

Summer 1998

Steps toward a Pedagogy of Improvisation in Legal Ethics, 31 J. Marshall L. Rev. 1279 (1998)

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STEPS TOWARD A PEDAGOGY OF IMPROVISATION IN LEGAL ETHICS

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TABLE OF CONTENTS

Introduction: The Goal of Moral Maintenance	1279
Pedagogy and Moral Maintenance	1286
Behavioral Sciences and Moral Maintenance	1287
Pedagogy in Light of the Behavioral Sciences	1291
Conclusion and Model	1294
Appendix: On the Uses of Pedagogical Scholarship in Legal Ethics.....	1299

INTRODUCTION: THE GOAL OF MORAL MAINTENANCE

Distinguished teachers of professional responsibility and legal ethics¹ have long advocated the use of "role playing."² Many more,

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1. Scholars sometimes distinguish among the terms "professional responsibility," "legal ethics," and "ethics-profession." Because no consensus on distinctions among the terms exists, I use them interchangeably.

2. See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY* xvii (1981) (discussing role playing); DEBORAH RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY PERVASIVE METHOD* 56, 66 (1994). See also JANET PERRY, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL CENTER ON PROFESSIONALISM, *PLEA BARGAINING: PROBLEMS AND ISSUES FOR THE CRIMINAL DEFENSE LAWYER (THE CASE OF ANTHONY MARCOS)* 4 (1992) (using exercises of role-playing in plea bargaining).

Scholars suggesting recourse to role-plays frequently provide no more than the thinnest of contexts. In her much-used text, Rhode presents role-play exercises such as this: "For this problem, the class should break into

perhaps, have used role playing at one time or another during their classroom teaching. However, unlike the theoretical bases of the competing pedagogies of professional responsibility and legal ethics—case method, lecture, problem-based, and clinical—the theoretical base of role playing, or more properly improvisation, has yet to have been compellingly explicated.³ This article

teams of four or five students. Each team should constitute a committee charged with drafting an alternative work schedule policy. Different teams can represent different practice settings." RHODE, *supra* at 56. The thinness of context transforms role-plays into almost purely analytical exercises; there is little experiential about them. See also BELLOW & MOULTON, *supra* at xvii (stating that "[s]uch an effort will be further enhanced if students also role play the situations presented" without providing further guidelines).

While I use "improvisation" rather than role-play to suggest exercises with a thicker context, *cf. infra* note 44, I prefer the term for several other reasons as well. The nomenclature of "role-play" suggests that the purpose of the exercise is to play a role. With such linguistic guidance, students often understandably concentrate on their classmate's (or their own) facility in playing; for amateur actors or non-actors, such facility is usually exercised and perceived through attempts to mimic a stereotyped notion of what the role entails. Students may perceive a role-play as requiring them to play a role external to themselves, and one in which they believe themselves unlikely to find themselves in the future; they thus may distance themselves from the experience even as they are engaged in it.

"Improvisation," by contrast, does not connote performance or otherness. To the contrary, we all improvise when confronted with difficult situations, cobbling together prior experiences to craft an appropriate response to a new situation. Using such a description may therefore make students more likely to be present during the exercise. It may serve a further pedagogical device as well: by encouraging a kind of ethical extemporaneity, it links students' experience in legal ethics to the rest of their ethical selves. In so doing, it may help prevent the wholesale slide into ethics rule-manipulation that I see as an unfortunate and avoidable consequence of much of current legal ethics pedagogy. See *infra* notes 12, 15-17 and accompanying text.

3. In his explication of the treatment of ethical issues in William and Mary Law School's Comprehensive Skills Development program, James Moliterno has made an important contribution to the pedagogical literature. See James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991) (setting out considerations in development of a sustained improvisational setting). Steven Hartwell expertly considers some Kohlbergian underpinnings to his particular classroom model. See Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995). Neither Moliterno nor Hartwell, however, considers either the work of the social cognitivists, nor more general issues of improvisation.

For other analyses touching on pedagogy and improvisation, see generally Mary Marsh Zulack, *Rediscovering Client Decisionmaking: The Impact of Role-Playing*, 1 CLINICAL L. REV. 593 (1995) (examining use of role-playing in improving attorney-client communications); Susan Senger Bowyer, *Challenging Legal Culture From Classroom to Practice: A Case Study of New College's Politics of Law Practice Course*, 4 B.U. PUB. INT. L.J. 363, 384-85 (1995) (suggesting use of scripted skits and unscripted improvisations for various purposes). See also Ralph L. Rosnow, *Teaching Research Ethics*

attempts to fill that gap, describing the support for the limited use of a pedagogy of theatrical improvisation in legal ethics.

Before beginning, it is important to ask why ethics-profession courses are taught. Two possibilities present themselves. First, law schools may teach legal ethics for the same reason that they teach any other subject in the curriculum: to explicate the doctrine, or more specifically, to enable students to make arguments on either side of any given dispute arising in that area of the substantive law.⁴ In short, one might refer to this as enabling students to *manipulate* the doctrine.

Second, law schools may teach legal ethics in order to encourage students to behave more ethically as legal practitioners. Note here how different legal ethics is from any other subject in the law school curriculum: professors teach torts not to inculcate superior tortfeasance among their students (hopefully), but to teach them how to think about torts. Under this view, however, the teaching of ethics aims for more than teaching students how to think about ethics. Though it does indeed aim to teach students how to think about ethics, profession-ethics education also aims to guide students' action, or at least aims to have their ethical thinking guide their action. In short, one might refer to this as encouraging students to *assimilate* the ethical norms.

Yet legal ethics is, by and large, taught in much the same way as the rest of the law school curriculum: lectures, cases, statutes, hypothetical problems. The dominant pedagogy of legal ethics thus assumes that the method that works to inculcate a *manipulative* skill likewise works to foster an *assimilative* skill. Teaching manipulative ethics skills to law students no doubt serves important goals in professional education: it provides them with the tools to defend clients accused of ethical violations, allows them to understand how far they can go in carrying out their mandate of vigorous advocacy, and provides them with a set of heuristics with which to analyze their own borderline behaviors. But, where the manipulative pedagogy grows too strong, the assimilation of ethical norms suffers. I argue here that the different function of assimilative education requires a different form of teaching. Consequently, some space within the legal ethics curriculum should be carved out to encourage that assimilation. In the following pages, I attempt to identify why a pedagogy of

Through Role-Play and Discussion, 17 TEACHING OF PSYCHOL. 179, 180 (1990) (arguing that role-plays free students of overly harsh initial ethical judgments). See generally the Appendix to this paper.

