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Ethics in Legal Education: An Augmentation of Legal Realism

Gerald R. Ferrera*

[T]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire.

Oliver Wendell Holmes, Jr.¹

INTRODUCTION

The integration of ethics into the law curriculum continues to pose a formidable challenge to law professors who often express discomfort in developing ethical theory in case analysis as something alien to traditional legal reasoning. This article takes the position that coverage of ethics in legal education is a reasonable extension of the "legal realism" movement of the 1930s. This argument is based upon the doctrines of the founder of legal realism, Oliver Wendell Holmes, Jr., and other legal scholars who contributed to the jurisprudential school of "legal realism." Contemporary legal education ought to integrate the ethical paradigm into legal studies as an extension of the traditional jurisprudence of legal realism. A thorough analysis of case decisions demands such a conviction. The elimination of ethical discussion from legal education assures loss of student value orientation and moral growth.

The purpose of this article is not to suggest that the law somehow seeks out ethical theory for its epistemological justification. The ethical paradigm² serves to trace the rationale of the courts and enhances student comprehension of the ethical choices involved in the decision-making process. Legal education should provide value choices within the ethical paradigm as a way to reach alternative social results. The argument that proposes a legal analysis, which

* Professor and Chair, Law Department, Bentley College.

1. O.W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 238 (1920).

2. See *infra* notes 60-91 and accompanying text.

omits the ethical perspective, conceals judicial value choices and misconstrues the normative judgments of the courts. The utilization of the ethical paradigm will assist both scholars and students in their search for value choices present in decisional law.

This is hardly the first proposal that ethics is an appropriate and necessary discipline to be synthesized with legal education.³ Nevertheless, this article demonstrates that ethical theory provides a way to explain legal argument, which itself represents an extension of legal realism. This is illustrated by a discussion of some of the Burger and Rehnquist Court decisions within the context of the ethical paradigm.

Part I of this article provides an overview of the legal realism movement. Although the legal scholars who developed the movement proffered various versions of its metaphysics, their consensus reveals an aversion to the "rule of law" as the guiding principle of jurisprudence. Instead, the primary focus of the legal realism movement was legal education that would bring about politically desirable social ends.

Part II briefly surveys the ethical paradigm and reviews its ethical construct. This author suggests that some legal realists, unlike Justice O.W. Holmes, would have approved of ethical case analysis. The article proposes that the ethical paradigm can be readily used in legal education because of its adaptability to case analysis.

Part III offers a review of First Amendment cases from the Burger and Rehnquist Courts using the ethical paradigm as an extension of legal realism. This perspective suggests a methodology suitable to case analysis, as ethics becomes relevant to legal education when construed as an augmentation of legal realism. Part III further argues that the omission of ethical analysis from case decisions prevents the development of student value orientation and moral growth.

Part IV contends that the ethical paradigm is a logical extension of legal realism, which applies to values not found in appellate court decisions traditionally used in legal education. Extending legal realism to include the ethical paradigm in case analysis will enhance moral development and intensify the social, economic, and political awareness of the student.

3. For an excellent discussion of the role of ethics in business education and the scholars who have contributed to that movement, see Conry & Nelson, *Business Law and Moral Growth*, 27 AM. BUS. L.J. 1 (1989). Conry argues that legal education should promote moral growth in students. *Id.* at 36.

I. HISTORICAL OVERVIEW OF LEGAL REALISM

A. *Justice Holmes' Early Attack on Legal Formalism*

Justice Holmes has been characterized by legal scholars as "historically significant for his contribution to the subversion of an untenable orthodoxy."⁴ This repudiation is a reference to legal fundamentalism, which embraced the rule of law as the guiding standard of jurisprudence. Holmes' seminal work, *The Common Law*, was published when he was a thirty-nine-year-old professor at Harvard Law School. It is perhaps best known for its often cited language:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁵

Justice Holmes would argue that decisional law should reflect reality and at some level become public policy, which incorporates the evolving social arrangements of a free society. This theory contradicted the classical legal reasoning of the late nineteenth century, which viewed case law as apolitical and unconcerned with social reality. The latter position posits a legal landscape contoured by the legislature rather than discovered through the judicial process. Holmes' famous dissent in *Lochner v. New York*, announcing that "general propositions do not decide concrete cases,"⁶ became a rallying cry for the nascent movement of legal realism opposed to classical legal orthodoxy.

