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1220 (1981).

199. Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247, 269 (1984). Surprisingly, radical legal theorists on the political left are not the only proponents of a nonobjectivist perspective. As Stephen Macedo has recently noted, new right legal philosophers like former Judge Robert Bork and Lino Graglia are skeptical about the claimed objective truth of certain moral and ethical principles. See generally S. MACEDO, *THE NEW RIGHT AND THE CONSTITUTION* (1986). Thus, although the end result promoted by CLS advocates is totally different from the end result promoted by these new right thinkers, the underlying epistemological stance is the same.

200. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

most basic assumptions of his adolescent life; namely, the belief that if two intelligent and reasonable people talked long enough about an important problem of knowledge or learning, eventually they would come to agreement. After relating these facts, Singer states the crucial lesson of his story. "Morality is not a matter of truth or logical demonstration."²⁰¹ It is different for each individual. Clearly, Singer is describing his own transition out of dualism and into multiplicity and relativism, just as Perry's and Haan's students had described.

The connection between Singer's and Perry's ideas continues. Singer attributes the feeling of many law students that they are losing their souls to the belief that morality and law require rational foundations. "If we feel we need to ground our beliefs in a way that will remove all doubts," Singer states in a crucial passage, "and if such a firm ground is unavailable, we respond with either despair or apathy or cynicism."²⁰² Singer suggests an alternative approach. "The absence of secure foundations or decision procedures for belief should be experienced not as a void but as an opportunity."²⁰³ Then, inadvertently using Perry's terminology, Singer argues for movement past despair or cynicism. "It is up to us to live in a way that can create commitments and communities."²⁰⁴

To be sure, Singer does not stand alone among legal educators in his call for commitment. Roger Cramton also wants commitment. "The [legal] educator," Cramton insists, "has an obligation to address the values that he is serving; . . . to call the legal profession and the larger society back to a covenant faith and moral commitment that it has forsaken."²⁰⁵ But a fundamental difference exists between Singer's ideas about commitment and Cramton's. For Cramton, as for Lawrence Kohlberg, commitment and morality build upon the existence of objective truth. For Singer and other CLS proponents, however, as for William Perry and Norma Haan, commitment follows and builds upon multiplicity and relativism, that is, upon the nonexistence of relative truth.

Not surprisingly, the debate between CLS proponents and mainstream legal educators is not only a debate about the objec-

201. *Id.* at 39.

202. *Id.* at 67.

203. *Id.*

204. *Id.*

205. Cramton, *The Ordinary Religion*, *supra* note 195, at 263.

tive or relative nature of truth. It is also a debate about crucially important political and social matters. For example, much CLS work is a radical critique of American culture, particularly the culture of law in the United States. Furthermore, many CLS advocates sound almost utopian in their calls for political and social change. Ironically, a similar debate about political and social mores currently splits the world of developmental psychology. Developmental psychology has produced its own group of radical, almost utopian, critics of current culture in the United States. This group consists of feminist developmental psychologists.

B. *Feminist Psychology and the Different Voice*

Carol Gilligan, a mainstream psychologist, inadvertently launched a radical attack on mainstream developmental psychology with the publication of her book *In a Different Voice*.²⁰⁶ Gilligan began her work with an innocuous observation. All of the people interviewed by Lawrence Kohlberg and all of the people interviewed by Jean Piaget were male. Gilligan wondered whether girls and women develop differently than boys and men. To find out, she began interviewing girls and women and then studied cross-sections of both males and females.