4. More comprehensively, such a conception seeks to enhance the student's analytical thinking skills, convey the substantive law, and consider the policy arguments surrounding the doctrine. Moliterno, *supra* note 3, at 93.

improvisation could serve such a goal.⁵

The array of exceedingly difficult ethical dilemmas that law review writers and casebook editors can conjure up—and indeed that practitioners must sometimes face—should not obscure the fact that the most common ethical choices an attorney must make are those that the legal community has indeed resolved, at least on the level of aspiration. "Never commingle funds," the maxim that on one famous occasion served as the entire course of legal ethics instruction is not a subject that benefits from sustained discussion and sensitivity to nuanced positions.⁶ Nevertheless, it is indeed an

5. By "assimilation," I do not mean indoctrination. Rather, I presume that the articulated consensus moral positions of the profession are those that most experienced students will come to agree represent an optimal condition from the perspective of a state that balances its citizens' interests and eliminates arbitrary advantage. As such, the use in this article of "assimilation" merely means any non-coercive means likely to lead students towards such a conclusion. In this vein, note that higher education programs that use indoctrination have been shown to inhibit the development of moral judgment. See Steven P. McNeel, *College Teaching and Student Moral Development*, in *MORAL DEVELOPMENT IN THE PROFESSIONS: PSYCHOLOGY AND APPLIED ETHICS* 27, 29-35 (James R. Rest & Darcia Narvaez eds., 1994); see also James R. Rest & Darcia Narvaez, *Summary: What's Possible*, in *id.* at 213, 216.

6. The magnitude of my proposal depends on the size of the core set of shared values around which professional consensus exists. Obviously, a description and defense of a particular set of substantive shared values rests beyond the scope of this article. Nevertheless, a few peremptory remarks are in order. Most states have adopted some form of the American Bar Association's Mode Code of Professional Responsibility or Model Rules of Professional Conduct. Though the Code and the Rules differ in several important respects, they share many norms. See generally STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* (1998) (noting areas of jurisdictional or historic variation in substantive regulation of lawyers). Even *Kaye, Scholer*—a case perceived as a paradigmatic instance of lawyers' lack of consensus on ethical norms—reveals just how much consensus exists.

In *Kaye, Scholer*, the Office of Thrift Supervision (OTS) filed a lengthy Notice of Charges alleging that a law firm had violated various federal banking regulations. Dir. Order, O.T.S. AP-92-19 (Mar. 1, 1992). The Notice of Charges included allegations that the firm had failed to disclose material facts to the OTS, an obligation that the OTS read into a series of regulations. The matter was quickly settled, and academics and practitioners unleashed a barrage of commentary on the substantive merits of a government charge that arguably conflicted with the Bar's internal standard of professional responsibility. See, e.g., STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 729-79 (1993); Edward Brodsky, *The "Kaye Scholer" Case*, N.Y. L.J., May 22, 1992, at 1 (criticizing the action taken against the Kaye Scholer law firm); Geoffrey C. Hazard, *Ethics*, NAT'L L.J., Apr. 27, 1992, at 15 (discussing the standard concerning disclosure of facts adverse to the client); see generally Symposium, *In the Matter of Kaye, Scholer, Fierman, Hays and Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. CAL. L. REV. 977 (1993). A second generation of commentary moved away from analysis of the

area that great many attorneys will face. Some will be tempted to commingle, perhaps many more than legal educators would like to admit, and some smaller number will do so. Indeed, in one recent study at a major law school, more than one in ten students completing their education reported that they would engage in insider trading or bar examination cheating if given the opportunity.⁷ If so many students at the end of their law school education would violate such central norms of the profession, the number willing to violate other norms less central, but around which a professional consensus still exists, must be even higher.

The danger with the current approaches to teaching legal ethics is that they concentrate almost entirely on the intellectually sexier areas in which a consensus does not exist: issues where compelling arguments can be made on either side. But, it is arguably garden variety temptation that afflicts most transgressing practitioners, not the exotic and eminently debatable weed.⁸ To the extent that the teaching of legal ethics fails to address this pragmatic fact, it fails to prepare its students for the real world. In so doing, the Academy fails to protect the Bar, and indeed the broader public, from its students.⁹

substantive charges and analyzed the structural ramifications of competing bodies of ethical norm promulgation and enforcement. See Nancy Amoury Combs, *Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663 (1994) (evaluating the Office of Thrift Supervision's regulations imposed on lawyers and their conflict with rules of ethics); David B. Wilkins, *Afterword: How Should We Determine Who Should Regulate Lawyers?: Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465 (1996) (conducting a comparative analysis of regulatory institutions and the need for such analysis).

Buried in the fruitful debate over substantive norms and appropriate regulatory bodies, however, is the fact that the bulk of the OTS's charges proved not to be controversial at all. Of the three types of claims made in the Notice of Charges, only one—omission of a material fact relevant to a matter within the OTS's jurisdiction, 12 C.F.R. § 563.180(b)(1) (1998) (formerly 12 C.F.R. 56.18(b)(1) (1986))—ignited controversy. The others—repeated and knowing misrepresentations to the Federal Home Loan Banking Board and breach of professional duties to Lincoln Savings and Loan—presented straightforward factual charges of settled legal obligations. See Combs, *supra* at 678-80. The example is illustrative. While I would hazard that many teachers of legal ethics use the *Kaye, Scholer* example to discuss the battlefield issue of whether attorneys should disclose material facts, I suspect that precious few even mention that fully two-thirds of the OTS charges in that most controversial of cases rested on uncontroversial norms.

7. Donald L. McCabe et al., *The Effects of Professional Education on Values and the Resolution of Ethical Dilemmas: Business School vs. Law School Students*, 13 J. OF BUS. ETHICS 693, 697-99 (1994).

8. See James Evans, *Lawyers at Risk*, CAL. LAW., Oct. 1989, at 45 cited in Hartwell, *supra* note 3, at 537 n.105 (reviewing 285 ethical disbarments in California).

9. For its part, the Bar relies on a combination of disciplinary system and

Indeed, the Academy's focus on hard cases may do more than allocate too much time on ethical matters of peripheral significance.¹⁰ By emphasizing the ability to manipulate norms, the case book method encourages analysis over valuation, and may therefore directly hinder moral maintenance and development. As Michael Kelly has noted, "the repetitive use of difficult problems may create a sense of conceptual incoherence and breed a thoroughgoing relativism among those subjected to a strict diet of dilemmas."¹¹

Legal education directly affects some individuals' moral beings. It does so, of course, in complex ways,¹² but one of them is certainly the increasing ability to objectively *analyze* and the decreasing trust in the ability to subjectively *value*. By the middle of the first semester of law school, most students—who have indeed come to school with developed personal moral selves which have guided their typically brief adult lives—find themselves enmeshed in an intransigent cynicism, wrestling with the seeming certainty that the Court heats the law's rigid bars, then twists them to its own desires. And where judges seem to subsume the law to their own morality, lawyers seem to do the reverse, checking their moral selves at the office door as surely as they check that part of them that yearns for poetry or a walk in the woods.