Justice Holmes' essay, *The Path of the Law*,⁷ written while he was a judge on the Supreme Judicial Court of Massachusetts, emphasized the objective of legal study as the prediction of a judge's decision.⁸

4. KAPLAN, ATIYAH & VETTER, *HOLMES AND THE COMMON LAW: A CENTURY LATER, THE HOLMES LECTURES*, 1981, at 81 (Harvard Law School, Occasional Pamphlet No. Ten, 1983) [hereinafter *HOLMES*]. Professor Vetter's position is that Holmes had little to contribute to legal reasoning by way of moral or economic analysis. *Id.*

5. O.W. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963) [hereinafter *COMMON LAW*].

6. *Lochner v. New York*, 198 U.S. 45, 74-75 (1905) (Holmes, J., dissenting) (supporting the constitutionality of social legislation and stating, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics [A] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.") *Id.* at 75-76.

7. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter *The Path*]. (arguing that historical circumstances shape the law rather than logical necessity).

8. *Id.* at 460-61.

To Holmes, knowing how a judge would rule on a particular set of facts became more significant than the rule of law. Holmes abhorred the juxtaposition of law and ethics and admitted his way of analyzing a contract “stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”⁹ Holmes’ theory of a contract excluded a duty to perform and emphasized the contract as an allocation of risk.¹⁰ He substituted an “objective” approach to contracts with the “subjective” approach followed by the courts.¹¹ Lawyers were told by Holmes not to confuse morality with law.¹² To Holmes, the lawyer of the future was “the man of statistics and the master of economics.”¹³ Ethics and the rule of law should not contaminate the operative factual consideration of a case, posited Holmes. Holmes insisted that “[t]o have doubted one’s own first principles is the mark of a civilized man.”¹⁴ He would refer to his own beliefs as “can’t helps” insisting that others were under no obligation to share them.¹⁵ Holmes was an agnostic who adopted the Darwinian social philosophy of survival of the fittest.¹⁶ This evolutionary philosophy may account for his statement that “[t]he important phenomenon is . . . the justice and reasonableness of a decision, not its consistency with previously held views.”¹⁷ Law, according to Holmes, “should correspond with the actual feelings and demands of the community, whether right or wrong.”¹⁸ Hardly the stuff of ethical theory! Holmes’ basis of morality was the conception of law as an evolving social policy, rather than as a theory of the ethics of social justice.

B. *The Development of Legal Realism in the 1930s*

The Realists borrowed from Holmes a vision of law as an opera-

9. *Id.* at 462.

10. *Id.* at 472-74. See also COMMON LAW, *supra* note 5, at 334-36.

11. See G. GILMORE, THE DEATH OF CONTRACT 35 (1974) (arguing a modern approach for contract liability that supports Holmes’ “objectivist theory” that contract is being absorbed into the mainstream of tort law under the doctrines of quasi-contract, unjust enrichment and promissory estoppel). Most contract cases can be brought under section 90 of the Restatement (Second) Contracts, which states in part: “[O]bligations and remedies based on reliance are not peculiar to the law of contracts Reliance is also a significant feature of numerous rules in the law of negligence, deceit and restitution.” RESTATEMENT (SECOND) OF CONTRACTS § 90 comment a (1979).

12. *The Path*, *supra* note 7, at 461.

13. *Id.* at 469. Holmes called for more empirical social science research in the law and stated: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” *Id.*

14. O.W. HOLMES, *Ideals and Doubts*, in COLLECTED LEGAL PAPERS 307 (1920).

15. See HOLMES, *supra* note 4, at 69.

16. *Id.* at 97.

