Teaching Law Ethically: Is It Possible?

Mary Jewell

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Legal Education Commons

Recommended Citation
I. Introduction

In the past few years the public has been deluged with a constant barrage of unfavourable articles, newsreels, television shows, movies, books, and commentaries about lawyers. This constantly increasing quantity is infinitesimal in size when compared to the vast array of material written by legal educators in the last thirty years.

If it can be accepted that the popular press represents to some extent the voice of the people, it may be suggested that society is trying to say something about its lawyers and the role they play in society. The message is clear and unequivocal: lawyers are not nice people! Regardless of how the message is interpreted by the reader, the general tenor of the material is odious indeed.

The growing awareness that something is wrong with lawyers as they function in society has brought about a renewed interest in legal ethics and professional responsibility. These concerns have prompted much discussion by legal educators in an attempt to remedy the increasingly complex and difficult dilemma in which lawyers find themselves.

This article will have as its focus a discussion centering upon the role law schools in North America play in preparing lawyers for their task. To that end, a general discussion concerning legal education will be undertaken. This will be followed by an analysis of the various methods used by legal educators in attempting to grapple with the problem of professional responsibility. It will be shown that those methods which have been used to impart the attributes of professional responsibility have been, for the most part, unsuccessful. Additionally, an effort will be made to show that legal education, at least in its present form, seriously impedes the production of professionally responsible lawyers. At this point, the reader is warned that the paper does contain a bias in favor of clinical education — a bias that is felt to be justified upon the review of relevant material on both legal education and professional

*Member of the Newfoundland Bar. The author would like to thank Professor Leon Trakman for his invaluable assistance in reading earlier drafts of this article.
Teaching Law Ethically: Is It Possible?  475

responsibility. The paper will therefore conclude in strong support of clinical education as a more appropriate vehicle for the transmission of those skills which are necessary for well-rounded lawyering and for the imparting of techniques related to professional responsibility.

II. Legal Education: Its Perspectives and Aims

Much of traditional legal education has been characterized by objectivity and neutrality. These features were seen as being a necessary adjunct for the inculcation of lawyering skills. Objectivity and value-free neutrality also became the veritable hallmark of a good law school. Legal education, it was said, had concerns which extended beyond the "pragmatic interests of the practising profession". As well, the law schools were said to inherit a "knowledge finding function and a critical function". It was from these institutions that the best qualified practitioners were alleged to have emerged.

The lawyer's role in society demanded that the lawyer function within the framework of what has been handily described as a "limited purpose friendship". That is, the lawyer became a friend of the client for the duration of the lawyer-client relationship. In this context, the lawyer need do nothing more than serve his client to the utmost of his ability. Broad questions relating to the social utility of that relationship were not seen as being the concern of the individual lawyer. In other words, practitioners need only be concerned with befriending their clients; they need not be concerned

4. Ibid., p. 65.
5. Ibid., p. 66.
6. Charles Fried, "The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation", (1975-76) 85 Yale L. Journal 1061 at 1071. For a supporting view, see David Melkenkoff, The Conscience of a Lawyer, (St. Paul, Minn.: West Publishing Co., 1973). Melkenkoff believes that much of the criticism waged against the legal profession is rooted in a fundamental misconception of the lawyers' mission. Melkenkoff maintains that the lawyer does not exist "to spread truth and goodness to the ends of the earth". Rather, the lawyer exists to make some sense of equality before the law.
7. Ibid., p. 1074.
with the effect these relationships, either individually or in their totality, may have on the society around them. Morality for the lawyer, therefore, inhered in the quality of the lawyer-client relationship and did not extend to moral and ethical questions arising outside that relationship. The main thrust of the lawyers' moral responsibility was, in the first instance, heavily circumscribed by prevailing beliefs and norms in legal education. This stilted definition of morality reflected itself in older codes of professional responsibility which laid out the criteria thought necessary to the lawyers' moral character. Following Code requirements lawyers were considered most virtuous, for example, when they displayed traits of honesty, integrity, fairness, and responsibility in their dealings with their clients. Legal morality consisted of a group of culturally approved positive legal-moral standards. Hence, what Lawrence Kohlberg has called the "Boys Scout" or the "Bag of Virtues" approach to moral instruction has thus far dominated North American legal education.

In spite of increasing difficulties with lawyers, the traditional approach to morality has received renewed support and has been staunchly defended in the recent past. Indeed, it has even been suggested that for a lawyer to act in a fashion other than that which is dictated by the confines of the lawyer-client relationship may very well result in an unjust or immoral act. Although newer professional responsibility codes attempted to broaden the lawyers' responsibilities to include social responsibilities, these issues were

8. Ibid., p. 1077.
9. Ibid., pp. 1083-84.
10. See, for example, Canons of Legal Ethics (adopted by the Canadian Bar Association on September 2, 1920).
11. Ibid., pp. 4-6.
13. Ibid., p. 31.
15. Charles Fried, p. 1066.
16. See Code of Professional Conduct; The Canadian Bar Association (1974), Chapter XII, "The lawyer should encourage public respect for and try to improve the administration of justice". The notion that a lawyer should be concerned with the administration of justice first and his client second has received renewed support. See, for example, Arthur Maloney, Q.C., "The Role of the Lawyer In Society", (1978-79). 9 Man. L. J. 351, 357. Maloney suggests that if lawyers are
never taken seriously nor did they receive a fair hearing in the law schools. Thus, the schools viewed their task in terms of teaching students how to perform as lawyers in a very limited professional role.

Although these views are those espoused by many in North American legal education, newer themes relating to the quality of professionalism have emerged in recent years. The advent of the sixties brought about a rekindling of social interest concerns in legal education. Some academics expressed a desire to broaden the format of legal education to include enhanced professional competency, notions of fairness, justice and social utility. As complaints were being heard to the effect that traditional legal

to take a "wide view" of their obligations and responsibilities as professionals then the lawyer must be prepared to go far beyond law books, the court room and the mere defense of clients.

17. See Edward J. Bloustein, "Social Responsibility, Public Policy and the Law Schools", (1980) 55 N.Y.U. Law Rev. 385 at 421. In this article, the reader is advised that justice, morality and public policy have a rightful place in the law schools. And for a more detailed view of the role of a good lawyer see D. L. Johnston; "The Role of The Lawyer in Society", (1979) 13 L.S.U.C. Gazette 119 at 123. In the words of the author, the role of a good lawyer demands that he:

1) Cherish the concept of justice; 2) Treasure his reputation for integrity, and shapes it year by year through honesty and integrity; 3) The role of the lawyer involves a sense of responsibility to the community; 4) It is not enough that a particular activity pays and is not against the law. There is the lawyers' canons of ethics and there is the fact that he is an officer of the court and that he has a role in the community, often of selfless service; 5) The lawyer as a professional must continue to grow, continue to self-educate; 6) The lawyer has a special responsibility for making the legal system work and work justly; 7) It (the lawyers' role) means service to improvement of laws through contributions of time and expertise to Bar associations, sub-committees, and Legislative Task Forces, through work on Rules Committees, through law reform. . . It means constant pressure to simplify the law and make it more understandable; 8) Finally, the lawyers' professional role implies an insistence that the system work for the good of all.


education ignored these concerns, some educators asked for a renewed definition of professional responsibility.\textsuperscript{20} Succinctly stated, the most complete definition of professional responsibility was said to include, 1) high quality services, 2) professional ethics, and; 3) a perception of the legal system's role in society.\textsuperscript{21} For the purposes of this study, these criteria will serve as a starting point from which questions will be raised concerning legal education and professional responsibility. Does legal education, in its present form, lay the foundation for high quality services? Have the law schools answered the ethics question? What about the adequacy of methods used to teach the law and legal morality? Can it be said that student lawyers will gain insight into the legal system during their three years at law school? These and other questions will be brought to the fore, dealt with, and it is hoped answered, in an attempt to critically evaluate modern legal education and its effect on lawyers as professionals.

III. The Schools: Past and Present Criticisms

Paralleling the ongoing discussion over professional ethics and whether indeed it should be taught in the schools is the discussion concerning legal education itself, its quantity, quality and usefulness.

Law schools have always maintained a set of primary goals in the making of a lawyer. Important among these are the imparting of knowledge and skills and also helping the student to understand the process he will participate in as a lawyer. In addition, it is felt that the real objective of the law school is "to teach men to think like lawyers".\textsuperscript{22} Canadian schools have adopted these criteria and have held these objectives to be major ones in the making of proficient lawyers.\textsuperscript{23} To adequately meet these goals two primary methods have been used: The case method and the Socratic method.

\textsuperscript{20} See, for example, Donald T. Weckstein, "Boulder II: Why and How?" in Donald T. Weckstein (ed) Education In Professional Responsibility of the Lawyer, which is Appendix B to Stuart C. Goldberg (ed) National Conference on Teaching Professional Responsibility (1977).

\textsuperscript{21} W. Wade Berryhill, "Clinical Education — A Golden Dancer", (1978) 13 U. of Richmond L. Rev. 69 at 76.

\textsuperscript{22} Lon Fuller, "What the Law School Can Contribute To The Making of A Lawyer", (1945) 1 J. of Legal Ed. 189 at 190.