To average first semester law students, law and morality

reputational constraint to encourage moral maintenance. The self-administered disciplinary system, however, often appears ineffectual, whether because of timidity, self-protection, or structural inability. Reputational concern is likewise a constraint of questionable utility, since unethical actions actually increase prestige among many sections of the Bar. Lawyers at the top of the profession "experience maximum pressure to conform to distinctively professional standards, as well as the more ordinary, ethical norms; at the same time they are insulated from pressures to violate. Conversely, lawyers at the bottom of the status ladder are maximally exposed to pressures to violate, and least subject to pressures to conform." BELLOW & MOULTON, *supra* note 2, at 40.

10. I do not mean to imply that covering areas of legal ethics where there is no professional consensus is merely self-indulgent. Teachers may well sometimes concentrate on more "difficult" ethical issues because they believe that encouraging students to discuss such matters early in their careers may help the next generation come to a consensus where the prior one has failed, or because they fear that the ramifications of transgressions in those areas are great. Teachers of ethics should indeed spend time on such contested issues. I argue here merely for the necessity of balancing conversation about—and contestation within—legal ethics conundrums with improvisational exercises centered on consensus legal ethics.

11. MICHAEL J. KELLY, THE HASTINGS CENTER REPORT ON LEGAL ETHICS AND LEGAL EDUCATION 27-28 (1980).

12. One recent study, for instance, reports that legal education partially succeeds in convincing students to accept central tenets of role-specific morality: McCabe et al., *supra* note 7, at 697-99.

seem locked in an inherently dysfunctional relationship. Many lawmaking judges seem more concerned with their own morality than with the law. And the great bulk of lawyers—who not only must (like everyone else) live with the morally-originating rules that the judges craft but whose particular role is to convince the judges to choose certain rules rather than other rules—inexplicably pay more attention to winning than to concerning themselves about whom or what causes they are serving.

After reading *Lochner*¹³ and *Griswold*¹⁴ within a month—or the commerce clause cases or the conflicting contract doctrines of gratuitous promise and reliance—many students begin to see the work of making judgments of value in the light of endless judicial bickering over intransigent moral dilemmas. What always felt somewhat difficult, judging value, now becomes associated with insoluble conflict. The ability to analyze for its own sake—or rather as a building block for arguing either side of the moral divide—begins to look more and more appealing. Distance yourself from caring about the unsolvable arguments, many students tell themselves. Take refuge in your growing ability to argue either side. All of a sudden checking the ethical self at the door starts to look like a pretty good idea. When the defensiveness is combined with the profession's natural tendency to present professional excellence as an independent virtue, students have a powerful incentive to separate their moral and professional lives.¹⁵

Within time, the particular ethical conundrums of the profession are not seen through the prism of the personal moral system previously developed, but through the prism of a set of *legal* requirements: the Code, malpractice doctrine, etc.¹⁶ The paradigm is legal, not moral, and the student *manipulates* the ethical code as she would manipulate the law; she does not

13. *Lochner v. New York*, 198 U.S. 45 (1905).

14. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

15. Gerald Postema asks "whether, given the fact of moral distance," (distance between role-specific morality and general morality) and psychological distance (distance between one's moral personality and one's role), "it is possible to retain and act out of a mature sense of responsibility in a professional role." Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980). One danger of these distances, he notes, is the temptation to identify fully with the professional role, thereby cutting oneself off from the wellsprings of practical judgment. *Id.* at 75. See also ERVING GOFFMAN, *ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION* 87-88 (1961) (studying collective behavior of social groups in focused and unfocused interactions).

16. See KELLY, *supra* note 11, at 37 (stating that "[m]ost teachers . . . find a course largely limited to . . . the Code and disciplinary system—to be morally objectionable because it can, by and large, be taken as instruction in how far a lawyer can go legally before being subjected to the risk of discipline or trouble").

ruminate on it as she would ruminate on a moral decision.¹⁷

By indoctrinating students into the cult of argument, legal education itself thus decreases the likelihood that students will accept the consensus view of professional ethics. They have been trained to search for another argument, no matter how obscure. Moreover, when incentives are added to the equation, when the violation of an ethical norm may enrich the lawyer or protect her client, the likelihood of rejecting the norm becomes even higher. Is it possible to maintain a student's developed ability to value as she moves into a culture that enshrines analysis over value, without sacrificing her ability to make important analytic distinctions between general and role-specific morality?

PEDAGOGY AND MORAL MAINTENANCE

Two and a half centuries ago, in an introduction to *Meshillat Yesharim* (The Highway of the Upright), Moshe Hayyim Luzzatto noted that he had not composed his work of moral discourse in order to¹⁸

teach people what they do not already know, but to remind them . . . of what is well known to them indeed. For most of what I say is nothing more than what most people do know and have absolutely no doubts about. But what is said in the following pages is constantly ignored, most often forgotten, *because* it is common knowledge and obvious.¹⁹

In an attempt to respond to the recurrent pedagogic problem of much moral discourse—it "says nothing new,"²⁰ as Luzzatto candidly acknowledged—the moralist sought refuge in the balm of repetition. Repeat the known, Luzzatto suggested, and the listeners will eventually take it to heart.

It is perhaps no surprise that among the first answers to this problem was the lecture. Faced with the need to transmit moral principles, many in the legal academy turned to the paradigm of preaching, the preferred vehicle for moral inculcation in Christian culture. However, the double valence of the English word "preaching" suggests the precariousness of such an approach: while the word in its transitive form connotes the expounding of religious or moral principles, its intransitive form carries with it

17. See Barbara Bezder, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159, 1162 (1992) (ascertaining that "[t]he teaching of what purport to be ethical rules for the legal profession lapses into an imitation of the legalistic methodology of the bulk of the curriculum").

18. Moshe Hayyim Luzzatto, MESHILLAT YESHARIM (undated manuscript, circa 1740), cited in Judah Goldin, *Foreword* to HEBREW ETHICAL WILLS 1 (Israel Abrahams ed., 1976) (facsimile edition).

19. *Id.*

20. Judah Goldin, *Foreword* to HEBREW ETHICAL WILLS 2 (Israel Abrahams, ed. 1976) (facsimile edition).

the tiresomeness of repetitious inveighing.²¹ In such a linguistic culture, repetition is unlikely to prove a successful pedagogic technique.