17. M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, 155-57 (1963).

18. See HOLMES, *supra* note 4, at 36.

tional process that reflects the current reality. The 1930s produced two provocative texts on legal realism: Karl Llewellyn's *The Bramble Bush*¹⁹ and Jerome Frank's *Law and the Modern Mind*.²⁰

Llewellyn was a thirty-seven-year-old law professor who had taught at Columbia Law School for seven years before publishing *The Bramble Bush*. Llewellyn is known to both lawyers and law students as the principal drafter of the Uniform Commercial Code. In 1930, he published a law review article on the new realist jurisprudence, which criticized Roscoe Pound, renowned scholar and Dean of Harvard Law School.²¹ Dean Pound's response²² attacked the Realists and resulted in Professor Llewellyn's publication of a survey of twenty legal scholars from Yale and Columbia on their opinions of the accuracy of Pound's argument. The census created a heated debate among law professors on the nature of legal realism.²³ Pound was a pre-World War I legal progressive and founder of the school of sociological jurisprudence. His "Liberty of Contract" paper of 1909 argued for the connection of the social sciences with law. Dean Pound wrote:

[T]he entire separation of jurisprudence from the other social sciences . . . was not merely unfortunate for the science of law on general considerations, in that it necessitated a narrow and partial view but was in large part to be charged with the backwardness of law in meeting social ends . . . and the gulf between legal thought and popular matters of social reform. Not a little of the world-wide discontent with our present legal order is due to modes of . . . juridical method[s] which result from want of "team-work" between jurisprudence and the other social sciences.²⁴

Dean Pound's disapproval of the Roosevelt administration's New Deal political and social programs accounts for his controversy with

19. K. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

20. J. FRANK, *LAW AND THE MODERN MIND* (1930) [hereinafter *MODERN MIND*].

21. Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 COLUM. L. REV. 431 (1930).

22. Pound, *The Call For A Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

23. Llewellyn, *Some Realism About Realism - Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). See also Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921 (discussing Llewellyn's failure to fully articulate his vision of Realism by providing only a partial list of Realists to Pound).

24. Pound, *The Scope and Purpose of Sociological Jurisprudence (part 1)*, 24 HARV. L. REV. 591 (1911); Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (Pound suggested the modern teacher of law should be a student of sociology, economics, and politics to remedy the backwardness of law in meeting social problems). See generally R. POUND, *LAW AND MORALS* (1924) (Pound wrote "[a]ll discussion of the relation of . . . jurisprudence to ethics, goes back to the Greek thinkers").

some of the legal realist scholars of the 1930s.²⁵ However, both Professor Llewellyn and Dean Pound claimed loyalty to Justice Holmes.²⁶ Recall that Holmes left little room for emotion or feeling in his philosophy. Holmes had written that "at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference."²⁷ He did not believe in the natural law or moral ideas as the legal framework of society.²⁸ The legal realist saw Holmes' jurisprudence as a means to resolve "[t]he conflict between fixed, mechanical concepts of law and dynamic, progressive ideas in politics."²⁹

Realism was a method of scrutinizing a transaction while letting it dictate its own arrangements and rules rather than imposing exterior regulations.³⁰ It stimulated proposals for legal reform and value orientation although such values were not found in the decisions of appellate courts or other materials commonly used in legal education.³¹ Professor Llewellyn believed that legal realism was not an ideology or coherent legal philosophy, but rather a *method or technique*, which could be used by legal scholars regardless of their philosophy.³² He suggested that no scholar would have to adopt the methodology of legal realism as the single or even primary mode of analysis.³³ Professor Llewellyn wrote that all the Realists derived their jurisprudence from Justice Holmes and declared that "Holmes almost alone, has cracked open the law of these United States."³⁴

Professor Jerome Frank's *Law and the Modern Mind* attempted to bring Dr. Sigmund Freud into the law and argued that law is the father symbol in society.³⁵ His treatise was written when the United States was still a pre-Freudian culture. Frank was undergoing psychoanalysis while he was writing this book and developed a new the-

25. See L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 45-66 (1986). But see Hull, *supra* note 23 (indicating Pound may not have, personally, taken as conservative a stand on these issues as he did in public). For a book review of *Legal Realism at Yale, 1927-1960*, see Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435 (1989).