206. The following discussion is drawn from C. GILLIGAN, DIFFERENT VOICE, *supra* note 170; Dubois, Dunlap, Gilligan, MacKinnon, & Menkel-Meadow, *Feminist Discourse, Moral Values and the Law—A Conversation*, 34 BUFFALO L. REV. 11 (1985) [hereinafter Gilligan, *Feminist Discourse*]; Gilligan, *Remapping Development: The Power of Divergent Data*, in VALUE PRESUPPOSITIONS IN THEORIES OF HUMAN DEVELOPMENT 37 (L. Cirillo & S. Wapner eds. 1986) [hereinafter Gilligan, *Remapping Development*] (probably the best introduction to Gilligan's ideas and to the difference between her ideas and the work of Kohlberg and others); Gilligan, *Remapping the Moral Domain: New Images of Self in Relation*, in RECONSTRUCTING INDIVIDUALISM: AUTONOMY, INDIVIDUALITY AND THE SELF IN WESTERN THOUGHT 237 (T. Heller, M. Sosna, & D. Wellberg eds. 1986); Gilligan, *Reply [to Critics]*, 11 SIGNS 324 (1986); Murphy & Gilligan, *Moral Development in Late Adolescence and Adulthood: A Critique and Reconstruction of Kohlberg's Theory*, 1980 HUM. DEV. 77. For extensive secondary discussions of Gilligan's ideas, see J. Rich, *supra* note 32, at 117; Ford & Lowery, *Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations*, 50 J. PERSONALITY & SOC. PSYCHOLOGY 777 (1986). A particularly enlightening discussion of Gilligan's and Kohlberg's work is Lifton, *Individual Differences in Moral Development: The Relation of Sex, Gender and Personality to Morality*, 53 J. PERSONALITY 306 (1985). Lifton differentiates between sex and gender. Sex differences, he says, involve only biological issues, i.e., male and female. Gender differences, however, are psychological or sociological. Some women, for example, are "masculine" in orientation and some men are "feminine." *Id.* at 308. Lifton suggests that no sex differences exist between males and females as groups in connection with moral reasoning. However, gender differences do produce different ways of looking at moral issues. *Id.* at 329-30.

Gradually, Gilligan began to believe that women, as a group, deal with moral issues very differently from men as a group. Based on her observations of both men and women, Gilligan concluded that two different voices of moral activity exist. One voice, frequently but by no means exclusively associated with men, focuses on concerns for justice and reason. Gilligan calls this the justice voice. It seems to be a voice abstractly related to objectivism, that is, the belief that certain ideas and principles have an objectively true existence. The other voice, frequently albeit not exclusively associated with women, focuses on concerns for caring and compassion. Gilligan calls this the caring voice.²⁰⁷ This voice is abstractly related to multiplicity and relativism. According to Nona Lyons, a follower of Gilligan's, the justice voice is "rooted in impartiality and the search for objectivity, the capacity to distance oneself and determine fair rules for mediating relationships"²⁰⁸ The caring voice, Lyons continues, is "grounded in the specific contexts of others, the capacity to perceive people in their own terms and to respond to their needs."²⁰⁹

207. Gilligan theorizes that some individuals develop the caring voice by evolving through three phases of moral growth. This development, however, is not a staircase of stages but rather a gradual progression upward. C. GILLIGAN, *DIFFERENT VOICE*, *supra* note 170, at 51. Initially these persons care only about themselves and their own needs. This part of these individuals' lives, of course, is similar to the early stages described by Haan and Kohlberg. Gradually, however, Gilligan argues, these individuals come to care for others, particularly for their own dependents. Unfortunately, conflict then follows as the person's self seems to be excluded from the circle of care. Eventually, the third aspect of personality development occurs and the individual comes to see that caring for others is linked to caring for one's self. The caring concern then becomes linked to the idea of caring as the basis of all worthwhile human relations.

208. Gilligan, *Remapping Development*, *supra* note 206, at 42.

209. *Id.* One of the very best illustrations of the differences between the caring and the justice voices is captured in Gilligan's report on the conversation of a pair of four-year-olds. Little Girl: "Let's play next-door neighbors." Little Boy: "I want to play pirates." Little Girl: "Okay, then you can be the pirate who lives next door." Gilligan comments:

By comparing this inclusive solution of combining the games with the fair solution of taking turns and playing each game for an equal period, it is possible to see not only how these two approaches [to moral behavior] yield different ways of solving a problem in relationships but also how each solution differentially affects the identity of the games and the experience of the relationship.

The fair solution of taking turns leaves the identity of each game intact, providing an opportunity for each child to experience the other's imaginative world and regulating the exchange by the imposition of a rule based on a premise of equal respect. The inclusive solution, in contrast, transforms both games through their combination Although the fair solution protects identity and ensures equality within the context of a relationship, the inclusive solution transforms identity through the experience of relationship.