And yet, Luzzatto certainly had an important point: some values (perhaps some truths as well) are so basic and accepted that they are ignored. Though he might not have said so in the eighteenth century, we on the brink of the twenty-first century might conclude that they are ignored because they share a cardinal postmodern sin: they are boring. As such, the lecture method is their perfect handmaid, a stream of facts (whether claims of value or truth) presented by a single speaker to an undifferentiated mass of listeners.

Like the repetition embraced by Luzzatto, the lecture method ignores the individuality of the listener, who remains significant only as a neutral vessel into which facts are poured or pounded. The listener, accustomed to the complexity of the many-sided case method and to professors' solicitation not only of her ability to argue various sides of a case but of her ability ultimately to judge them, wilts before the non-interactive presentation of uncontroverted fact. The problem, then, is how to marry Luzzatto's concentration on central uncontroverted virtues with a successful means of teaching them.

The case method cures the problem of disengagement by concentrating on the periphery of contested virtues. Because contested virtues open themselves to debate and judgment, they provide students with the opportunity to play their by-now familiarly active roles (advocate, judge) in the learning process. However, such concentration, though providing learning excitement, skews the moral maintenance and development of students.

BEHAVIORAL SCIENCES AND MORAL MAINTENANCE

Is there a way to teach profession-ethics that can allow students to maintain their developed general ethical prisms and promote the analysis of specific professional ethical conundrums without cutting the students off from the wellsprings of their ethical selves? Certain non-western cultures solve the western "preaching problem" by casting the repetition of enduring truths in variegated forms that the hearer or reader must herself unpack. Pedagogic devices such as haiku or Zen koan enlist the listener in the construction of meaning, thereby avoiding some of the problems of preaching.²² An improvisational pedagogy of legal

21. See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1030 (1982) (defining the word "preach").

22. Though they are not the dominant form of ethical transmission in the West, these "mystified" ethical packages do regularly appear as a sort of

ethics similarly seeks to enlist the student in the construction of personal meaning, permitting a dynamic inculcation of the profession's consensus ethics. Before I suggest a model for such a pedagogy, one that can achieve the two goals identified above, I turn to the behavioral sciences, which have conducted the most searching inquiry into the process of norm assimilation and the problems in fostering it.

Around the middle of the twentieth century, Lawrence Kohlberg began to develop a sequential typology of moral rules known as "stage theory."²³ The theory postulated that the human organism inherently prefers to evolve morally upwardly: a person at any given stage coming into contact with a person one stage above her falls into a cognitive conflict that will eventually lead to a one-stage moral evolution.²⁴

Let us assume for the moment that Kohlberg was correct, that there are identifiable evolutionary stages of moral development and that contact with slightly more advanced stages nudges individuals into a higher state.²⁵ In such a world, morally developed faculty could programmatically lead law students through incremental advances in moral reasoning merely by exposing them, one stage at a time, to "higher" moral stages.

Would such advance in the *capacity* for moral reasoning necessarily correlate with an advance in the *use* of moral reasoning?²⁶ Even if it did, would an advance in the use of moral reasoning necessarily correlate with an advance in moral *action*? Early in his work, Kohlberg doubted any connection between an individual's capacity for moral reasoning and his demonstration of moral behavior.²⁷ Thus, an individual having reached a certain

persistent undercurrent. See, for example, Christian parables and Babylonian Talmud Tractate Pirke Avot.

23. Lawrence Kohlberg, *The Development of Modes of Thinking and Choice in Years Ten to Sixteen* (1958) (unpublished Ph.D. dissertation, University of Chicago) (on file with University of Chicago Library). See generally Lawrence Kohlberg, *Moral Development and Identification*, in *CHILD PSYCHOLOGY: SIXTY-SECOND Y.B. OF THE NAT'L SOC'Y FOR THE STUDY OF EDUC.* (Harold W. Stevenson et al eds., 1963); Lawrence Kohlberg, *The Development of Moral Character and Ideology*, in *1 REVIEW OF CHILD DEVELOPMENT RESEARCH* (Martin L. Hoffman & Lois Wladis Hoffman eds., 1964); *1&2 LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT* (1981, 1984).

24. Lawrence Kohlberg, *Stage and Sequence: the Cognitive-Developmental Approach to Socialization*, in *HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH* 347-480 (David A. Goslin ed., 1969).

25. *Id.*

26. Some doubt the proposition that people generally use the highest mode of thinking that they understand. See Don Locke, *Cognitive States of Developmental Phases?: Critique of Kohlberg's Stage-Structural Theory of Moral Reasoning*, 8 *J. OF MORAL EDUC.*, 168, 168-81 (1978) (criticizing Kohlberg's six stages of moral reasoning and cognitive-developmental theory of moralization).

27. Lawrence Kohlberg, *From Is to Ought: How to Commit the Naturalistic*

stage of moral development, an ability to manipulate the tools of moral analysis, is no more or less likely to choose any given ethically transgressive behavior than an individual of a level below—i.e., to have assimilated the normative values inherent in the analysis. The changes in level indicate the way in which the individual considers the transgressive behavior; they do not determine the outcome of the individual's decision. In his later work, however, Kohlberg suggested that evolution in the level of moral reasoning led to both an increased likelihood of moral conduct and an increased likelihood of consistency between judgment and conduct.²⁸ Experimentation has failed to prove or disprove Kohlberg's later position.²⁹

A central pedagogical problem for teachers who hope to encourage students to assimilate the profession's normative aspirations without sacrificing moral maintenance, then, is that Kohlbergian moral development may not necessarily lead to more moral action. This difficulty, like the lack of consensus around some ethical issues that forms the heart of the case method pedagogy, encourages students to develop their manipulative

Fallacy and Get Away With It in the Study of Moral Development, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 151-232 (Theodore Mischel ed., 1971).

28. Lawrence Kohlberg & D. Candee, *The Relation of Moral Judgment to Moral Action*, in MORALITY, MORAL BEHAVIOR AND MORAL DEVELOPMENT: BASIC ISSUES IN THEORY AND RESEARCH 52-73 (William Kurtines & Jacob L. Gewirtz eds., 1984).

29. See Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, in 1 HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 46, 67 (William M. Kurtines & Jacob L. Gewirtz eds., 1991) (citing contradictory studies, studies notwithstanding replication, and studies with methodological deficiencies); Walter Mischel & Harriet N. Mischel, *A Cognitive Social-Learning Approach to Morality and Self-Regulation*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES 84, 101-07 (Thomas Lickona ed., 1976).