26. See Kaplan, *Encounters With O.W. Holmes, Jr.*, 96 HARV. L. REV. 1829, 1838 n.58 (1983).

27. See COMMON LAW, *supra* note 5, at 38.

28. M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870* 213-14 (1957).

29. H. COMMAGER, *THE AMERICAN MIND* 374 (1950).

30. See Hull, *supra* note 23, at 966.

31. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973). (arguing that legal realism affected social change and legal reform by appealing to values not found in appellate court decisions or other materials traditionally used in law schools).

32. K. LLEWELLYN, *THE COMMON LAW TRADITION* 510 (1960).

33. Hull, *supra* note 23, at 959-60.

34. Llewellyn, *Holmes*, 35 COLUM. L. REV. 485, 487 (1935).

35. J. FRANK, *LAW AND THE MODERN MIND* 13-31 (1930).

ory of examining legal problems with a strong emphasis on factual interpretation, rather than the application of rules of law. He insisted that law was an unpredictable science. The Realists adopted this reliance on facts and argued that what was morally right would spring from an intense concentration of facts without interposing any consideration of ethics.³⁶ Frank, just as Llewellyn, idealized Holmes and entitled a chapter of his book, *Law and the Modern Mind*, "Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist."³⁷

It should be noted that legal realism was not without its critics. Legal scholars of the 1940s found Justice Holmes to be amoral and attacked legal realism as well as Holmes.³⁸

However, what emerged from Holmes and was later refined by the legal realists was a theory that law is indeed political and involved with social phenomena. The legal realists related law to other disciplines. Their casebooks acknowledge the reliance on history, sociology and psychiatry as relevant to legal education.³⁹ Although there was an aversion to formal ethics, especially by Holmes and Frank, the opening of the law by the legal realist provides room for case analysis by a utilization of the ethical paradigm.

II. THE ETHICAL PARADIGM

A. *Ethical Theory*

Ethical theory is the study of the nature and justification of ethical principles.⁴⁰ From the generally accepted ethical theories that appear in ethics literature, principles can be developed that may apply to case analysis. Ethical theory is generally divided into teleological and deontological ethics.⁴¹ All ethical arguments can be classified under one of these theories:

(1) Teleology is derived from the Greek word "telos" meaning end or consequences. Teleological theories are often called consequentialist theories and assert that the morality of an action is determined by

36. See HOLMES, *supra* note 4, at 11.

37. See MODERN MIND, *supra* note 20, at 253.

38. See e.g., Palmer, *Hobbs, Holmes and Hitler*, 31 A.B.A. J. 569 (1945); Palmer, *The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy*, 37 A.B.A. J. 809 (1951).

39. See L. KALMAN, *supra* note 25, at 229.

40. See T. BEAUCHAMP & N. BOWIE, *ETHICAL THEORY AND BUSINESS* (1983).

41. See Comment, *Outsider Trading — Morality and the Law of Securities Fraud*, 77 GEO. L.J. 181, 194-96 (1988) (describing the two broad categories of ethical theory).

its consequences.⁴² There are various kinds of teleological theories, the most common of which are ethical egoism and utilitarianism.

Ethical egoism measures the morality of an act by how it maximizes the benefit for oneself or an institution.⁴³ How others are affected as a result of the act is irrelevant. This theory justifies actions generally considered immoral, such as dumping toxic waste or filing a fraudulent tax return.