A. Methodology

1. The Case Method

Law schools have used the case method as a means of instruction for more than a hundred years. With the case method the student is expected to learn legal rules or principles of law which are set out in judgments from the various appellate courts around the country. Along with increasing the students' knowledge of the law, the method is thought to heighten the students' ability to critically analyze cases, statutes, and related legal materials. However, serious criticisms concerning the effectiveness of the method began to appear in the early twentieth century.24

Almost fifty years ago Jerome Frank offered suggestions and criticisms which he thought would greatly improve the quality of legal education. His chief complaint was that law schools were too book-oriented and not people-oriented. Frank's recommendations included the use of clinics and a revision of the case method so that it would "in truth and in fact become a case system and not a mere sham case system".25 Frank suggested that the schools' use of appellate decisions as a means of teaching the law "hopelessly over-simplified" what actually happens in practice.26

This view is repeated by Jon Richardson who goes a little further and states that the case method is wasteful of time and energy.27 Richardson brings out the fact that the method of instruction used in all law schools has not changed significantly since its inception at Harvard Law School in the mid-nineteenth century. This is so even though the world in which the lawyer functions has changed drastically during that time.

Richardson chastises the schools for an unnecessary preference for rules, a preference which takes precedence over more meaningful techniques and modes, which if used, could provide lawyers with guidelines for a more holistic approach to the practice of law. Richardson feels that though the lawyer must have a good grasp of legal rules, he must also have an appreciation for the effect these rules have on people. He warns that the schools' present insistence on teaching the law in a vacuum serves only to "duck the

25. Ibid., p. 916.
26. Ibid., p. 913.
educational problem”. Interestingly, recent studies indicate that law schools, because of the rule approach, have the effect of frustrating students’ humanistic interests.

Although the case method is used almost exclusively in Canadian and American schools, the dissatisfaction with its utility is mounting. The Shaffer and Redmount study is indicative of this growing sense of dissatisfaction. These authors found that the use of the case method is detrimental to students’ overall needs because it tends to develop analytical skills to the exclusion of other skills essential to professional competence. The study also indicated that the use of the case method was largely responsible for the task-oriented approach used by students, practising lawyers, and professors who were interviewed. It was felt that the insistence of interviewees upon treating each case as a “thing” was reminiscent of the method of instruction used in the schools. The failure of the method prompted the authors to conclude that:

Learning the law is now...too primitive an experience. It lacks mental, moral, emotional and social development and therefore does not serve the best interests of society or for that matter, the best interests of the legal profession. It lacks humanistic concern probably because it lacks the appropriate means and conditions which would ameliorate and improve the learning experience.

Without doubt, the strongest criticism of the case method to emerge in recent years relates to its narrowness as a pedagogical device. Although it has been said that the case method is useful in honing analytical skills and imparting knowledge of the law, it would appear that its functional utility ceases there. Proponents of the clinical method are adamant in their claims that the clinical method is a more realistic vehicle for teaching the refinements of professional responsibility. The case method, while singularly narrow in scope, has been negatively compared to the clinical

28. Ibid., p. 446.
30. Ibid., p. 27.
32. Ibid., p. 33.
method because of the wide array of teaching techniques available to the clinical teacher in his efforts to instill practice skills, notions of morality, ethics and in general, professional responsibility. In addition, concerns have been expressed that the almost total use of the case method during the three years of legal training may have harmful effects on law students and their perceptions of the legal order. One clinical educator phrased his objections this way:

Legal education gives the student a distorted view of the importance of principles and rules in both law applying and law making. The letter of the law is in practice rarely singularly honoured or applicable without reference to essentially non-legal, but extremely relevant attitudes, actions and perceptions. On a fundamental level law cannot be predicted and the meandering of legal process cannot be prophesised without reference to the human factor. In its operation, the law is not a restatement or working out of positive rules. The law operates as it does because it is influenced by a myriad of conflicting variables which must be understood by the practicing lawyer. Legal education should equip students to identify these factors so that when they work with the law, they can manipulate them as effectively as they do legal principles. This must be a conscious study.

Not only has the case method been blamed for "keeping students in ignorance of the realities of the system" but the method has also been cited as being inherently indoctrinative. Academics fear that students may be subjected to three years of value-inculcation because the moral content in legal education is not overtly questioned. Indeed, it has been said that the traditional format of

38. Kenneth E. Gray, "What We Do To Law Students or The Judicial Philosophy of W. Barton Leach", (1978-79) 17 Duquesne L. Rev. 381 at 397: This writer advises that the problem in legal education is often that students do not understand what is happening to them because value judgments are made in a very limited way. He advises also that case discussion in class is "laced with evaluation" every time it is discussed.
legal education is capable of conditioning students to accept certain values as "intrinsic to the profession".39

The view that an unquestioning attitude or complacent acceptance of the prevailing value system does amount to indoctrination has received support from Lawrence Kohlberg. Kohlberg has suggested that morality is inseparable from education and any system of education which denies this fact at best "miseducates" and at worst "indoctrinates" its students.40 Kohlberg further suggests that any curriculum whose moral content remains unquestioned supports the notion that it is valid to have an "unreflective hidden curriculum".41 It is patent, therefore, that as the question of morality has never been seriously dealt with in case analysis, an obvious risk of indoctrination does exist in spite of legal educators' staunch claims to the contrary. Kohlberg warns that such practices are not compatible with "conceptions of civil liberties that are central not only to American democracy but to any just social system".42

Thus, the arguments surrounding the discussion on the use of the case method generally regard the extent to which it is used as being unnecessary in varying degrees,43 outdated,44 and even morally45 and psychologically46 damaging to the individual lawyer and ultimately to the society he represents.47 Some do agree that its use, though shortened and moderated from its present form, may still have a place in the law school curriculum.48

39. David R. Barnhizer, "Clinical Education At the Crossroads: The Need for Direction", p. 1043. Here, the author points out that it is extremely difficult to teach value systems and professional behavior when these are at odds with existing values of the legal profession — the existing values being an "elitist concentration on the preservation of entrenched property, wealth and power".
40. Lawrence Kohlberg, pp. 1-4.
41. Ibid., p. 7.
42. Ibid., p. 8.
44. Jon Richardson, P. 434.
45. Lawrence Kohlberg, pp. 1-4.
47. Andrew Watson, "The Quest For Professional Competence", pp. 117-133.
2. The Socratic Method

Causing almost as much consternation and debate as the case method is the use of the Socratic technique which is employed by most schools in both Canada and the United States. Through the use of this method the student is asked thought-provoking questions which produces an analysis of legal issues. It is believed that this procedure, used in conjunction with the case method, results in a sharpening of the students' ability to critically analyze relevant material. Additionally, it is felt that the use of the method serves to prepare the student for the adversarial stance which must be adopted in practice.

The Socratic method of instruction is at least as old as the case method and has withstood twentieth century change almost as admirably as the case method itself. This apparent inflexibility prompted one writer to observe that the Socratic method and legal doctrine were "not married in Heaven, only at Harvard".49

The acute distress created within the student by the use of the Socratic technique is generally well recognized by legal educators. Disagreement has arisen in relation to the validity of that distress. One student, for example, referred to the prevailing atmosphere in the first year class as an "atmosphere of collective terror".50 It has been said that this terror is essential because it "breeds precision and ability and confidence" necessary in the world of the courtroom.51 The modern students' desire to learn the law without undergoing intense discomfort has been characterized by one leading academic as an element of the "hedonism of modern life".52

Along with the prevailing resentment attached to the continued use of the technique, writers attribute an increasing number of problems both inside and outside the law school to its use. Some educators feel that the use of the method in the first year class is an exercise in intimidation and does not bring about the beneficial

49. Jon Richardson, p. 435.
52. Francis A. Allen, p. 73; and see also James P. Taylor, "Law School Stress and the Deformation Professionelle", (1976) 27 J. Legal Ed. 251 at 266. This writer argues that while legal education is indeed stressful, that stressfulness may not be entirely harmful. The implication is that stressfulness may play a useful role in the making of proficient lawyers.
results which might justify its continued use.\textsuperscript{53} Indeed, the somewhat dubious role of the law teacher in the Socratic classroom has not gone unnoticed by students or faculty.\textsuperscript{54} Law students have been said to exhibit extreme vulnerability in first year, and in some instances, are at the mercy of their teachers.\textsuperscript{55} The very nature of the Socratic method with its unending questions, few rewards, and lack of professional sympathy is perceived by the student as an assault.\textsuperscript{56} Thus interpreted, the assault creates a feeling of being in constant "danger" — a danger that has been characterized as being "real".\textsuperscript{57} Since stressfulness cannot be maintained indefinitely, students tend to extricate themselves by adopting an "unemotional" stance.\textsuperscript{58} The rewards for the creation of this formation are twofold: It serves to protect the student from further anxiety and some approval is forthcoming once the student has embraced the approved norms of objectivity and rationality.\textsuperscript{59} This procedure, however, bears lamentable consequences for law students. In this "splitting and polarizing"\textsuperscript{60} process, subjectivity, idealism and hope, attributes which are essential to professionalism remain buried and are thereafter not easily accessible.\textsuperscript{61}

While some educators are of the opinion that anxiety is a natural and even rewarding consequence of the learning experience,\textsuperscript{62} others feel that the degree of anxiety in the Socratic classroom impedes fruitful learning and therefore the method should be seriously questioned as a good teaching technique.\textsuperscript{63} However, recognition has been given to the damaging qualities of the Socratic method as it is used in modern law classes and it has been suggested that the critical problem facing legal education is how to mitigate

\begin{footnotes}
\footnote{53. Shaffer and Redmount, p. 8.}
\footnote{54. See generally Duncan Kennedy, pp. 72-75; and Jon Richardson, pp. 435-444.}
\footnote{55. David R. Barnhizer, "Clinical Education At the Crossroads: The Need For Change", p. 1036.}
\footnote{56. Duncan Kennedy, p. 73.}
\footnote{57. Andrew Watson, "The Quest For Professional Competence: Psychological Aspects of Legal Education", p. 122.}
\footnote{58. Ibid., p. 131.}
\footnote{59. Ibid., p. 132.}
\footnote{61. Andrew Watson, "The Quest For Professional Competence: Psychological Aspects of Legal Education", p. 127.}
\footnote{62. Francis A. Allen, pp. 73-74.}
\footnote{63. Andrew Watson, "The Quest For Professional Competence: Psychological Aspects of Legal Education", p. 123.}
\end{footnotes}
the traditional "syndrome of disengagement" experienced by law students.⁶⁴