The problem lies in part with the difficulty of definition: how does one define "moral action" where ethical consensus does not exist? Moral philosophy has struggled with that question for some time. In the early 1900s, moral philosophers recognized the impossibility of objectively analyzing morality without establishing a touchstone of morality that would depend on an arguable value basis. Failing to agree on one, moral philosophy saw itself bob into the backwaters of philosophy. Only in 1971 did it find itself pulled back into the main current, as John Rawls chose a value basis and constructed a theory around it. JOHN RAWLS, A THEORY OF JUSTICE 46-53 (1971). To those who do not accept Rawls' particular value basis, the work proves less than satisfying. See generally READING RAWLS: CRITICAL STUDIES ON RAWLS' 'A THEORY OF JUSTICE' (Norman Daniels ed., 1975). As Alisdair MacIntyre noted, where "there is no longer a shared concept of the community's good . . . there can no longer either be any very substantial concept of what it is to contribute more or less to the achievement of that good." ALASDAIR MACINTYRE, AFTER VIRTUE 215 (1981). The method presented in this article, however, deals primarily with those areas in which there are consensus concepts of the community's good.

skills: without a corresponding change in behavior, the Kohlbergian evolution in moral-analytical skills becomes no more than a subset of analytical development.

This problem—that greater powers of moral analysis may not lead to a stronger inclination towards moral action—has been squarely faced by the social cognitivists, who questioned Kohlberg's failure to focus on the social context of moral development. Among those social cognitivists, Norma Haan argues that "moral development" may not occur at all. What Kohlberg views as moral development, Haan argues, could be the maturation of individual problem-solving capacities within the progressively more complicated social situations in which a maturing individual finds herself.³⁰ Haan concludes from empirical investigations that "when the development of moral *action* is the focus . . . learning how to handle one's self in conflicts is more critical than improving one's moral vocabulary. . . ."³¹

Kohlberg, of course, concentrated on the improvement in vocabulary and the concomitant ability to utilize the vocabulary well. However, as Haan recognizes, virtuosity in the practice hall does not necessarily lead to successful performance: some abstractly learned skills are of little use in the playing of a game.³² While some abstractly learned skills—the ability to recognize an improper target area in foil fencing, for instance—require little translation in order to be applied in conflict, some skills can only be learned through practice. The foil fencer, for instance, may understand parries, but until he parries often, his knowledge will do little to protect him. We may speak more accurately not merely of a bifurcation between moral vocabulary (a manipulative skill abstractly learned) and moral action (an assimilative value acquired through practice), but rather of a continuum of skills that runs from those that may be learned entirely through abstraction to those that may be learned only through practice. Thus where the foil fencer who has assimilated the ability to parry may be said to have acquired a non-analytic skill, it is nonetheless true that his

30. Norma Haan, *Moral Development and Action From a Social Constructivist Perspective*, in HANDBOOK, *supra* note 29, at 252, 264-65. Haan solves the "no moral touchstone" problem the Rawlsian way: she asserts a first principle—hers is "moral dialogue"—and uses it as the basis of her analysis. *Id.* at 267.

31. *Id.* (emphasis added).

32. In its broadest form, this is merely a restatement of the Aristotelian notion of "practical judgment", which Postema describes as "both a disposition—a trait of character—and a skill which must be learned and continually exercised." Postema, *supra* note 15, at 68. See also David Luban & Michael Millemann, *Can Judgment Be Taught?* (draft at 41-46) (paper presented to Yale Law School faculty workshop, Spring 1995) (describing advantages of clinical ethics education in promoting both Aristotelian practice-based "habituation" and Kantian judgment).

skills are far more abstract than those of a broadsword soldier in King George's army, whose practice-acquired skills flash unconstrained by the abstract rules of foil. The virtuosic vocabulary of foil has only limited use in the realm of martial conflict.³³

PEDAGOGY IN LIGHT OF THE BEHAVIORAL SCIENCES

If the social cognitivists are right, a pedagogy that aims to increase the likelihood that students will use their virtuosic vocabulary in the service of improved ethical conduct must provide students with the opportunity to learn how to handle themselves in times of ethical conflict. Most of the traditional pedagogies of legal ethics, however, concentrate largely on the enhancement and use of moral vocabulary. The lecture method, of course, presents the least experiential alternative. The case method presents at best a skeletonized version of moral choice: fact-scoured appellate opinions that nudge students' attention toward the epiphenomenal legal issues. At worst, the case method's focus on manipulation distracts students from the work of learning to stand in the midst of competing ethical claims.

Of the traditional pedagogies, two come closest to creating a space in which students can learn to handle themselves in conflicts: clinic-based ethics courses and role-playing exercises. The advantages and disadvantages between the two methods are familiar, and different schools weigh them differently.³⁴ For those who seek to provide a space in which students may learn to handle themselves in conflicts, but for whom the costs of using a clinical program as an ethics classroom outweigh the benefits, role-playing provides a suitable alternative.

One must define what is meant by "conflict" before turning to how an improvisational pedagogy can create a space in which students learn to handle themselves in conflicts. Among the social

33. And further still, the English soldier's conduct is itself constrained by the abstractly learned dictates of proper martial conduct inherent in Elizabethan culture.

34. Moliterno describes the trade-off between clinical and role-play methods of instruction in the following terms:

real problems with instructor dominance, unpredictable substance (some issues will never arise), uncontrollable coverage, and relatively short term exposure (resulting in many of the ramifications of ethics choices being passed to the next student instead of being experienced by the acting student), or long-term simulations that will not result in real outcomes for any client but have certainty of issue coverage, the likelihood that students will see the results of their own choices, and students exercising independent judgment and developing long-term relationships with the various participants.

Moliterno, *supra* note 3, at 133. For a broader comparison of the two approaches, see *id.* at 122-33.

cognitivists, Albert Bandura has conducted one of the more searching inquiries into conflict. The primary source of conflict, he notes, is the self. Conflict is, after all, the self's realization that it is not locked into one particular path: many paths open from the crossroads of moral choice. At such a crossroads, social influences may determine direction: moral choices are "more a function of the social influences operating in the situation than of persons' stages of moral competence."³⁵

Note the distance from Kohlberg: in the real world, Bandura observes, analytic reasoning often takes a back seat to self-regulatory capabilities. A student may be an expert at virtuosic application of the moral vocabulary attendant upon the highest steps of Kohlberg's stage theory; may be able to attach metaphors culled from cases to the dilemma in which he finds himself; and may be able to point to specific exhortations or suggestions of the disciplinary codes. But none of these matters if he cannot exercise self-regulation within the peculiar new world of professional choices.