Utilitarianism gauges the morality of an act by the determination of its consequences upon all those affected by the act. This viewpoint is commonly expressed as "the greatest good for the greatest number." The theory weighs alternative courses of action to the act, then chooses the option which maximizes the benefits for all concerned. As a majoritarian paradigm, utilitarianism could lead to judicial deference and neutrality by avoiding ethical confrontation. For example, allowing police without probable cause to set up highway roadblocks to check drivers for drunkenness may be in the best interest of all concerned, but it abrogates the civil rights of individual citizens to be free from unreasonable searches under the Fourth Amendment.⁴⁴ Seen in such light, the United States Constitution is a counter-majoritarian document.

(2) Deontological theory maintains that actions are not justified by their consequences, since the action itself has intrinsic value beyond its consequences. Derived from the Greek word meaning duty, deontology claims that a morally right action must satisfy the demands of justice in that it represents the rights of others, or because one has promised to perform an act.⁴⁵ Deontology provides, by way of example, the ethical basis for the fulfillment of a contractual commitment.

A further explanation of deontology is found in the ethical theories of Immanuel Kant. Kant argued that it is each individual's duty to conduct himself rightly because moral duty is absolute and unconditional.⁴⁶ Kant called this binding moral law a "categorical impera-

42. R. BUCHHOLZ, *FUNDAMENTAL CONCEPTS AND PROBLEMS IN BUSINESS ETHICS* 48-49 (1989).

43. See Kalin, *On Ethical Egoism*, in *STUDIES IN MORAL PHILOSOPHY* 26-27 (N. Rescher ed. 1968).

44. *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481, 2488 (1990) (Brennan, J., dissenting). The Court stated, "[b]y holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police. I would have hoped that before taking such a step, the Court would carefully explain how such a plan fits within our constitutional framework." *Id.* at 2489.

45. W. HOFFMAN & J. MOORE, *BUSINESS ETHICS* 1-31 (2d ed. 1990) (discussing ethical paradigm).

46. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd trans. 1965) and Fletcher, *Symposium on Kantian Legal Theory: Law and Morality: A Kantian Perspective*, 87 *COLUM. L. REV.* 533 (1987).

tive."⁴⁷ According to Kant, only actions that are invariably universalizable may be moral. Kant stated, "I ought never to act except in such a way that I can also will that my maxim should become a universal law."⁴⁸ Our conduct ought to respect human beings as ends in themselves. He argued, "[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."⁴⁹ This principle, as the basis of human dignity, places all people as full members of the human community and demands that we take human rights seriously.⁵⁰ Our legal principle of "equal opportunity" supports that proposition.

Distributive justice involves the process used, generally by the state, to fairly distribute benefits and resources to society. How this is to be justly achieved presents a problem. Why should one person deserve more than another? Do we decide exclusively on the basis of the contribution that person has made to society? John Rawls, a professor of philosophy at Harvard University, has advanced the ethical theory of deontology based on the philosophy of Kant. His book, *A Theory of Justice*,⁵¹ states that the purpose of his philosophy is "to present a conception of justice which generalizes and carries to a higher level . . . the social contract as found, say, in Locke, Rousseau, and Kant . . . [following] the guiding idea . . . that the principles of justice for the basic structure of society are the object of the original agreement."⁵² Rawls argues that all people of goodwill would agree on two principles of justice:

1. Each person is to have an equal right to the most extensive basic liberties compatible with a similar system of liberty for all.

47. See Fletcher, *supra* note 46, at 547 (equating the categorical imperative to the moral law); Kuklin, *On the Knowing Inclusion of Unenforceable Contract Terms*, 56 U. CIN. L. REV., 845, 855 (1988) ("the categorical imperative: one should act pursuant to a maxim that could be willed as a universal law"); West, *Law, Rights, and Other Tote-mic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 820 n.11 (describing the categorical imperative as the "absolute law of moral duty").

48. I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 70 (Paton ed. 1969).

49. *Id.* at 96.

50. See generally, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) (positing that to take rights seriously one must treat all people as members of the human community and the weaker members are entitled to the same concern and respect as the more powerful).

51. J. RAWLS, *A THEORY OF JUSTICE* 136 (1971). Rawls argues that we should evaluate social arrangements by imagining a "veil of ignorance" regarding our status in society that would prevent us from distributing justice in a way that would benefit us at the expense of others. *Id.*

52. *Id.* at 11.