Although writers are concerned about the possibility of psychological damage, others have expressed additional fears about what they consider to be newer problems associated with the use of the method. It has been pointed out that the size of the modern day law class does not easily lend itself to the technique. Classes in some schools average between sixty and ninety students and are largely impersonal. In such a setting the Socratic technique becomes perverted and a situation arises in which the students ask questions only after the Professor has given a "mind-boggling exposition of skill and argument".⁶⁵ When the method is used in larger classes it results in imparting knowledge but does nothing to increase the students' ability to critically analyze. This dilemma prompted one writer to conclude that the Socratic method is nothing more than an "'obscene myth...which is today little more than a memory".⁶⁶

The Socratic method, while effective at least to some extent in increasing students' ability to critically analyze, has been cited as causing some of the more serious flaws which later appear in the lawyers' professional character. It is noteworthy that while many in legal education feel that the Socratic method is still useful, no one has made the claim that the method, as presently used, overtly assists lawyers in confronting the larger issue of professional responsibility. Ironically, it has been suggested that the Socratic technique has the opposite effect.⁶⁷

Writers have not been remiss in recognizing that the Socratic method as used in the modern day law class bears little resemblance to the original Socratic technique.⁶⁸ For example, Thaler draws a distinction between the original Socratic technique where students were taught to clarify values with sensitivity and creativity and the method presently being used in the schools.⁶⁹ It has been suggested that the Socratic method was first used to promote a concern for the

⁶⁴ Allan A. Stone; p. 427.
⁶⁵ Shaffer and Redmount, p. 9.
⁶⁶ Ibid., p. 18.
growth of justice in students — a concern which is linked to the growth of justice in society. 70

Interestingly, Lawrence Kohlberg, who has cited justice as being the ultimate form of morality, believes that the Socratic technique is an appropriate method for encouraging moral development in students. 71 In a word, Kohlberg’s theories hold that ethical judgment is a function of individual moral growth, 72 that moral development is characterized by identifiable stages 73 and that moral development, like cognitive development, is sequential, invariant and universally applicable. 74 Kohlberg maintains that the Socratic method, correctly used, could serve to enhance students’ moral growth because:

The way to stimulate stage growth is to pose real and hypothetical dilemmas to students in such a way as to arouse disagreement and uncertainty as to what is right. The teachers’ primary role is to present such dilemmas and to ask Socratic questions that arouse students’ reasoning and focus students’ listening to one another’s reasons. Developmental moral discussion thus arouses cognitive-moral conflict and exposes students to reasoning by other students at the next stage above their own. 75

70. Lawrence Kohlberg, p. 37.
72. This view is in direct contradiction to older views which posited that moral development ceased after infancy and that moral growth and development were fixed and therefore not malleable after the infancy stage. See for example, Donald W. Weckstein, “Watergate and the Law Schools”, (1975) 12 San Diego L. Rev. 261.
73. Lawrence Kohlberg, p. 16-19. Theorizing from years of cross-cultural studies, Kohlberg believes that individuals progress through stages of moral development. Kohlberg’s theories differ from older views which maintain that morality is relative to the individual’s culture. Kohlberg has identified six universal stages of moral development:

A. The Preconventional stage
   Stage 1. Punishment and Obedience Orientation.
   Stage 2. Instrumental Relativist Orientation.
B. The Conventional Level
   Stage 3. The Interpersonal Concordance or “Good girl-nice boy” orientation.
   Stage 4. The Society Maintaining Orientation.
C. Post Conventional, Autonomous or Principled Level
   Stage 5. The Social Contract Orientation.
   Stage 6. The Universal Ethical Principle Orientation.
74. Ibid., pp. 20-26.
75. Ibid., p. 27.
Kohlberg is of the opinion that moral education is a drawing out from within through dialogue\(^\text{76}\) and that moral education, far from being incompatible with educational systems and their objectives and aims, is an intricate part of educators' commitment to justice and to the rights of people.\(^\text{77}\)

The use of the Socratic method as a technique in developing morality in law students would depart from the current trend in two important areas. Firstly, the Socratic technique would be used to increase both moral development and analytical skills. Secondly, this combination could serve to reunite legal education and morality thus having a positive impact on the way law is practised by lawyers. Allowing students to retain their innate sense of justice and morality may bestow further benefits: It may assist in eradicating the well-established syndrome of fear, anger, resentment and apathy that so characterizes much of North American legal education.

\textit{B. The Curriculum}

Although academics have warned the members of the profession that the practice of law will undergo drastic changes in the years to come, little has been done to alter basic curricula. This is so even though vast amounts of money have been spent on curricular reform in the past twenty years.\(^\text{78}\) In fact, curricula in most schools have for the most part remained static since the early twentieth century. Minor changes took place in the late sixties when a shift was made from an almost exclusively compulsory curriculum to a somewhat less structured one. During the ensuing ten years students were able to choose which courses they would take particularly in upper level years. Additionally, the schools experienced an increased proliferation of "law and..." courses. And even though it poses no serious threat to traditional legal methodology, clinical law programs became an accepted part of law school curricula.

With increased complaints from the Bench and Bar\(^\text{79}\) regarding the poor professional performance of lawyers, the late seventies and

\textit{\footnotesize 76. Ibid., p. 30, Kohlberg argues that justice can be taught through dialogue because we “know it” all along. In that sense, the teaching of justice as morality is “natural” to the student.}

\textit{\footnotesize 77. Ibid., pp. 35-39.}

\textit{\footnotesize 78. Edward Veitch, “The Vocation of Our Era For Legal Education”, (1979) 44 Sask. L. Rev. 19 at 22-23.}

\textit{\footnotesize 79. Mr. Justice R. J. Matas, “Legal Education In the Wake of the Sixties”, (1979) 44 Sask. L. Rev. 63 at 68, and see also: Terry J. Wuester, “Cafeteria-Style Legal}
The early eighties saw demands for the schools to expand their lists of compulsory courses. It was felt that such a move was necessary to improve the quality of professionalism among lawyers. Those concerned appeared to equate the complaints being waged against lawyers with newer less structured curricula. This deduction may have been drawn without careful reference to the meaning of law and its role in society. The ever-present circularity in the thinking of some educators caused one academic to conclude that without a "guiding theory about law, the compulsory/optional debate will rage on indefinitely at its current superficial level". It can be seen that the total lack of real critical enquiry into the relevance of the present curriculum is probably one of the most striking features of modern legal education.

Every one seems to agree that in order to become a professionally responsible lawyer, one must possess a minimal degree of competence in lawyering skills. Yet, curricula in most schools do little or nothing to address the issue of practice skills. These crucially important skills are left to be learned during the students' period of articles or in the early years of practice. It is presumed that intricate skills such as negotiation, counselling, direct and cross-examination, oral presentation and courtroom etiquette, to name but a few, are best learned via the "pick it up" approach or by what has been coined the "sink or swim" method.

---

81. Ibid., p. 43.
82. W. Wade Berryhill, p. 79; Berryhill says that it cannot reasonably be suggested that graduates should possess all the skills necessary for lawyering; and the question therefore becomes — what are the minimum skills a graduate should possess?
83. David R. Lowry, "A Plea For Clinical Law", (1972) Can. Bar Rev. V.L. 183 at 189; see also Robert A. Fairbanks who, at p. 643, lists the following as being modern problems associated with articling: 1) The high potential for an uneven quality of training; 2) The lack of uniform curriculum; 3) Limitations due to the specialized nature of the practice of supervising lawyers; 4) The foremost concerns of supervising lawyers is their practice and the generation of legal fees, not teaching practice aspects of the law; 5) There is little assurance that the supervising lawyer will be a satisfactory model of professional competency and integrity worthy of emulation, and; 6) There is a high potential for economic hardship being placed upon clerks and, concomitantly, potential for creation of a bondage-like atmosphere: For an opposing view see Kenneth Jarvis, Q.C., "An Alternative Approach To Legal Education", (1975) 9 L.S.U.C. Gazette 108 at 111.
Within the confines of the law schools, a minimum degree of competence means learning the law and acquiring the ability to analyze and synthesize cases. Unfortunately, the same phrase holds different connotations for those in practice. For years, law schools have held the belief that the true aim of legal education was "the study of law and the institutions of the law". The somewhat lesser world of practice was not the concern of the law school. Students still graduate from law school without the faintest idea of what is involved in practising law. As a justification for this dereliction, the schools have always insisted that students could learn practice skills under the tutelage of senior lawyers. In the words of one writer:

Practical instruction is still left for the most part, to busy lawyers many who lack the aptitude for teaching, and none has sufficient time to prepare his material effectively much less develop effective teaching techniques. Teaching is a difficult art. Amateurs occasionally do it well but if consistently high quality is desired it is necessary to rely chiefly on those who have undertaken to make a full-time career of education. There is truth in the epigram 'Those who can do' there is equal truth in the corollary 'but they can't usually teach'.