Most students, of course, possess some self-regulatory capabilities.³⁶ "There is a difference[, however,] between possessing self-regulatory capabilities and being able to apply them effectively and consistently under the pressure of contravening influences."³⁷ "Effective self-regulation of conduct,"

35. Bandura, *supra* note 29, at 48 (citation omitted). Central psychosocial factors governing moral conduct include: cognizance of potential personal consequences, William E. Sobesky, *The Effects of Situational Factors on Moral Judgments*, 54 CHILD DEV. 574-84 (1983); cognizance of potential consequences on others, Bandura, *supra* note 29, at 53; and the influence of peers and parents, *id.* at 55. See also Sanford M. Dornbusch, *Individual Moral Choices and Social Evaluations: A Research Odyssey*, in 4 ADVANCES IN GROUP PROCESSES: THEORY AND RESEARCH 271-307 (E.J. Lawler & B. Markovsky eds., 1987) (stating that even though parents' evaluative reactions carry more weight, peers' evaluative reactions win out, because peers present at decisional moment). Other factors include:

nature of the transgression; its base rate of occurrence and degree of norm variation; the contexts in which it is performed and the perceived situational and personal motivators for it; the immediate and long-range consequences of the actions; whether it produces personal injury or property damage; whether it is directed at faceless agencies and corporations or at individuals; the characteristics of the wrongdoers, such as their age, sex, ethnic, and social status; and the characteristics of the victims and their perceived blameworthiness.

Bandura, *supra* note 29, at 65. In addition, individuals' weighing of the significance of process (ethical) against product may affect choice.

36. The Model Penal Code labels individuals who possess few or no self-regulatory capabilities as mentally ill. See MODEL PENAL CODE § 4.02(1) (annunciating that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity . . . to conform his conduct to the requirements of law").

37. Bandura, *supra* note 29, at 69.

Bandura says, "requires not only self-regulatory skills but also strong self-belief in one's capabilities to achieve personal control."³⁸ Individuals who believe themselves to have strong powers of self-regulation persevere more strongly in their efforts at self-control and more successfully resist social pressures which violate their standards. On the other hand, a low sense of self-control "heightens vulnerability to social pressures for transgressive conduct."³⁹

Ultimately, the development of both self-regulatory skills and confidence in the use of such skills does not provide an individual with an unpiercable ethical armor. An individual who has learned to handle himself in conflicts—i.e., who has experientially learned self-regulatory capacity and confidence— still has available many strategies with which to disengage his powers of moral control.⁴⁰ An opportunity to use each strategy may arise at one or more discrete moments during or after the moral choice: he may justify his transgressive behavior despite his knowledge that the justification is insufficient; compare the behavior to worse behaviors; euphemistically label the behavior; deny proximate causal responsibility; claim that responsibility lies with a group; minimize, ignore, or misconstrue consequences of the action; dehumanize the victim; or attribute blame to the victim.⁴¹ The experimental literature, beginning with the work of Stanley Milgram,⁴² is rich with descriptions of these deactivations and their consequences.⁴³

38. *Id.*

39. *Id.*

40. The following conflict factors carry different weights in different contexts. "With increasing experience and cognitive competence, moral judgments change from single-dimensional rules to multidimensional rules of conduct." Bandura, *supra* note 29, at 65. Each ethically troubling situation, then, potentially brings to bear a large number of relevant psychosocial factors, which the deciding individual must process. Since humans are maladapted at integrating large sets of information, *see generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982), individuals confronted with complex situations turn to simple positions, often those that speak to simple interests.

41. *See* Bandura, *supra* note 29, at 72 (fig. 1.1). *See generally* ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT & ACTION: A SOCIAL COGNITIVE THEORY (1986).

42. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

43. *E.g.*, Albert Bandura et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. OF RES. IN PERSONALITY 253-69 (1975) (asserting that subjects punish victims up to 50% more when punishment decisions are made by group instead of individual; subjects punish victims up to 400% more when individuals are dehumanized); Bandura, *supra* note 29, at 87 (stating that less than half as many subjects directly inflict suffering on individuals as remotely inflict suffering) (plotting data from Milgram); *id.* at 84 (illustrating that nine times as many subjects

CONCLUSION AND MODEL

A pedagogy of improvisation thus faces a host of challenges. To begin with, it must limit itself to the area of the curriculum that seeks to inculcate consensus values, while building bridges to methods better suited to the teaching of analytic skills.⁴⁴ In an important use of such a bridge, it must reflect on an improvisational experience to elucidate a typology of moral disengagements that promotes knowledge of common self-deceptions employed in times of conflict. It must avoid the dangers of preaching, instead attempting to dynamically inculcate consensus ethics by enlisting the student in the construction of personal and social meaning. Finally, it must permit the construction of a class that allows students to learn how to handle themselves in conflicts by enhancing their self-regulatory competence and confidence.

Whether or not a pedagogy of improvisation can meet these challenges is a question that can only be answered in practice, with students in an actual class tested for change. I broadly sketch here one possible format for such a class and some predictive underpinning for the format. Unfortunately, a lack of printed resources in a theory of improvisation constrains my research in this area;⁴⁵ as such, the model and suggestive

are obedient to injurious commands when authority's command bulwarked by compliant peers as when authority's command contradicted by defiant peers) (plotting data from Milgram). See also CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1992) (providing a structural explanation for Nazi terror). But see DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* 542 n.29 et seq. (1996) (directly attacking Browning's structural explanation of Police Battalion 101's terror and providing a cultural explanation).

44. Though I have specifically avoided consideration of the claim that an improvisational pedagogy would be useful in the teaching of non-consensus moral positions, the possibility is worth investigating. Anthony Kronman reveals the role of imagination in deliberative inquiry: to choose among incommensurable choices one must construct a mental image of potential choices, not just to analyze them rationally, but also "to learn something about the experience of actually committing oneself to them." ANTHONY T. KRONMAN, *THE LOST LAWYER* 69 (1993). Improvisational theater, of course, rests on the assumption that one learns far more about the experience of actually committing oneself by actually committing oneself—albeit in an artificially structured environment—than one does by merely *imagining* committing oneself; directors of scripted plays often use improvisation to increase the complexity (and thus reality) of their actors' imaginations. If the case method is really "largely an exercise in forced role playing", *id.* at 117, then perhaps fuller role playing could promote greater prudence. I leave to the future—or to others—the task of describing how such improvisation might work in theory and practice.

45. The three major texts in improvisational theater are VIOLA SPOLIN, *IMPROVISATION FOR THE THEATER* (1983), ANTHONY FROST & RALPH YARROW, *IMPROVISATION IN DRAMA* (1989), and KEITH JOHNSTONE, *IMPRO!* (1987).

explanations are mere preliminary sketches.