2. Social and economic inequalities are to be arranged so that they are both:
(a) reasonably expected to be to everyone's advantage, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁵³

One could consider the application of Rawls' ethical principles to the Americans with Disabilities Act as well as the Civil Rights Act of 1964. The Disabilities Act⁵⁴ prohibits discrimination against the estimated 43 million Americans who suffer from a physical or mental disability.⁵⁵ Rawls' philosophy furthers collective social and economic equality.

Although ethical theory gives further rationalization beyond this brief survey,⁵⁶ the principles of teleology and deontology may be used as the basis for the ethical paradigm in case analysis.

B. The Ethical Paradigm as a Logical Augmentation of Legal Realism

The ethical paradigm may be expressed as a method with which to ethically analyze a case. A sedulous use of the ethical paradigm will assure the student's understanding of the process. This author argues that legal realism provides, as stated by Karl Llewellyn, a method or technique which can be used by legal scholars regardless of their philosophy.⁵⁷ Now that the law has been "crack[ed] open,"⁵⁸ there is room for the ethical paradigm as a method for case analysis in legal education. Moral reasoning, although repugnant to Holmes, would be an appropriate means to understand social responsibility by today's legal realists. Why should teleology and deontology not be integrated with case discussion to stimulate moral awareness?⁵⁹ Law professors who utilize the ethical paradigm simply extend the jurisprudence of the legal realists by viewing the law as both a political and ethical construct with moral consequences.

53. *Id.* at 60.

54. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C.A. §§ 12101-12231, 29 U.S.C.A. § 706, and scattered sections of 47 U.S.C.A. (West Supp. 1990)).

55. See *Rights Bill for Disabled is Sent to Bush*, N.Y. Times, July 14, 1990, at A6, col. 1.

56. See generally, M. HOFFMAN, BUSINESS ETHICS: READINGS AND CASES IN CORPORATE MORALITY (1990); R. BUCHHOLZ, *supra* note 42; M. VELASQUEZ, BUSINESS ETHICS, CONCEPTS AND CASES (1988); T. BEAUCHAMP & N. BOWIE, *supra* note 40 and accompanying text.

57. HULL, *supra* note 23 at 959-60.

58. Llewellyn, *supra* note 21, at 487.

59. Conry & Nelson, *supra* note 3, at 24 (discussing experimental intervention for learning ethics).

III. ADAPTABILITY OF THE ETHICAL PARADIGM TO CASE ANALYSIS

A. *The Burger Court*

The Burger Court decided many cases during the Chief Justice's tenure from 1969 to his retirement in 1986. One of its most significant First Amendment decisions was *Rosenbloom v. Metromedia, Inc.*,⁶⁰ in which the defendant radio station broadcasted news of Rosenbloom's arrest for possession of pornography.⁶¹ The report stated that as a result of Rosenbloom's arrest, the police had found a main provider of obscene material.⁶² When Rosenbloom sued the radio station for libel,⁶³ the jury found in his favor and awarded him substantial damages.⁶⁴ The Court of Appeals for the Third Circuit reversed and held that although Rosenbloom was not a public figure, the Warren Court's *New York Times Co. v. Sullivan*⁶⁵ standard applied.⁶⁶ That rule, enunciated in a decision written by recently retired Justice Brennan, states that libel suits may not be brought by public officials unless they can prove "actual malice."⁶⁷ In *Rosenbloom*, Justice Brennan wrote that *New York Times v. Sullivan* should extend to defamatory falsehoods relating to private persons if the statement concerned matters of general or public interest.⁶⁸

An application of the ethical paradigm to *Rosenbloom* would reveal a teleological argument. The benefit of news to the general or public interest outweighs the benefit to Rosenbloom's right to privacy. This reflects a utilitarian analysis, which considers "the greatest good for the greatest number."⁶⁹ According to that ethical principle, the morality of broadcasting a libelous statement is justified, in the absence of actual malice, because the public interest demands that people have a greater right to hear the news than the protection of an individual's privacy.