Clearly, a dichotomy exists between what the law schools view as their role in society and what lawyers have claimed are their needs. This rift has created a great deal of tension between practitioners and the schools. The resulting animosity reveals itself

85. Francis A. Allen, "New Anti-Intellectual In American Legal Education", p. 73.
87. See Francis A. Allen, "New Anti-Intellectualism In American Legal Education": at p. 75 he defines "the preservation and extension of intellectually based and humanistically motivated legal education" as the greatest challenge facing American law schools; For practitioners' view of educational needs see: Francis Kahn Zemans and Victor G. Rosenblum, "Preparation For The Practice of Law — The Views of the Practising Bar", (1980) 1 Am. Bar J. 1. The authors point out that 65.5% of the lawyers interviewed felt that graduating students had only a fair or a poor notion of what practice entails. Also, while practitioners gave law schools credit for legal education as such, they maligned the schools for giving insufficient attention to areas of great importance such as counselling, negotiating, effectiveness in oral presentation and general interpersonal skills: see also L.L. Baird; "A Survey of the Relevance of Legal Training To Law-School Graduates", (1978) 29 J. Legal Ed. 264: This study involved 1,600 former graduates from the years 1955, 1965, and 1970 from 6 major law schools. More than 1/3 of the graduates felt that law school did not prepare them for their particular field of law.
in charges by the Bar that the schools are simply "ivory-towering" and are "unsympathetic" to the real needs of lawyers. The schools have reacted to these criticisms by alleging that modern law students are "insecure" and to alleviate that insecurity students needlessly demand "instantaneous practicality" from the schools. Clinical law programs, in a token-like fashion, are the schools' response to those demands.

IV. Legal Education: Some Preliminary Conclusions

Legal education advances the notion that lawyers are equipped to enter the practice arena once they have learned basic legal doctrine and have mastered the art of legal analysis. Legal education finds no shame in the slipshod manner in which practice skills are acquired by young lawyers, nor does it find shame in the way in which law is taught in the schools. The Socratic method and the case method, traditionally the most prevalent teaching techniques, have undergone heavy criticisms in recent years. A wide array of ills have been said to result from the pervasive use of these methods. The restrictive impact in regard to skills training, the irreparable moral and psychological damage to the student and the inability of these methods to effectively deal with the ethics question have all been mentioned as major drawbacks. While some educators feel that these techniques should be maintained in first year, many are beginning to question their continued use in upper level years.

In addition, the curriculum debate continues to occupy much of the time and energy of some members of the Bar and some members of the professoriate. While a harking-back to the pre-sixties compulsory curriculum is being contemplated, little attention is being given to more serious questions which might shed light on some of the problems now being faced by lawyers. The modern law
school curriculum, reflective of the corporate economy, makes no attempt to address the justice issue. And under the thin veil of objectivity and impartiality, students are encouraged to accept, without further inquiry, an educational system which not only supports but promotes society's vested interests. The pursuit of justice, while widely recognized as a meaningful goal, receives no attention in the home of its would-be deliverers.

Additionally, broadly defined social issues such as the lawyers' duty to use his power and skills to assist society or to actively pursue law reform are not even recognized as valid concerns in legal education. These omissions have been rationalized amid anxious claims that the schools must remain morally and socially neutral, and that in general, academic neutrality is absolutely essential to the pursuit of truth in higher learning. Most prominent in legal education, therefore, is the impairment of moral and social conscience. The curriculum as such, speaks loudly of a definition of professional responsibility so narrow in scope that it serves only to undermine the higher aspirations of most students. Paradoxically, one educator has bemoaned the profession's "loss of confidence" in traditional legal education.

Although dissatisfaction with legal education is prevalent in academic circles, few have attempted to substantially change the approach used in either Canadian or American law schools. It would appear that although everyone is "uncomfortable over lost opportunities in legal education, almost everyone who has a vote

votes that it stay the way it is’.\textsuperscript{95} Perhaps an explanation for this irony is that lawyers are basically ‘‘sentimental’’ and share a belief that legal education, at least fundamentally, cannot be improved upon.\textsuperscript{96} Suffice it to say at the moment that the preceding view is one which the legal profession can ill-afford given the limited respect the teaching and practising Bar now command.

V. Legal Ethics And Professional Responsibility

This section deals specifically with the various methods which have been used in the past to teach the rudiments of legal ethics and professional responsibility. It should be noted that these methods, with the exception of the clinical method, appear to support general format and current methodologies in legal education. It was upon the validity of the legal educational system, or for that matter the entire legal order, that programs were devised to deal with the ethics question.

Initially, law schools did not graciously accept the suggestion that they were the keepers of their students’ ethics.\textsuperscript{97} Gradually, as the problems with lawyers in practice became more acute and the need became more apparent, legal educators began to insist that the schools confront their responsibilities to their students.\textsuperscript{98} It was determined that legal ethics can and should be taught in the schools because:

\begin{enumerate}
\item The already conscientious student will be encouraged by learning of the concern of others for the lawyers’ obligations;
\end{enumerate}

\textsuperscript{95} Shaffer and Redmount, p. 10.
\textsuperscript{96} Ibid., pp. 8-18; see also Rod MacDonald, p. 16. Here, the author mentions that reform in legal education ‘‘presupposes a context sympathetic to change’’. Change has been long in coming because ‘‘. . . few groups are more conservative than the legally trained’’, and see also Edward J. Devitt; ‘‘Law School Training: Key To Quality Trial Advocacy’’, (1979) 65 Am. Bar Assoc. J. 1800. The author argues here that the Langdellian approach to legal education has created ‘‘irrational prejudices’’ within the intellectually-oriented law school community. These irrational prejudices have created barriers against balancing present law school curricula.
\textsuperscript{97} Eric Schnapper, ‘‘The Myth of Legal Ethics’’, (1978) 64 A.B.A.J. 202 at 204. Schnapper, voicing the frustration experienced by many educators and practitioners with conventional methods used to teach legal ethics stated that: ‘‘legal ethics, like politeness on subways, kindness to children or fidelity in marriage cannot to a great effect be taught in school’’.
The young lawyer will not be apt to violate the canons through mistake or ignorance of its provisions; 
(3) The indifferent student may become convinced of the benefit to the profession, and consequently to himself, of adherence to the canons and of the assumption of professional responsibilities, and;
(4) Even the unethical student will become aware of and possibly be restrained by the sanctions that can be imposed upon him for improper conduct.  

Although some writers made a distinction between legal ethics and professional responsibility, it was generally agreed that the schools should be responsible for imbuing the student with a sense of professionalism. For example, Leroy Lamborn made a marked distinction between legal ethics and professional responsibility. According to this writer, legal ethics included the duties of the practitioner as expressed principally in the canons. Professional responsibility, on the other hand, was said to be concerned with the moral obligations of the lawyer. The moral obligations of the lawyer encompassed such broad areas as law reform, community service projects and adequate representation for the indigent client. Other writers put forth even broader definitions of professional responsibility stating it must necessarily include all those things done by practising lawyers. Thus, professional responsibility gradually took on a meaning which involved not only legal ethics in the conventional sense, but also an enlarged conception of legal ethics which included the lawyer’s duty to society.  

Because of the renewed interest in professional responsibility, a series of conferences was held to determine viable ways of bringing notions of professional responsibility into the law school curriculum. In 1956 a number of eminent scholars and members of associated professions gathered at Boulder, Colorado to discuss proposed ways of teaching professional awareness to lawyers. Throughout the conference, five major areas of public responsibility

100. Leroy L. Lamborn, p. 2.
101. See, for example, Donald T. Weckstein, “Watergate And The Law Schools”, p. 278.
were isolated by its members.104 It was generally agreed that methods should be made available in the schools to accommodate instruction with these areas in mind. Other conferences followed the Boulder one reiterating the themes expressed and adding that newer and better means of instruction were required.105

A. Methods Used to Teach Legal Ethics and Professional Responsibility

Historically, ethics and morality in legal education were taught by a combination of elucidating for law students positive moral-legal standards or by extolling the virtues of a good lawyer.106 Both approaches assumed that morality was referable to the immediate climate and culture in which the lawyer lived and worked.107 Thus, the virtues of a good lawyer could be categorized and enumerated in a fashion which might make them accessible to easy ethical instruction. Because the lawyers’ morality was seen as being personal in nature, legal educators exhibited a strong disdain for the necessity of delving into those virtues which formed the basis of

104. Ibid., pp. 6-7; Professor Julius Stone compiled the material discussed at the conference and listed five major areas of public responsibility: (1) The lawyers’ standard of decency; (2) Standards in pursuit of clients’ interests; (3) Standards vis-a-vis the community generally in advancing his own or his clients’ interests; (4) Standards as a citizen, of affirmative interest in the public domain, and; (5) Standards for settling conflicts between the duties arising within each of these areas or between them and those of general moral or religious duty.


106. C. Paul Rogers III. “An Approach to Teaching Professional Responsibility To First Year Law Students”, (1977) 4 Ohio N.U.L. Rev. 803 at 817. This writer takes the view that lawyers may perform acts of “questionable” character because they are ignorant of the ethical restraints which govern their profession. Thus, sensitizing students to their obligations via the Code of Ethics or by drawing to the students attention the practical ethical problems faced by lawyers may serve to instill ethical behaviour.

107. Lawrence Kohlberg, pp. 2, 53; Kohlberg maintains that the problem with traditional “character education” is that it equates virtue with “conventional or social consensus morality”. The relativist approach assumes that standards of “cultural correctness” ought to be studied and internalized as the basic moral rules of the culture.
choices and decisions made by lawyers. The fear of indoctrination also became a real concern for those involved in teaching legal ethics. Nonetheless, law schools attempted to teach professional responsibility and legal ethics by a variety of means. The major vehicles were the course method, the pervasive method and most recently, the clinical method. Some schools tried the guest lecture technique, along with video and audio aids (though to a much lesser degree). The course method and the pervasive method, traditional servers of the task, have occupied much of the time and energy of those interested in teaching morality and for that reason a lengthy discussion of each will follow. The clinical method, the newest and most radical effort, has gained considerable momentum in recent years. Clinical education will be examined and evaluated not only as a viable alternative to current ethical methodologies but also as a constructive addition to the law school curriculum.