Gilligan's empirical studies included a number of interviews with people who were, or who eventually would become, lawyers. These people provide a fascinating contrast to the lawyers studied by Kohlberg, particularly to his Case 65.²¹⁰ One of Gilligan's lawyers stated that she had gone through a period in high school where she had held a completely relativistic (that is, multiplicitous) perspective on moral issues.²¹¹ At age twenty-five, however, as a third year law student, she thought of herself differently. She told Gilligan that she valued "a very strong sense of being responsible to the world, having other people that I am tied to, and also having people that I'm responsible to. I have a very strong sense of being responsible to the world."²¹² She informed Gilligan that she was concerned about the "possibility of omission, of your not helping others when you could help them."²¹³

Two other lawyers whom Gilligan interviewed provide additional help in understanding her theory about the different voices of morality, and the differences between her theory and Kohlberg's.²¹⁴ Gilligan notes that one lawyer she interviewed had a justice orientation. "I usually resolve the dilemmas according to my internal morality," this lawyer told Gilligan. "The more important, publicly, your office is, the more important it is that you play by the rules."²¹⁵ This lawyer then explained to Gilligan the reason for the game imagery. "You play by the rules because society hangs together by these rules. And, in my view, if you cheat on them, even for a laudatory purpose, eventually you break down the rules because it is impossible to draw fine lines."²¹⁶ Gilligan juxtaposes the forego-

Id. at 40. Interestingly, Gilligan's words sound vaguely like the writings of theorists interested in the previously discussed idea of cognitive styles. See *supra* note 155. Field dependent individuals sound a bit like Gilligan's description of people interested in inclusive solutions and field independent individuals sound a bit like Gilligan's description of the people interested in fair solutions. For a good discussion of cognitive style theory, see generally M. MAXWELL, IMPROVING STUDENT LEARNING SKILLS (1979).

210. See *supra* text accompanying notes 157-161.

211. C. GILLIGAN, DIFFERENT VOICE, *supra* note 170, at 20-21.

212. *Id.*

213. *Id.*

214. Gilligan reports on these two lawyers in Gilligan, *Feminist Discourse*, *supra* note 206, at 59-60.

215. *Id.*

216. *Id.* at 60. The justice lawyer also said this about helping the opposing side in an adversarial dispute: "Once you, as an attorney, step out of the role of adversary, which is what you do if you start helping the other side, . . . then you are not being true to your role. You are changing your function, and that destroys the system." *Id.* This comment should

ing quotations with ones reflecting a caring voice. "I have to preside over these decisions and I try to make them as non-disastrous as possible for the people who are most vulnerable," this other lawyer told Gilligan. "The fewer games you play, the better."²¹⁷

Gilligan's work has generated intense response, both negative and positive. Criticism comes from all directions. Lawrence Kohlberg and Anne Colby, for example, strenuously disagree with Gilligan. They insist that their data, and the data of many other psychologists, indicate that both men and women speak in the same moral voice. These theorists believe Gilligan simply misinterpreted her data.²¹⁸ Furthermore, some radical feminists have recently criticized Gilligan's ideas²¹⁹ because, they argue, the different voice idea reinforces traditional gender-based stereotypes.

Other feminists however, believe that Gilligan's ideas herald a new way of examining human consciousness. In a recent book, Mary Belenky and a group of colleagues attempt to link Gilligan's ideas about women's different voice of moral development to William Perry's ideas about cognitive development.²²⁰

be considered in light of Kohlberg's description of the problems experienced by Case 65. See *supra* text accompanying notes 157-61.

217. Gilligan, *Feminist Discourse*, *supra* note 206, at 60. The caring lawyer also said: I am dealing with a legal system and dealing with something it does not know how to deal with very well. I become very distressed because it is hard for me to put together exactly what my role is supposed to be. You are presiding over some pretty emotional moments in people's lives and I never know whether I should say, "Here is the law book," and not do anything, or try to give whatever kind of counseling, whatever kind of support, one might provide for people without costing them a fortune. I think people need something like this.

Id.

218. See 2 L. KOHLBERG, *supra* note 145, at 338-70. For an attempt to resolve this dispute, and for many references, see generally Lifton, *supra* note 206.

219. For a good sampling of this feminist criticism, see *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS 324 (1986). See generally Clinchy & Zimmerman, *Epistemology and Agency in the Development of Undergraduate Women*, in *THE UNDERGRADUATE WOMAN: ISSUES IN EDUCATIONAL EQUITY* 161 (P. Perun ed. 1982).

220. M. BELENKY, B. CLINCHY, N. GOLDBERGER, & J. TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* (1986) [hereinafter M. BELENKY]. Another interesting example of this radical feminist psychology is Giarelli, *The Cognitive-Developmental Theory of Moralization: Toward a Radical Political Reconstruction*, 164 J. EDUC. 305 (1982) (deconstructs developmental theory and provides extensive bibliography of Marxist writings on development). At least one writer has linked a radical feminist perspective to legal issues. Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 294 (D. Kairys ed. 1982).