Because a consideration of the ways in which an improvisational pedagogy could meet the challenges posed above requires a tangible point of reference, I sketch a simple model of an ethics class built upon a pedagogy of improvisation. Students work in a small group with a professor on the comprehensive legal problems (i.e., from initial interview to final resolution) of role-played clients for a full year.⁴⁶ The legal problems present ethical issues, both mundane and exotic. Students play lawyers only, i.e., they undertake only those roles in which they can reasonably imagine themselves a few years hence; clients (and other necessary roles, such as witnesses) are played by outsiders.⁴⁷ The group meets in analytic sessions after each week of improvisation to discuss the prior sessions.⁴⁸

Though all seek to understand what works in improvisational theater and what does not, none attempt to discover an overarching theory of improvisation. My thoughts on improvisation evolved from these three texts and from my own experiences as an actor and director of both scripted and improvisational theater.

I suspect that the dearth of theatrical theory comes from two major sources: one structural, the other innate to the discipline. First, theater offers few rewards for the publication of theory: universities more often base tenure on production quality than publication quality, and professional reputation is based almost wholly on production quality. Second, improvisation is itself nearly anti-theoretical; the most experiential of arts, it presumes that only practice teaches.

46. The length of the improvisation permits greater verisimilitude along two important axes. First, context exerts a significant influence on an individual making ethical decisions; by ensuring that the student will face the same faces after her decision, the model ensures that she will experience the consequences in a group educational setting. (As Rhode has noted, the way in which an individual evaluates the consequences of her actions "can be critical in shaping conduct." RHODE, *supra* note 2, at 7.) Second, one ideal of ethical decisionmaking is the continued commitment to further growth; by keeping the student involved for a year, the model allows the student not only to experience the process of ethical decisionmaking, but potentially to experience an evolution of her own process.

47. The model described in the preceding sentences of this paragraph is drawn from the Comprehensive Skills Development program at William & Mary. See Moliterno, *supra* note 3, at 123 (illustrating a simulated client representation program in which students role-play legal problems).

48. The analytic sessions provide the bulk of education in the development of moral reasoning, while the improvisational sessions provide education in moral action. Thus the improvisational sessions avoid concentration on the development of a vocabulary and its virtuosic use; such concentration on higher levels of moral reasoning has proved no more effective in altering moral judgment than mere observation of the same moral arguments being modeled. See Robert E. Matesy & Barbara A. Acksen, *The Effect of Role-playing Discrepant Positions on Change in Moral Judgments and Attitudes*, 128 J. OF GENETIC PSYCHOL. 182, 182-200 (1976) (reviewing a study of moral positions and judgment in an experiment with 60 children in role-playing exercises). We should expect such a result: if a legal ethics course concentrates solely on analytic reasoning—i.e., on development of a

Such a model permits a focus on the profession's consensus ethical positions, while avoiding the dangers of preaching by permitting students to take an active part in discovering and indeed constructing the norm. In order to maximize students' investment in the construction of norms, teachers may consider using part of the analytic sessions in a manner suggested in another context by Hartwell:⁴⁹ the group of students analytically identifies the ethical issue; each student individually determines what she thinks should be done; the group reaches consensus on a rule to guide such situations, then justifies the rule on the bases of attorney integrity, attorney/client unit integrity, fairness and efficiency of the legal system, and the public's right to know.⁵⁰ Such a classroom process not only maximizes investment—thereby solidifying students commitment to professional ethical rules that accord with the generation's consensus concepts of justice—but also clarifies the ways in which the students believe the current ethical norms fall short, thus allowing the students themselves to identify areas in need of improvement.⁵¹

Such commitment and clarification depend on subsequent analytical elucidation of the formal rules and comparison of them to the student-generated rules. Hartwell's suggested rule-writing approach thus indicates one possible link between an improvisational pedagogy and traditional legal analysis. A second

manipulative skill without concern for development in moral action—lecture or case method should prove at least equally effective.

49. See Hartwell, *supra* note 3, at 522-27. Hartwell suggests this method as an independent approach; he does not consider the ways in which it may intersect with an improvisational approach.

50. Students could not justify their rule based on any formal professional ethical rules; Hartwell teaches the black letter rules independently. See Hartwell, *supra* note 3, at 527 (reporting test results consistent with Kohlberg's theory of moral development).

51. The relationship between individual and group construction of ethical norms in such a model requires further development. Bandura notes that "[t]o enhance the compatibility between personal and social influences, people generally select associates who share similar standards of conduct and thus ensure social support for their own system of self-evaluation." Bandura, *supra* note 29, at 70 (citations omitted). A classroom is by nature cross-sectional, even if the course is elective. Thus the class will provide opportunities to test the conflict between personal and social feedback; in a classroom attentive to the development of political fraternity, see generally KRONMAN, *supra* note 44, such conflict should be productive.

Hartwell's model has led to increases in ethical analytical development as measured by Kohlberg's standard DIT test, though he has not attempted to show a correlation with moral action. Hartwell notes that his model differs from legal discourse in that it requires self-revelatory and cooperative skills rather than advocacy- and persuasion-oriented ones. Hartwell believes that the former is more important in ethical development. The group decisions, he argues, influence the students more deeply and lastingly than mere positions that they are asked to defend or attack. Hartwell, *supra* note 3, at 524-32.

link goes beyond the traditional understanding of the use of analytic method in professional responsibility courses: analytic sessions could be used to identify those moral disengagement strategies used by students in the course of the improvisations.⁵² While such identification does not fall within the current understanding of the role of a teacher of professional ethics, it is an essential task of any teacher who hopes to forge a connection between the moral reasoning of the classroom and the moral action of the fast approaching world.⁵³

An improvisational model succeeds most directly in permitting students to learn how to handle themselves in conflicts by enhancing their self-regulatory competence and confidence. Here, preference for an improvisational method is clearest.⁵⁴ Since competence and confidence in the practice of a skill can only be achieved by doing, sustained improvisation provides a clear advantage.⁵⁵ The closer that profession-ethics instruction can come

52. For discussions of moral disengagement strategies as described by the social cognitivists, see notes 41-44 and accompanying text. Students who learn of strategies of moral disengagement after having actually implemented such strategies or seen their peers do so are far more likely to internalize knowledge of those strategies than students who merely hear or read of them.

53. Even students highly educated in moral reasoning are susceptible to slight pressures counselling moral disengagement. In a famous Princeton experiment, researchers investigated the responses of students studying the parable of the Good Samaritan in one building who passed a hurt person on their way to tape a sermon on the Good Samaritan in a second building. The percentage of students who stopped to assist the injured person was strongly correlated with whether or not they were told to hurry on their way to the second building. John M. Darley & C. Daniel Batson, *From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. OF PERSONALITY AND SOC. PSYCHOL. 100, 100-08 (1973).