This theory was later rejected by the Burger Court in *Gertz v. Robert Welch, Inc.*,⁷⁰ in which a policeman was convicted of murder and

60. 403 U.S. 29 (1971).

61. *Id.* at 33.

62. *Id.*

63. *Id.* at 36-37.

64. *Id.* at 39-40.

65. 376 U.S. 254 (1964).

66. *Rosenbloom*, 403 U.S. at 32.

67. *New York Times*, 376 U.S. at 280 (*i.e.*, libel published "with knowledge that it was false or with reckless disregard of whether it was false or not").

68. *Rosenbloom*, 403 U.S. at 44-45.

69. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 250 (1987).

70. 418 U.S. 323 (1974).

the victim's father retained Gertz to sue the policeman in a civil action.⁷¹ An article in the John Birch Society magazine claimed that the policeman's murder trial was a communist plot to weaken the local police and implied that Gertz had a criminal record.⁷² When Gertz sued for libel, the jury found in his favor.⁷³ The court of appeals set aside the verdict, ruling that the *New York Times v. Sullivan* standard as stated in *Rosenbloom* should apply.⁷⁴ The Supreme Court reversed, refusing to apply the *New York Times* test to private individuals, and found for Gertz.⁷⁵ Justice Powell, writing for the majority, held that although the states may establish the liability standard in a libel suit, they may not impose strict liability for defamatory speech.⁷⁶ The Court's dictum that constitutionally protects opinion speech states:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.⁷⁷

In *Gertz*, the Court supports the deontological ethics of a state statute that establishes a right to sue. One could find support in *Gertz* for judicial approval of Kant's Categorical Imperative or Rawls' principles of justice that each person should have an equal right to the most extensive basic liberty compatible with similar liberty for others.⁷⁸ The underlying ethical theory is that our conduct ought to respect human beings as ends in themselves.

B. *The Rehnquist Court*

In 1986, President Ronald Reagan named William Rehnquist Chief Justice of the United States Supreme Court. Generally regarded as the Court's most consistently conservative member, Rehnquist cited Justice Holmes in the 1988 landmark decision of *Hustler Magazine v. Falwell*.⁷⁹ This classic First Amendment case involved Jerry Falwell who sued *Hustler Magazine* based on a "parody" of a Campari liqueur advertisement.⁸⁰ *Hustler Magazine* copied the form and layout

71. *Id.* at 325.

72. *Id.* at 325-26. Gertz was called a "leftist" and a "communist Fronter." *Id.* at 326.

73. *Id.* at 328-29.

74. *Id.* at 330-32.

75. *Id.* at 351-52.

76. *Id.* at 347.

77. *Id.* at 339-40 (footnote omitted).

78. See J. RAWLS, *supra* note 51, at 60 and accompanying text.

79. 485 U.S. 46 (1988). See generally Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423 (1988).

80. *Hustler Magazine*, 485 U.S. at 48.

of the Campari ads and in an alleged interview stated that Falwell's "first time" was during a drunken incestuous rendezvous with his mother in an outhouse."⁸¹ At the bottom of the ad, in small print, appeared the disclaimer "ad parody - not to be taken seriously."⁸²

Since the *Gertz* dicta⁸³ allows defamatory ridicule, Falwell proceeded on the tort of intentional infliction of emotional distress.⁸⁴ Chief Justice Rehnquist, writing for the majority, cited *Gertz* and stated:

The First Amendment recognizes no such thing as a "false" idea. As Justice Holmes wrote, "when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁸⁵

The Court held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . a false statement of fact which was made with 'actual malice.' . . . [S]uch a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."⁸⁶

The ethical paradigm that applies to First Amendment jurisprudence is quite complex. To what extent should society regulate free speech? Certainly the armed forces and secondary educational institutions regulate speech.⁸⁷ Deontological theory would characterize free speech as an action that possesses intrinsic value. Immanuel Kant stated:

It would be ruinous for an officer in service to debate about the suitability or utility of a command given to him by his superior: he must obey. But the right to make remarks on errors in the military service and to lay them before the public for judgment cannot equitably be refused him as a scholar.⁸⁸

It appears that Kant would not approve of the media's right to pub-

81. *Id.*

82. *Id.*

83. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

84. RESTATEMENT (SECOND) OF TORTS §§ 46-48 (1965). "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." *Id.* at § 46.