In the context of these references to radical political and social perspectives, two interesting empirical studies must be noted. Both found that liberal or left-leaning students

Although Perry interviewed a number of women students, Belenky's group argues that Perry's nine positions essentially describe the thinking processes of men. For Perry's nine positions, Belenky's group substitutes five different epistemological perspectives, or, to use these authors' terminology, five women's ways of knowing. Although these authors explicitly stop short of claiming that their five different perspectives describe a developmental sequence through which women evolve, the book's description of these perspectives, and the order in which the authors place them, suggest that the authors believe, at least tentatively, that such a developmental sequence exists. The sequence involves increasingly greater reliance on an inner voice of compassion and feeling.²²¹

Not surprisingly, Belenky and her group of radical feminist psychologists decry traditional educational institutions that belittle women's reliance upon an inner or different voice that stresses caring and connection. These authors suggest that this belittling occurs because educational institutions emphasize adversarial and competitive learning rather than learning processes that involve caring and cooperation.²²² In short, traditional educational institutions emphasize Kohlberg's justice voice rather than Gilligan's caring one.

tended to score higher on the Kohlberg scale than did conservative or right-leaning students. No satisfactory explanation for this phenomenon is provided. Emler, Renwick, & Malone, *The Relationship Between Moral Reasoning and Political Orientation*, 45 J. PERSONALITY & SOC. PSYCHOLOGY 1073 (1983); Nassi, Abramowitz, & Youmans, *Moral Development and Politics a Decade Later: A Replication and Extension*, 45 J. PERSONALITY & SOC. PSYCHOLOGY 112 (1983).

221. All five of the women's ways of knowing described by Belenky and her colleagues involve the use or nonuse of an inner voice of reason. See generally M. BELENKY, *supra* note 220. Women who reason at the first perspective have no inner voice at all. In fact, they do not even realize that they have an innate ability to reason and learn. Not surprisingly, all of the women described as viewing the world from this perspective were either quite young or almost completely uneducated. *Id.* at 23-24. The second perspective is a clear advance. Here women realize that they can learn and know. However, to these women, most of whom have limited education, a fact is simply a fact. No method for discriminating between conflicting facts exists. See generally *id.* at 35-51. At the third perspective in this sequence, women begin to rely on an inner voice of reason, or on gut feelings that they may have. The authors note that most women at this level of development have some, albeit limited, education. The authors also suggest, however, that at this point in development women find their true identity, an identity heavily influenced by the inner voice. *Id.* at 54-55. Women in the final two categories described by Belenky and her colleagues are highly educated and tend not to rely on the inner voice or on gut feelings. Book-learning and intellectualization here replace and even conflict with the wisdom and street smarts of the earlier categories. See generally *id.* at 87-130.

222. See generally *id.* at 190-213.

Carrie Menkel-Meadow makes essentially the same observation about law schools.²²³ Objectivity and separateness are paramount virtues in law school, she writes, as are endless concerns for fairness, justice, and rights.²²⁴ Furthermore, little or no sympathy exists in law schools for connection with others, or for responsibility and caring.²²⁵ Menkel-Meadow suggests that "Hilary," Gilligan's most significant lawyer-interviewee, is representative of what happens to women in law schools.²²⁶ Hilary experienced serious psychological distress as she found herself being torn apart by the process of being a lawyer.²²⁷

Menkel-Meadow boldly places the blame not so much on the law schools but on an underlying idea that pervades the legal system itself. The adversary system, she insists, is a masculine model.

The basic structure of our legal system is premised on the adversarial model, which involves two advocates who present their cases to a disinterested third party who listens to evidence and argument and declares one party a winner. In this simplified description of the Anglo-American model of litigation, we can identify some of the basic concepts and values which underlie this choice of arrangements: advocacy, persuasion, hierarchy, competition, and binary results (win/lose). The conduct of litigation is relatively similar (not coincidentally, I suspect) to a sporting event—there are rules, a referee, an object to the game, and a winner is declared after the play is over. . . . [T]his conception of the dispute resolution process is

223. See Menkel-Meadow, *supra* note 143. Other references to Gilligan's work in the legal education literature include Burns, *The Law School as a Model for Community*, 10 *NOVA L.J.* 329, 337 (1986).