54. The advantage of an improvisational method over a clinical method is not clear. See *supra* note 34.

55. Note that the veracity of my claim rests on the assumption that Aristotelian habituation acquired during the form of communication denominated "play" can lead to lasting changes beyond the play itself, including enduring increases in self-confidence. See *supra* notes 32-34 and accompanying text. For an explanation (widely used by anthropologists, psychiatrists, literary theorists, and art historians) of the communicative dialectics inherent in the relationship between play and not-play, see Gregory Bateson, *A Theory of Play and Fantasy*, II A.P.A. PSYCHIATRIC RESEARCH REPORTS (1955), reprinted in GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 177, 177-93 (1972).

While Bateson provides some theoretical support for my claim that students' involvement in improvisational simulation of ethical dilemmas can lead to increased self-confidence in ethical decisionmaking, proof would require empirical psychological data. While none has been attempted, Moliterno provides anecdotal evidence of increased self-confidence in his program, which he says allows incremental development that allows "students to gain confidence in their skills." Moliterno, *supra* note 3, at 125. Similarly, Michael Millemann notes that "students must feel better about their own competency"; his multi-week role play at Maryland "allow[s them] to become

to experience—i.e., the less it requires of the student in the way of transposition and analogy—the more likely it is to provide increased reserves of self-control. Furthermore, the continuing experience of verisimilitude present in a sustained (i.e., multi-session) improvisation makes a student more likely to internalize a norm:

If people encounter essentially similar constellations of events time and again, they do not have to go through the same moral judgmental process of weighting and integrating moral factors each time before they act. Nor do they have to conjure up self-sanctions anticipatorily on each repeated occasion. They routinize their judgment and action to the point when they execute their behavior with little accompanying thought.⁵⁶

In Rawlsian terms, an improvisational pedagogy allows the student to achieve "reflective equilibrium" through practice. Though an individual may achieve an initial equilibrium in later life, after both experience and the time, and inclination for considered reflection, she will have done so only after years of disequilibrium. Of course, equilibriums change. An improvisational model allows the first swings—always the widest in the path to a balanced center—to take place before they can deeply injure the novice attorney, her clients, or the broader society.

competent." Telephone Interview with Michael Millemann, University of Maryland School of Law (Dec. 14, 1995).

56. Bandura, *supra* note 29, at 69. "[S]ignificant changes in morally relevant factors" trigger reactivation of the evaluative process, however. *Id.*

AN APPENDIX: ON THE USES OF PEDAGOGICAL SCHOLARSHIP IN
LEGAL ETHICS

A dearth in the literature of descriptions of actual legal ethics programs has limited the descriptive nuance of this research. Perhaps the dearth is due to the fact that those few articles on the subject that do appear receive scant attention. Professor Moliterno's careful analysis of the teaching of ethics-responsibility in William & Mary's comprehensive skills development program, for instance, had been cited in only one law review article in last five years before I wrote this article, and even there not for its substantive concerns. Though bromides for and against the teaching of certain narrow elements of professional responsibility may be tossed around in a few articles, and though the question of whether ethics-responsibility ought to be taught in a course, clinic, pervasively, or not at all remains debated, critical analyses of actual teaching programs that have been developed and run are almost universally ignored.

In the area of ethics-responsibility, at least, legal education seems to be deaf, dumb and blind. Institutions develop programs, experiment with them, and maintain them or abandon them, with other institutions learning little or nothing from all the work. Hearsay and gossip, rather than peer-reviewed analysis, seem to constitute the central communicative channels in the field. The primitivism of ethics-responsibility curricular development is stunning: each institution going it alone, hearing appraisals of curricular programs only informally at conferences or through the occasional transfer of a professor from one school to another.

The ignorance of the field stands in marked contrast to other areas of law, in which scholars quickly seize upon new articles to scrutinize the arguments in the grand tradition of peer review. Ironically, it is this field—legal pedagogy—that requires attention far more than the others. The reason has nothing to do with the underlying significance of the subject matter, or even with the levels of attention or disregard of a given field, but rather with the structures of deliberation and decision.

In other substantive areas, scholars may deliberate, but courts decide. In legal pedagogy, the same individuals hold the powers of deliberation and decision. Thus their ignorance of pedagogical deliberations far more significantly affects developments in the real world than would ignorance of deliberations in an area of substantive law. Compare, for instance, the areas of civil procedure and legal pedagogy. In procedure, a scholar may analyze developments in mass torts cases to reveal an underlying structure previously unrecognized, and from there propose a change in procedure. Other scholars may or may not analyze her article, but their analyses are ultimately not the point;

they exist in the realm of deliberation. In a parallel realm, practitioners and lawmakers' aides will occasionally scan articles such as the first scholar's in order to cull arguments that will be of use to their struggles in courts and legislatures. To the extent that her analysis passes muster in their eyes, they will use it, presenting it to those courts and legislatures. Judges and representatives will then hear her analysis and proposal, and decide. Thus her deliberation will lead indirectly to the realm of decision, whether or not other professional deliberators choose to consider it.

In the field of legal pedagogy, things are quite different. There are no decisional tribunals for matters of legal pedagogy other than law school faculties and administrations. Therefore the realms of deliberation and decision are essentially coterminous. To the extent that subsequent deliberators do not consider the first scholar's deliberations, then, and to the further extent that those subsequent deliberators are the decisionmakers, the deliberation and the decision are divorced. Decision remains uninformed by deliberation.

That is a shame. The endeavor of ethical-responsibility legal pedagogy is, at least in part, to send more ethical lawyers into the world, and from there to foster a more ethical world. The extent to which faculties and administrations leave themselves blind to the experiments of other schools is unquestionably related to the extent to which they fail to achieve what they could in that endeavor. Education and psychology are, after all, developed fields with methodologies for measuring curricular success and failure.

Why should this be so? The failure to read (or at least cite) articles that analyze attempts to teach ethics-responsibility material can not, of course, be explained by their limited availability. Journals carrying relevant articles are subscribed to by a wide variety of law libraries, and the overwhelming number of curricular appraisals are printed in journals carried by the major online computer services.

In part, I think the failure is an understandable (though avoidable) consequence of the disciplinary divisions of the Academy. Neither lawyers nor law professors are trained much in education or psychology, and yet it is precisely lawyers and law professors that structure American legal education. Though they may have strong opinions about the need to teach ethics-responsibility, they may have little taste for essentially educational analyses of other programs.

The result is ethics-responsibility curricular development that might fit neatly in the stone age slot on the timeline of educational methodology, development often doomed to repeat mistakes made by others before. There is always room for spontaneous

pedagogical developments; no field will survive for long without the raw sparks of innovation. But for those sparks to survive, for fire to be more than an innovation of one clan in one cave, the field must learn to nourish those sparks in the blowing wind of analytic discourse.