85. *Hustler Magazine*, 485 U.S. at 51 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (other citations omitted).

86. *Id.* at 56.

87. See *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73 (1988) (school officials retain right to impose reasonable restrictions on student speech in high school paper); *Brown v. Glimes*, 444 U.S. 348, 359 (1980) (Air Force regulations that require commander's approval before circulating petitions on base not violative of first amendment).

88. I. KANT, *WHAT IS ENLIGHTENMENT?* 85, 87 (L. Beck trans. 1959).

lish satire as superior to an individual's reputational rights since this would treat the individual as a means to an end.⁸⁹ However, does the utilitarian principle of "the greatest good for the greatest number" not demand that public discourse, including political satire, be encouraged as the essence of democratic self-governance?

Legal realism allows the relevancy of the ethical paradigm to establish value orientation not openly discussed in appellate decisions. When Chief Justice Rehnquist cited Justice Holmes' dicta that "the best test of truth is the power to get [it] accepted in the competition of the market," he was establishing relativism as the basis of truth.⁹⁰ Constitutional law scholar Laurence Tribe suggests that we should not "tilt the legal landscape in favor of some groups and against others . . . [and] avoid the parochial fallacy of looking at the legal universe only through the eyes of those in power."⁹¹

Use of the ethical paradigm exposes the moral value of a decision and assists the student's orientation toward moral growth.

IV. CONCLUSION

A comprehensive analysis of appellate decisions using the ethical paradigm will enhance student appreciation of value choices as well as their understanding of the courts' holdings. Legal realism, by denouncing the formal rule of law that excluded moral and political consequences, provides the legal commentator or law professor with an opportunity to integrate insightful ethical analysis into case decisions. Thus, as law professors consider whether an ethical issue is relevant to a social end, the ethical paradigm becomes a crucial method in discussing values not found in appellate decisions. This process will intensify an understanding of the interrelationship between law and ethics.⁹² Such an ethical inquiry will reevaluate the social and moral meaning of decisions, especially as they relate to those marginated from society and often judicially precluded from legal recourse. As legal education moves from legal realism to the ethical paradigm, it will stimulate moral growth and also heighten political awareness.

Legal realism enlightened legal education from the 1920s to the

89. See I. KANT, *supra* note 48, at 61.

90. *Hustler Magazine*, 485 U.S. at 51 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

91. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 38 (1989).

92. See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (Tent. Draft No. 2, 1984). The corporation . . . may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and . . . may devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes." *Id.*

1960s⁹³ and, to a lesser, yet considerable, extent, the critical legal studies movement⁹⁴ of the 1960s to the 1980s.⁹⁵ Ethical legalism could be the enlightened movement of legal scholarship for the 1990s and beyond. Perhaps no other theory is more suitable to reevaluate the ethical issues confronting the country and the courts in the twenty-first century.

93. See L. KALMAN, *supra* note 25 at 230 (stating that “[f]or all its innovations, legal realism proved to be essentially a conservative movement”). For another insightful review of Kalman’s book, see Horwitz, *Book Review*, 1989 AM. HIST. REV. 94, 299; White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972).

94. The Conference on Critical Legal Studies (“CLS”) was founded in 1977. CLS scholars continue the realist movement and further argue our political/legal environment is of our own making and can be restructured. See Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

95. See Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (arguing that the legal studies critique of society does not provide an adequate basis for a just community); Tushnet, *supra* note 94; Note, *Round and Round The Bramble Bush: From Legal Realism To Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