224. Menkel-Meadow, *supra* note 143, at 59.

225. *Id.*

226. *Id.* at 58-60.

227. C. GILLIGAN, *DIFFERENT VOICE*, *supra* note 170, at 134-36, 165. Hilary told Gilligan of an experience at trial where opposing counsel failed, by oversight, to introduce into evidence a useful document, a document that would have advanced the opposing lawyer's meritorious claim. Hilary deliberated about telling the opposing lawyer of the document but then realized that "the adversary system of justice impedes not only 'the supposed search for truth' but also the expression of concern for the person on the other side." *Id.* at 135. Later, after Hilary had chosen not to reveal the mistake, she felt that she had failed to live up to her own standards of morality. Gilligan says of Hilary: "Though she has access, as a lawyer, to the language of rights and recognizes clearly the importance of self determination and respect, the concept of rights remains in tension with an ethic of care." *Id.* at 136.

Another one of Gilligan's lawyer-respondents is "Alex." Interestingly, Alex seemed to move from a justice orientation toward a caring one as he experienced the breakup of an important personal relationship. *Id.* at 166-67.

applied more broadly than just in the conventional courtroom. The adversarial model affects the way in which lawyers advise their clients ("get as much as you can"), negotiate disputes ("we can really get them on that"),²²⁸ and plan transactions ("let's be sure to draft this to your advantage"). All of these activities in lawyering assume competition over the same limited and equally valued items (usually money) and assume that success is measured by *maximizing individual gain*.²²⁸

To a certain extent, empirical data support Menkel-Meadow's comments about the masculine nature of the adversary system. Several studies suggest that law students possess a disproportionately high desire to dominate others.²²⁹ Psychologists usually identify the desire to dominate as a masculine trait. Furthermore, one study discovered that women law students tend to view the legal profession as specifically masculine in nature. The students viewed the profession as more masculine than they viewed themselves.²³⁰ Finally, one study of law students conducted in light of Gilligan's ideas seems to have identified statistically significant differences between men and women law students in connection with their respective orientations toward caring or justice.²³¹ Thus, data does exist that supports

228. Menkel-Meadow, *supra* note 143, at 50-51 (emphasis added).

229. Walsh & Palmer, *Some Personality Differences Between Law and Non-Law-Oriented Students*, 19 VOCATIONAL GUIDANCE Q. 11 (1970). Interestingly, this study also found law students to be less self-critical and less self-blaming than other students. In fact, as the Walsh and Palmer students progressed through law school, their level of self-criticism fell off markedly. See also Reich, *California Psychological Inventory: Profile of a Sample of First Year Law Students*, 39 PSYCHOLOGICAL REP. 871 (1976). Reich found law students to be exceptionally interested in dominance, status, social pressure, and the like, at least in terms of external appearances. However, he also discovered that their internal lives were filled with insecurities. In short, according to Reich, law students "wear a social mask." *Id.* at 873.

230. See generally Coplin, *supra* note 168.

231. Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 LEGAL STUD. F. 287 (1987).

A number of empirical studies have compared and contrasted the attitudes of male and female law students. Unfortunately, however, none of these studies have a developmental perspective. See generally Campbell, *Differential Response for Male and Female Law Students on the Strong-Campbell Interest Inventory: The Question of Separate Sex Norms*, 23 J. COUNSELING PSYCHOLOGY 130 (1976); Coplin, *supra* note 168; Frank *Psychodynamic Conflicts in Female Law Students*, 39 AM. J. PSYCHOANALYSIS 65 (1979) (discussion of students treated for serious depression); Spangler, Gordon, & Pipkin, *Token Women: An Empirical Test of Knater's Hypothesis*, 84 AM. J. SOC. 160 (1978).

A related study also deserves mention here. Smith, Kilpatrick, Suther, & Marcotte, *Male Student Professionals: Their Attitudes Toward Women, Sex and Change*, 39 PSYCHOLOGICAL REP. 143 (1976). Smith found that male law students had significantly greater feminist views than other male professional students. These profeminist law students also tended to be less dogmatic than the sampled nonlaw students.

these feminist attacks on the legal system, legal education, and mainstream theories in developmental psychology.