1. The Course Method

The course method was developed to familiarize students with the basic rules contained in the Canons of Ethics. Some schools also developed courses which included a more expansive treatment of the Canons. Involved in these courses were notions of the lawyer’s role in society, his duty to society and the lawyer’s moral obligations to society.

Although the course method has been used for teaching professional responsibility in one form or another, it has not met with success and acceptance from the academic community. Opinions on the course method range from total agreement with its

110. Leroy L. Lamborn, pp. 2, 4; the author notes that in 1963 seventy-seven percent of the approved American Law schools were teaching such a course. And see Stuart C. Goldberg, National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools, in Stuart C. Goldberg (ed.) Pre-Conference Materials; National Conference on Teaching Professional Responsibility vii, xviii (Detroit: University of Detroit Law School, 1977). The author indicates that by 1977 ninety-six percent of these schools were offering a course in either legal ethics, professional responsibility or the legal profession. Thus, an overwhelming majority of schools taught a course in ethics under one heading or another with slightly varied content.
usefulness,\textsuperscript{111} to partial acceptance of the method,\textsuperscript{112} to outright denial of the course method as a useful tool in sensitizing students to ethical problems in practice.\textsuperscript{113}

The lack of consensus on the merits of the course method relate not to questions involving the necessity of ethical instruction but to the appropriateness of course content and methodology. For example, H. W. Arthurs, having used the course method in his own classroom, admits to being a supporter of the method but balks at the suggestion that the method become mandatory in any form.\textsuperscript{114} His reasons for disagreeing with the avenue now being used by American Schools\textsuperscript{115} are threefold: mandatory courses in ethics makes the student resentful; the required course also makes the student apathetic to the overall objectives of the course; and additionally, it is felt that one cannot "coerce" students into virtue.\textsuperscript{116}

Arthurs is not alone in his concern about coercing students into virtue. Writers who have studied the use of the course method become agitated when confronted with the possibility of "preaching instead of teaching".\textsuperscript{117} The confusion concerning the aims of the course method and the effects upon the students and professors alike remain as a constant theme in many of the writings on the topic.

Further criticisms of the traditional course method are that it is singular in its approach "a canon by canon, disciplinary rule by disciplinary rule catechism".\textsuperscript{118} The course method was said to

\textsuperscript{111} Donald T. Weckstein, "Watergate And The Law School", pp. 260-309.
\textsuperscript{112} See generally C. Paul Rogers, "An Approach To Teaching Professional Responsibility To First Year Law Students", p. 803, and see Noyes Leech, p. 1530. Both writers agree that the course method may be useful in conjunction with other teaching methods.
\textsuperscript{113} See Charles W. Joiner, "Teaching Professional Responsibility", (1978) 64 A.B.A.J. 551. Joiner feels that present methods do not adequately deal with the ethics question. He therefore advocates team teaching as a reasonable substitute.
\textsuperscript{115} Chesterfield Smith, "President's Page", (1973) 59 A.B.A.J., 1073. Here, the author indicates that courses in ethics are now required by all approved American law schools.
\textsuperscript{116} H. W. Arthurs, pp. 195-196.
\textsuperscript{117} See generally: Donald T. Weckstein, "Watergate And the Law Schools", p. 641. For a similar view see James F. Bresnahan, "Ethics and the Study and Practice of Law", (1976) 28 J. Legal Ed. 189.
place a heavy emphasis on the professional independence of the practitioner and little, if any, on the system in which the lawyer functions. As a result of the superficial treatment given the problem, students rarely acquire an accurate understanding of the underpinnings of the adversary system. The course method in this context, produces students who are cynical and quite indifferent to the demands of their professional role.\footnote{119. Ibid., pp. 686-687.}

Thus far the course method has been used in one manner or another in most Canadian and American schools. The dashed hopes of any appreciable success with the method permeate the writings on the topic. Aronson suggests that a major reason for resistance by students to the method is that it remains foreign to the law school curriculum.\footnote{120. R. H. Aronson: "Professional Responsibility: Education and Enforcement", (1976) 51 Wash. L. Rev. 273 at 278.} The very nature of the ethical dilemma defies traditional law school modes of presentation, lectures and the Socratic method.\footnote{121. Ibid., pp. 278-279.} Indeed, one writer has concluded that the course method remains not only impervious to the law school curriculum but is largely defeated by it.\footnote{122. Ronald M. Pipkin, pp. 247-275.} The salient features of both the manifest and latent curriculum supports the development of lawyers who "understand matters of professional responsibility to be peripheral to their role".\footnote{123. Ibid., p. 265. For purposes of clarification, Pipkin describes the manifest curriculum as those attributes which identify the core and peripheries of professional training such as the designation of courses, variation of credit weight, required courses or electives, and limitations which may be placed on courses outside the classroom. The latent curriculum is said to include the content of instruction, cues from faculty, feedback from the job market and requirements for bar examinations. Some of the findings in this study were that courses in ethics have low status in the latent curriculum hierarchy. In legal education, analytical skills were valued most and sensitivity least. Because ethics courses were taught by the discussion method, students tend to devalue such courses. The author was of the opinion that to simply change the instructional format to the Socratic method would not increase the importance of the course to students.} This writer was of the opinion that if schools are to successfully respond to social and professional demands for a better, more ethically sensitive training for law students, ethical rule learning must be accompanied by new and perhaps radically different pedagogies.\footnote{124. Ibid., p. 275.} For the schools, the addition of courses in ethics to the law school curriculum has been a
relatively painless, inexpensive and nondisruptive means of addressing the issue of professional responsibility.

The frustrations experienced by legal educators in attempting to teach ethics and morality by the course method has been voiced in terms of a fear of preaching to students or indeed, in a fear of indoctrinating students with professorial values or with the values of others. The inherent risks in either of these approaches was said to be apparent. Educators tried to teach code requirements while at the same time remaining aloof from value inculation. Thus, teachers were caught in what appeared to be an unresolvable dilemma.

Teaching students positive legal-moral standards or preaching the attributes of a good lawyer leave educators grappling with what Lawrence Kohlberg refers to as the “relativity problem”. It has been pointed out that teaching content and methodology which is reliant on relativism, that is, the view that moral standards are relative to and determined by society, must, of necessity, result in the imposition of personal value standards and biases. Students have insistently and steadfastly rejected the values imposed on them by the teachers of the course method because these values are at odds with existing values in the legal educational system. To accept one set of values must mean a rejection of a contrary set of values and since lawyers must survive in practice, the spiritual exhortations of the classroom have fallen on deaf ears.

125. Lawrence Kohlberg, p. 11. Kohlberg says that acceptance of the idea of relativity means that the teachers should not teach any particular value. Yet, value inculcation is inherent in legal ethics courses because they attempt to teach the prevailing standards of the profession which are reflected in the various Codes.

126. Ibid., p. 10. The view that morals are relative to or determined by society conflicts with Kohlberg’s view because Kohlberg theorizes that morality originates within the individual.

127. Charles Fried, pp. 1073-5. Fried argues that the “lawyer as friend” concept is tied to the need to maintain one’s integrity as a person. Fried further argues that a lawyer is not “some kind of anointed priest of justice” and the lawyer, as such, has no special moral responsibilities. Rather, Fried affirms “the moral liberty of the lawyer to make his life out of what personal scraps and shreds of motivation his inclination and character suggests: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose; only so long as they lead him to give wise and faithful counsel”. The lawyer’s self-interest, therefore, easily dominates societal interests.


2. The Pervasive Method

The Boulder Conference of 1956\textsuperscript{129} officially recognized the pervasive method as a possible solution to teaching legal ethics and professional responsibility. However, the system enjoyed only informal treatment in some schools and interest in the method necessitated a more cohesive approach. The pervasive method is said to:

meld responsibility problems throughout the oral presentation and written materials which deal primarily with substantive legal and practical problems. In other words, discussion of professional responsibility is interspersed throughout the oral and written education designed to improve professional competence.\textsuperscript{130}

Thus, it was suggested that the pervasive method might be utilized in pervading a special course or for that matter, the entire curriculum.\textsuperscript{131} It was hoped that because of its possible breadth, the pervasive method might be the answer to the problem of teaching professional responsibility.\textsuperscript{132}

Originally it was thought that the pervasive method might more realistically deal with problems lawyers face in practice. Additionally, students who were subjected to the method might benefit from being instructed by faculty who had shown themselves to be aware of and concerned with problems of professional responsibility. To that end, it was urged that students, instructed in such a manner might be less resistant to learning about ethics.\textsuperscript{133}

\textsuperscript{129} Julius Stone, p. 240.
\textsuperscript{130} Joint Committee, \textit{Arden House}, pp. 11, 35.
\textsuperscript{132} H. R. Sacks, p. 1111. Sacks suggests that the pervasive approach should be used in hopes that in the context of regular law problems:

1) The significance and the pervasiveness of ethical issues might become more apparent;
2) The resistance of students to considering ethical issues, on the ground that it represents an attempt to "teach us to be good" or is an annoying deviation from the "real work" of a professional school, might be lowered;
3) The fact that instructors in regular courses took time to deal with professional responsibility issues might demonstrate to students that the faculty as a whole, and not just the instructor in legal ethics, are vitally concerned about such matters, and;
4) Students would be exposed to a range of faculty reactions to what are often very complex problems of professionalism.

\textsuperscript{133} Student resistance to the ethics question is well documented. It has been suggested that law students are more comfortable with legal discourse, and that in
The pervasive method, in this context, was said to offer students more practical insight into the workings of the legal system. It was hoped that the method would more adequately prepare students for situations in which their professional competency would be involved. Consequently, programs were suggested for planned pervasion of law school courses. A number of case books were printed which specifically dealt with ethical issues in conjunction with regular problems relating to substantive law. It was argued that these programs should begin in first year because:

early identification and emphasis on various aspects of the responsibility of lawyers to the legal system will serve to sensitize law students to their obligations and responsibilities as lawyers throughout their legal careers.

Educators warned that a lack of a cohesive approach would result in chaos and ultimately in total failure.

Watson took up the cause and vigorously supported the pervasive method. While he felt that the course method provided little functional utility, it might serve as a “capstone” to the pervasive method. Along with supplementing the pervasive method with courses in ethics, Watson recommended collaborative teaching wherein students might benefit from interchanges with psychiatric residents or medical trainees. His view was simply that no opportunity should be lost to effectively train students to be professionals in the fullest sense. Thus, it was urged that the process be started early, pursued relentlessly and never ignored during all formal contacts with students. Failure to cultivate a sense of professionalism was said to “place the graduating student on the stormy seas of professional life without helm or helmsmen”.

However, not all reactions to the method were favourable. Indeed, many serious flaws emerged with the use of the method. The Vanderbilt experiment was one of the first programs created

general, students fear being placed in a situation where their morals are questioned. See James R. Elkins, p. 29.
134. C. P. Rogers, pp. 803-4.
136. C. P. Rogers, p. 819.
137. Ibid., p. 804.
139. Ibid., p. 163.
140. Ibid., p. 157.
141. T. A. Smedley, p. 435.
to accommodate the pervasive method. Although early comments were favourable, serious shortcomings later appeared. At the outset, faculty cooperation was voluntary and the amount of time each participating professor devoted to ethical problems was a matter of personal choice. A professor using the method had the option of employing the "piecemeal approach" where he might spend a few moments of his time enlarging upon the ethical aspects of a case, or a professor could use the "concentrated approach" where he might deal with ethical problems at the end of each section. Each method was deemed to possess specific merit. Although faculty commitment was initially favourable, the burden of dealing with an extra workload began to emerge as a significant drawback from a teaching point of view. Professors were reluctant to devote a substantial amount of their time to the program either in the classroom or in time spent preparing for their courses.

Before these programs had an opportunity to become entrenched in the curriculum of the various schools, some academics reacted by urging caution, and others by completely condemning the technique as a viable alternative to the course method. As early as 1965 imperfections were being articulated and alternative suggestions were being offered. The attitude of the individual professor and his inability to cope with the method were mentioned as obstacles to the success of the method. In addition, typical case books did not easily accommodate the method and therefore produced a certain degree of frustration among teachers. Also, correction and evaluation became a contentious issue because of the far reaching scope of the method.

In a cogent attack on the use of the pervasive method, James E. Starrs best enunciated the frustrations experienced by both faculty

142. Ibid., p. 440. The piecemeal approach was seen to be more beneficial in some instances because it provided close integration of ethical issues with substantive law materials and the concentrated approach was seen to be useful because it allowed for full discussion at the end of the class.
143. Ibid., p. 443.
144. S. A. Samad, "The Pervasive Approach To Teaching Professional Responsibility", (1965) 26 S.L.J. 100 at 105.
146. S. A. Samad, p. 106.
147. James E. Starrs, p. 377. Students, it was said, were "slow to learn matters for which they would not be held accountable on a final examination".
and students who attempted to cope with the method. Starrs\textsuperscript{148} allowed that:

The pervasive method...possesses so many inherent and operational deficiencies that its implementation must either be stayed or, if not, it will inevitably die aborning. In a word, the pervasive method asks too much of law classes, of law school faculty and of law students. In terms of unreality, it defies the nature of the limits of the individual law school course, it dreams of an unlimited supply of talented and inspired teachers who have grasped the essentials of professional responsibility and are dedicated to the task of invigorating their courses with it; and it enters into the never-never land where students have an inexhaustible supply of enthusiasm, energy and patience which waits upon direction to matters of professional responsibility.

Additionally, Starrs was not negligent in observing that the “seeds of indoctrination were strewn throughout the pervasive system”\textsuperscript{149} and lastly, as students were already habituated to the case method, pervasive teaching was thought, in any event, to be entirely futile.\textsuperscript{150}

The pervasive method, like the course method, was viewed by students as an issue collateral to the main objectives of legal education.\textsuperscript{151} It was said that the pervasive method, taught as an appendage to substantive and procedural law, by its very nature, inherently adopts a secondary position in the curriculum.\textsuperscript{152} Because of the collateral nature of the method, ethical issues were also seen as being “foreign” or “strange”.\textsuperscript{153} Although educators made attempts to elevate ethics to the level of tax law, few were successful in achieving this goal. Thus, it once again became apparent that something inherent in the law school curriculum did not easily adjust to free moral and ethical inquiry.

\textsuperscript{148} Ibid., p. 370.
\textsuperscript{149} Ibid., p. 375.
\textsuperscript{150} Ibid., pp. 378, 380. The author notes that the classroom recitation of cases is not suitable for teaching professional responsibility. The “casebook is oriented to the courtroom, not to the comprehensive demands society puts on the lawyer...casebook emphasis is with facts and problems of professional responsibility involve values and objectives.”
\textsuperscript{151} James F. Bresnahan, “Ethics and The Study And Practice of Law: The Problem of Being a Professional In A Fuller Sense”, pp. 194-5.
\textsuperscript{152} James E. Starrs, p. 379.
\textsuperscript{153} James F. Bresnahan, p. 194.
B. Review of Ethics Methodologies

Both the course method and the pervasive method were added to law school curricula in an effort to inspire ethical behaviour among lawyers. These methods assumed that ethics and morality could be added to curricula without reference to curricula itself. Legal education has always discouraged overt moral questions relating to the law. By refusing to deal openly with moral issues, students were forced to accept the value consensus that filtered through the curriculum. That consensus indicated to students that the practice of law did not entail a great concern with the morality of practice. Morality and a search for justice or truth was something with which the good lawyer need not be concerned. Indeed, it could be said that the good lawyer was oriented in the opposite direction. The good lawyer was “hard-headed”, analytical, objective, and rational; the good lawyer was the one who took an “unemotional” or “no-nonsense” approach to the practice of law. In this rigid characterological format, no allowances were made for pondering

154. Lawrence Kohlberg, pp. 38-76. Kohlberg says that value neutrality in education is non-existent. Present educational systems are dedicated to transmitting the “cultural given”. Knowledge is objective, visible and repetitive — “that which can be pointed to in sense experience. . .and can be culturally shared and tested”. Kohlberg defines this view as part and parcel of “cultural transmission ideology”. Since the educational system, to a large extent, transmits culturally defined knowledge, any pretense of neutrality is said to create “the hidden curricula”.

155. F. M. Thomforde, Jr., “Public Opinion and the Legal Profession: A Necessary Response By the Bar and the Law School”, (1973-74) 41 Tenn. Law Rev. 504 at 529-30. The author says that “Generation after generation of students graduate from law school without having been required to evaluate critically the moral factors in decision-making. Even worse, they often graduate believing erroneously that morality has no place in the working of the legal process.”

156. Charles Fried, p. 1071. Fried says that the lawyer, as a limited purpose friend, is a “friend in regard to the legal system. He is someone who enters into a personal relation with you — not an abstract relation as under the concept of justice”. Inherent in this argument is the belief that the lawyers’ loyalty remains with his client. If a conflict between that loyalty and loyalty to himself or society develops, the lawyers’ loyalty must remain with the client, not with himself or society.

157. These phrases are standard phrases used to describe the good lawyer and are interspersed throughout the literature on legal education. See, for example, Donald T. Weckstein; “Watergate And the Law Schools”: rationality, we are told, is the “key to the legal process and the lawyers’ role therein”. See also Andrew Watson, “The Quest For Professional Competence”, p. 380: Watson, in recognizing the overemphasis placed on analytical skills in the law schools, reminds the reader that analytical skills are a “necessary and highly desirable capacity in lawyers, but surely not the only one”.