CONCLUSION

Many years ago, Henry Wadsworth Longfellow wrote of "ships that pass in the night, and speak each other in passing,/ Only a signal shown and a distant voice in the darkness."²³² The current separation of the fields of legal education and developmental psychology brings a chilling new significance to that nautical metaphor. Legal educators for the most part live alone on their own separate ship, isolated almost completely from the world of educational theory and developmental psychology. As one critic of modern legal education recently stated: "[A]t most law schools, the purposes and methods of teaching are regarded as unfruitful, if not unfit, topics for conversation."²³³ Unfortunately, something very similar can be said about the field of developmental psychology. Most developmental psychologists seem to have little or no interest in what goes on in law schools. No psychologist, for example, has examined law students in the context of either William Perry's scheme of cognitive development or Kitchener's and King's ideas about reflective judgment. Furthermore, although several psychologists/legal educators have studied law students in light of Lawrence Kohlberg's scale of moral development, the resulting reports seem to be either seriously flawed or significantly out of date. Only a few psychologists have as yet made any serious empirical efforts to study law students in light of the work of Carol Gilligan. Finally, no psychologists have examined law students in the context of the work of Norma Haan.

Not only have the two ships of legal education and developmental psychology passed silently in the night, but they also seem to be carrying the same cargo. In the field of developmental psychology, a fundamental dispute exists about the relative or objective nature of truth. The same is true in legal education. Furthermore, in the field of legal education, radical critics call for change by attacking the very foundation of modern society in the United States. The same is true in developmental psychology. Readers generally familiar with either the historical devel-

232. Longfellow, *The Theologian's Tale: Elizabeth*, in H. LONGFELLOW, *TALES OF A WAYSIDE INN* 224 (Riverside Press ed. 1913).

233. Feinman & Feldman, *Pedagogy and Politics*, 73 *GEO. L.J.* 875, 875 (1985).

opment of legal education theory or of psychological theory will have realized that the attacks on mainstream theory—attacks on both legal education theory by CLS proponents and on developmental psychology theory by radical feminist psychologists—are launched from underlying epistemological perspectives which have at earlier times rocked these respective fields. Although often unrecognized, constant tension has existed for more than a century between legal philosophers who advocate a conception of truth as objective and legal philosophers who argue for an essentially multiplistic or relativistic view of truth.²³⁴ The history of the development of psychological theory exposes this same tension. Sigmund Freud's ideas generated violent resistance not only because of their substance, but also because of Freud's pervasive skepticism about the objective nature of truth.²³⁵

In a sense, nothing could be a more fitting end to an Article describing theories of intellectual and moral growth in law school students than an end which is not an end. Thus, this Article provides no answers to questions it has raised. It gives no nod to objective or relative truth, Plato or Protagoras. "[I]t is better to travel than to arrive,"²³⁶ wrote Morris Bigge, capturing the essence of everything discussed in this Article. "Growth is not a means to any ultimate or final end, but only to more growth."²³⁷ Unfortunately, growth always carries pain with it. Surely Protagoras felt pain two millennia ago as he sailed off into a sea of multiplicity and relativism. Surely Plato also felt pain as he saw his own ideas about truth evolve over many years. This in turn illustrates an important point. As William Perry has noted, the pain of growth is not a shame of youth. Rather, it is something that all growing people feel, all of their lives.

Perry concludes one of his many essays with a little story about how teachers and students can share the pain of growth.²³⁸

234. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441 (1986).

235. In the context of this reference to Freud, a brief note about something written by Jerome Frank seems appropos. Frank was one of the most important legal philosophers during the early part of the twentieth century in the United States. He was also a great defender of the legal realist perspective. Frank argued that the craving for absolute certainty by so many judges, lawyers, and legal educators, "is a consequence of a childish wish for father authority, which is transferred to the law." *Id.* at 458.

236. M. BIGGE, *supra* note 27, at 66.

237. *Id.*

238. Perry, *Sharing*, *supra* note 97, at 267, 272-73.

This story, perhaps better than anything else, puts into final perspective all of the theories and ideas discussed in this Article. A dynamic young student came to Perry and announced that she was leaving school. He would never see her again. A long, long silence followed. Finally, unable to bear the silence, Perry spoke. "Growing is so bitter, so *bittersweet*."²³⁹ As the student rose to leave, she recognized, as Perry perhaps had not, that the two of them had been painfully growing along parallel routes. She softly touched his hand. "And bittersweet for you, too."²⁴⁰

239. *Id.* at 273 (emphasis in original).

240. *Id.*