Teaching Law Ethically: Is It Possible? 503
the outcome of the lawyers' actions as they affect society. Legal education, in its incessant separation of law and morals, served to create the "moral impoverishment" of the modern lawyer. 158

Traditional approaches to teaching legal ethics relied heavily upon spelling out for students what the attributes of a good lawyer were or upon explaining how a good lawyer should perform in given circumstances. These methods assumed that morality could be taught in a purely intellectual setting by lecturing on the virtues which a lawyer should possess. Left out was the question of the adequacy of those values or of the content of the values themselves. The most virtuous lawyers were those who came closest to exhibiting those virtues expressed in the various codes of professional responsibility. The legal profession, therefore, had its own "virtue bag". 159

The bag of virtues approach or the preaching of positive moral values as a means of inculcating morality carries with it several inherent flaws. Kohlberg maintains that there are no such things as virtues and even if there were, they couldn't be taught. 160 As well, the moral educator using these methods will inevitably find himself in the indoctrination trap. 161 The use of these approaches has created serious problems for lawyers. For example, a lawyer caught in a difficult situation could simply switch, change or bend his

159. Lawrence Kohlberg, pp. 8-9; The bag of virtues approach to moral education is basically character education consisting of personality traits which are culturally defined as being positive. Kohlberg maintains that there are two problems with using this approach: First of all, "everyone has his own bag and secondly, these virtues cannot be defined, e.g. What is one person's integrity is another's stubbornness". The legal profession's bag of virtues consisted of character traits like integrity, honesty, loyalty, and fairness.
160. Ibid., pp. 34-39. Kohlberg points out that psychologists believe there are no such things as virtues, i.e. people cannot be divided into honest and dishonest groups. Kohlberg maintains that character traits such as honesty tend to shift with the demand of the situation at hand. The view that law students cannot be taught "to be good" virtually permeates the writings on the topic. See generally Eric Schnapper "The Myth of Legal Ethics", and Jerome Carlín, "What Law Schools Can Do About Professional Responsibility", and see also: Ralph Slovenko, "Teaching Professional Responsibility: A Reply", (1963-64) 16 J. Legal Ed. 327 at 332. Slovenko, reiterating the view that personality traits cannot be taught, maintains that personality is a matter of superego development subject to formation only in the earlier years of one's life. Commenting on the shifting nature of personality traits, Slovenko was of the opinion that "every person at some point will yield to temptation, depending on the strength of the internal and external prohibitions and the strength of temptation".
161. Lawrence Kohlberg, p. 10.
"virtues" whenever the need arose. The defense for a change in position which might be observable was that the lawyer was acting in the best interests of the client or the cause.\textsuperscript{162} If this defense was insufficient, the lawyer's total lack of responsibility allowed him to state that he was acting pursuant to his client's instructions. The culturally approved norms of the profession permitted the lawyer to disallow responsibility for his actions. In other words, the client, not the lawyer, took the blame for slight indiscretions or for behaviours which are in the "ordinary parlance unethical".\textsuperscript{163}

The furor created by the Watergate scandal is largely responsible for the increased interest in legal ethics.\textsuperscript{164} Indeed, Watergate indicated to both legal educators and practitioners that in spite of twenty years of concentrated efforts to teach ethics, the end result has been one of dismal failure. These findings served to open the door — perhaps just another inch — for a more serious peek at clinical law programs.

C. The Clinical Method

The clinical method was first suggested as a teaching device by Jerome Frank as early as 1932.\textsuperscript{165} Dissatisfied with current law school methodology, Frank recommended the use of clinics as an aid to teaching students the law and its relationship to society. Indeed, he preferred the method and advised that students should be given the opportunity to see how the law interacts with the many social factors that make up a case. Frank was probably one of the first educators to think that the inculcation of good ethical standards could result from the use of the clinical method. He felt that professional ethics could be effectively taught only if students, while learning the canons, have available some first-hand observations of the ways in which ethical problems arise in the lawyer's work.\textsuperscript{166}

\begin{footnotes}
\item[162] The reader will recall that this defense was offered by Former United States President Richard Nixon and his top officials following the Watergate Scandal. The relativity aspect, therefore, always permits an "out".
\item[163] Eric Schnapper, p. 205.
\item[164] See, for example, Donald T. Weckstein, "Watergate and The Law Schools", p. 261, and see also Andrew Watson, "The Watergate Lawyer Syndrome: An Educational Deficiency Disease", (1974) 26 J. Legal Ed. 441.
\item[165] Jerome Frank, p. 918.
\item[166] \textit{Ibid.}, p. 922.
\end{footnotes}
After much discussion as to the feasibility of the clinical method as an instructional technique, legal educators from a number of American law schools agreed to participate in a clinical project sponsored by the Ford Foundation. The participating schools were awarded grants under the auspices of the Council on Legal Education For Professional Responsibility. This project met with limited success and was carried on as a regular part of curricula. Following the American lead, Canadian law schools instituted “the clinic” as an optional course available to students in upper level years.

Although the clinical program has become an accepted part of law school curricula, it has not gained whole-hearted approval from the law school community. Acceptance has been long in coming because clinical legal education has been characterized by goal confusion and a concomitant failure to develop its theoretical dimensions. More serious criticisms of clinical legal education are related to the cost involved in the implementation of these programs. To be effective, clinical programs require a small student/teacher ratio, an ample backup staff, and appropriate space

167. H. R. Sacks, p. 1110.
168. The success of these programs is defined as being limited because these programs involve only a small portion of the student body in most schools. The effectiveness of these programs is, therefore, severely circumscribed.
170. David L. Barnhizer, “The Clinical Method of Legal Instruction: Its Theory and Implementation”, p. 67, and see also Gorden Gee, Donald Jackson, “Bridging the Gap: Legal Education and Lawyer Competency”, 1977 Brigham Young L. Rev. 695; 974. Interestingly, these authors conclude that clinical programs have not been completely accepted because traditional classroom teaching is easier for the teacher and that the use of the casebook method and traditional classroom teaching fulfill the needs of faculty rather than the true needs of students.
171. W. Wade Berryhill, p. 95. Berryhill provides an excellent review of the stated criticisms and objections of the clinical method: 1) It (clinical) is a duplication of skills learned in the first year of practice; 2) Practice skills used at the clinic are not the same skills the graduate needs for real practice; 3) One may develop bad habits as well as good ones; 4) Cynicism may be the actual result rather than social sensitivity from early exposure to the troubles and woes of clients; 5) Because of high costs of supervision and administration, this method is financially unfeasible, and; 6) Due to lack of adequate supervision in most programs, the time of the student could be better employed in functions back at the law school. It is interesting to note, however, that the author rejects the first four criticisms as being unsound because “the argument that students are better off thrust into the sink or swim method in practice is in direct opposition to an argument for ethics... Neither is it convincing that duplication of practice is of no value since almost any other educational school maintains that practice makes perfect”. 
and other facilities. ¹⁷² These factors weigh heavily on the administrative arm of the law school.

Supporters of the clinical method have argued that clinical legal education provides the student with the only real opportunity to learn both professional ethics and practice skills. In recognition of their contribution to the complete professional character, clinical programs attempt to combine these two vitally important areas. Clinical education has the capacity to broaden traditional education in a most productive fashion. The schools' refusal to become involved in a meaningful way in either professional ethics or practice skills has created in the practitioner an "imperfect legal education which is never eradicated". ¹⁷³ By contrast, the injection of clinical programs into law school curricula is said to:

1) Assist the law student in developing a coherent and personalized system of professional responsibility;
2) To integrate and synthesize the diverse components of legal education;
3) To develop in the student the ability to make judgments; and,
4) To aid the student in learning basic technical skills.¹⁷⁴

These goals are achieved by actively setting an educational goal structure which will support the stated aims of clinical programs.¹⁷⁵

1. Teaching Professional Ethics

Clinical educators are gaining increasing support for their stand in opposing traditional methods which have been used to teach the ethics of practice. Often severely critical of abstractionism in legal education, clinical educators would prefer the reality-oriented forum of the clinic for teaching and encouraging good ethical behaviour among lawyers.

In the clinical environment, students are given responsibility for their clients under the direct supervision of a clinical instructor. The key to the success of the clinical program revolves around the

¹⁷³. Robert A. Fairbanks, p. 628. The view that lawyers are incompetent is not one that is shared by everyone. It has been said that lay complaints about lawyers relate more to their "too expert" character. See Marvin E. Frankel, "Curing Lawyers' Incompetence", (1977) 10 Creighton L. Rev. 613.
¹⁷⁵. Ibid., p. 76.
Students are called upon to engage in the legal process as active decision makers. They must work with clients, lawyers, bureaucrats, colleagues, and professors in a real life context in which their choices, behaviour and actions must be tested and tried against real life consequences. The tensions that arise out of the manifold relationship which students experience in clinical work give rise to true confrontations with questions of role, process, client needs and wants, and countless other questions linked to professional responsibility and the validity of legal institutions.

In a sense, students learn through their own errors and the clinical atmosphere provides a controlled setting for the learning process. Students are permitted the opportunity to deal with perplexing situations and dilemmas of the type they will inevitably encounter in practice prior to admission to the Bar. The value of this process cannot be overrated.

For years, clinicians have expressed concern about the lack of emphasis on the justice issue in conventional legal education. The view that justice should be part and parcel of the educational process is one of the newer themes which has received recent attention. Clinical education has been heralded as the most appropriate vehicle for exposing students to practice situations where they may encounter what justice is or what justice should be and where they may view the "tenuous strand that weaves justice in and out of the legal system".

The importance of emphasizing justice not only as the central goal of the law but also as the central goal in legal education has taken on new meaning in light of Lawrence Kohlberg’s theories of moral development. Kohlberg maintains that virtue is not relative to the culture in which the individual exists nor is it a list of easily

178. David R. Bamhizer, “Clinical Education at the Crossroads: The Need For Direction”, p. 1037. Bamhizer notes that students just admitted to practice, exhibit extreme vulnerability in their first years of practice. This vulnerability is thought to result from insufficient preparation for practice.
definable character traits or a group of positive spiritual phrases, rather "virtue is one and it is always the same regardless of climate or culture — the name of this ideal form is justice".\textsuperscript{180} Justice as virtue lies beyond easily malleable character traits such as honesty. Justice is a universal moral principle,\textsuperscript{181} which according to Kohlberg should be the dominant theme of every educational system because it forms the basis for an underlying belief in equality and the universality of human rights.\textsuperscript{182}

Clinicians have long argued that neither legal ethics nor professional responsibility of which legal ethics is an important part can be taught in the purely intellectual setting of the classroom. In its sterile atmosphere, legal education erroneously taught students that the law was either amoral or value-free. Students were said to graduate believing that justice had no place in the legal process.\textsuperscript{183} Recognition has now been given to the necessity of dealing openly and directly with the moral factors which are evident in the lawyer's day to day decision-making. The clinical setting is receptive to the role-taking process which is thought to be essential to moral development.\textsuperscript{184} As participants in clinical programs, students must confront, sort out, select and make basic moral judgments as a natural consequence of their work.\textsuperscript{185}

\textsuperscript{180} Lawrence Kohlberg, p. 189. Kohlberg further maintains that "not only is the good one but virtue is knowledge of the good. He who knows good does good, and the kind of knowledge of the good which is virtue is philosophical knowledge or intuition of the ideal form of the good, not correct opinion or acceptance of conventional beliefs".

\textsuperscript{181} \textit{Ibid.}, p. 40. Here, Kohlberg defines justice as a moral principle and states that a "moral principle is a principle for resolving competing claims: you vs. me, you vs. a third person. There is only one principled basis for resolving claims: justice as equality...a moral principle is not only a rule of action but a reason for action. Justice is called respect for people".

\textsuperscript{182} \textit{Ibid.}, p. 39. Kohlberg believes that the central moral value of the educational process is justice. Since teachers are moral educators, they must be concerned with justice. Thus, moral education is the process of moving students along to the next stage of development.

\textsuperscript{183} F. M. Thomforde, Jr., p. 530.

\textsuperscript{184} Lawrence Kohlberg, p. 147. Kohlberg claims that "1) moral judgment is a role taking process that 2) has a new logical structure at each stage paralleling Piagets logical stages; this structure is best formulated as 3) a justice structure that 4) is progressively more comprehensive, differentiated and equilibrated than the prior structure".

\textsuperscript{185} Thomas E. Willging, Thomas G. Dunn, "The Moral Development of the Law Student: Theory and Data on Legal Education", (1981) 31 J. Legal Ed. 306 at 318. In this study the authors made the following observations:
Clinical education places a heavy emphasis on the social and emotional growth of the law student. The transactional character of these programs permit and allow students to develop and mature emotionally with the view that growth positively affects the professional aspect of their lives. This feature of clinical education is in direct contrast to traditional teaching methodology.

Of more than passing interest to clinicians will be the connection which Lawrence Kohlberg has made between his theories of moral development and theories of ego development. The suggestion is simply that an overlap exists between the two areas. Historically, legal education has paid little attention to either the interpersonal element or the emotional component in legal study. This failing in traditional legal education has been the subject of much criticism in recent years. Watson, for example, says that lawyers who have not had concrete experiences in learning how to cope with their emotions and conflicts will later suffer the consequences of these deficiencies. Among these consequences will be the tendency to avoid painful ethical dilemmas and because these situations go unresolved, there will be an inclination to obscure the issue or simply to ignore it. Clinical education, on the other hand, gives students the chance to “mobilize these emotional conflicts in order that they might be experienced, apprehended and then handled”. Thus, clinical education has the potential to aid students in resolving friction between their personal feelings and conflicts which arise from developmental pressures.

1 Law students typically have the cognitive capacity for development of principled thinking; 2) Law students are at an age — typically the early 20’s — in which the possibility of further adult moral development emerges in conjunction with adult experiences. 3) Adult moral development demands substantial attention to emotional role-taking, and social perspectives which in turn require experience in a) taking responsibility for the welfare of others in society; and, b) making non-hypothetical irreversible moral choices."

186. Michael Meltsner, Philip G. Schrag, pp. 8-10; These authors, in defining clinical goals, added interpersonal and group dynamics plus personal development and self-awareness to typical legal educational goals such as learning legal skills relating to interviewing, preparing witnesses, preparing and conducting cross-examination, negotiation and the preparation of legal documents.

187. Lawrence Kohlberg, pp. 92-93. Kohlberg maintains that cognitive and moral development are a part of a “broader unity called ego development”. Kohlberg asserts that “education for general cognitive development, and perhaps education for moral development, must be judged by its contribution to a moral general concept of ego development”.


189. Ibid., p. 252.

190. Ibid., p. 265.
between those feelings and professional judgment. These lessons, once learned, serve as a basis for interaction between lawyers and clients and between lawyers and other people with whom students will one day work.

2. Teaching Practice Skills

Inextricably linked to a total concept of professionalism is the competence of the lawyer. Proficiency in interpersonal skills such as negotiating, counselling, and interviewing are a must in the lawyer's work. And to a slightly lesser degree, advocacy skills such as the art of direct and cross-examination and the ability to orally present and argue a case are still considered to be standard tools of the trade. These skills have never received high priority in the law schools and consequently skills training has not fallen within the law schools' self-defined mission. Very often young graduating lawyers were left to acquire proficiency in these areas at the expense of initial clientele. The law schools' "disdain for the practical" served only to fuel recent criticisms by both the Bench and the Bar. Indeed, it has been said that the schools' failure to satisfactorily

---

191. Michael Meltsner, Philip G. Schrag, p. 55. The authors' conception of clinical education was that it should provide both a support system and a forum offering students an opportunity to learn from their experiences. A unified approach to professionalism was evident because the authors believe that by working in such an environment students learn to function "not only as individuals playing a professional role, but also as a whole person who happens to be representing clients".

192. W. H. Hurlburt (ed.), "What Is Competence" in The Legal Profession and the Quality of Service: Report and Materials of the Conference on the Quality of Legal Services (Ottawa: Canadian Institute for the Administration of Justice, 1979). Competence was described as the "state of having the ability or qualities which are requisite or adequate for performing legal services", and incompetence was defined as the "state of lacking the qualities needed to give effective legal services". Incompetence, which is not consistent with the ability to act in a professionally responsible manner, was said to be caused by the following:

1) Lack of knowledge of the law and legal principles;
2) Lack of knowledge of procedures;
3) Lack of special skills, eg. skills of negotiation, and cross-examination;
4) Lack of organizational skills necessary to have an efficiently operating office;
5) Health related causes, eg. mental incompetence, senility or addiction to drugs, alcohol;
6) Lack of capacity to become competent, and;
7) Lack of motivation to do good work.

193. F. Zemans and V. Rosenblum, p. 27.
resolve the theory/practice dilemma remains one of the chief weaknesses of modern legal education.\textsuperscript{194}

While clinicians feel that clinical education should not totally replace traditional teaching methodology, many argue that clinical programs are best suited to providing students with a good background in skills training.\textsuperscript{195} Students in turn have said that skills acquisition is a primary reason for enrolling in clinical programs.\textsuperscript{196} Lastly, practitioners recognizing the importance of well-rounded legal training have repeatedly supported the inclusion of some form of skills training in legal education.\textsuperscript{197}

Despite protests from increasing numbers of the Bar, the Bench, and students, the law schools have not seen fit to formally equip graduating students with practice skills. This is so even though it has been pointed out that competence in legal work is directly related to the orderly meting out of justice.\textsuperscript{198} Clinical programs could do much to eradicate the sloppiness which is evident in modern practice. These programs give students the opportunity to prepare cases, interview clients and witnesses, and additionally, these programs give students an opportunity to experience the Court process. For example, students are given the responsibility for trying their own cases under the direct supervision of a clinical instructor or advisor. In addition to those learning experiences, the clinical setting is responsive to a host of instructional techniques which may be useful in providing training in advocacy skills.\textsuperscript{199}

Clinical education offers new methods and means of enhancing traditional legal education. It has the inherent capability of dealing effectively with the ethics question. In addition, clinical education provides a forum for training in practice skills which are by no means less essential to professionalism.

\textsuperscript{194} R. D. Gibson, p. 28.
\textsuperscript{196} Michael Maltsner, Philip Schrag, p. 11. But see Edward Vink, Edward Veitch, "Curricular Reform In Canada", (1977) 28 J. Legal Ed. 437 at 448. The authors argue that studies show that students are generally satisfied with the balance between theory and practice in legal education.
\textsuperscript{197} F. Zemans, V. Rosenblum, pp. 23-24.
\textsuperscript{199} Supra, note 35.
The failure of clinical education to adequately deal with the entire question of professional responsibility, unlike conventional methodology used to teach the law and morality, relate not to inherent functional deficiencies but to its lack of acceptance by the law schools. Even though these programs were first suggested more than fifty years ago the “struggle for legitimacy” drags on. Thus far, clinical programs have been relegated to a small and often unnoticeable part of the law school curriculum. One may well wonder how long it will take before recognition will be given to the glaring inadequacies in both conventional legal educational techniques and methods used to teach morality to law students. In spite of these obvious failings, very little has been done to encourage clinical education as a better and more constructive means of educating lawyers. The most prominent argument against clinical education relates to the cost of implementation and administration of these programs. In view of the increasing complexity of modern law practice, the fast growing number of young lawyers and the difficulties created by inadequate educational techniques, the cost argument appears to hold very little weight as an excuse for inaction and apathetic acceptance of the status quo. To lament that the cost is too high does not effectively deal with the problem nor does it offer an alternative solution: it merely stands in the way of change. One would hope that such an evasive rationalization might by now have outlived its popularity.

VI. Conclusion

Upon reviewing the relevant material on legal education one is confronted with the inescapable fact that all has been tried but nothing has been accomplished in the field of professional responsibility. Ironically, interest in legal ethics and professional responsibility has heightened in recent years, causing much debate among academics who are concerned with the problem. The renewed interest in legal ethics has resulted in various attempts to teach professional responsibility. While each method of instruction

200. Neil Gold, p. 104. Gold points out that clinical teachers are not viewed with the same degree of respect and acceptance as the typical law teacher. Gold maintains that clinical teachers are sometimes viewed with suspicion and are often non-tenured or special term appointments. Gold further suggests that clinical teachers are “rarely adequately compensated or particularly thanked”. This is so even though there is evidence that clinical teachers, as lawyers, teachers, and office managers, work much harder than the teacher of the classroom.
has achieved a modicum of success, little else can be said to have been gained by their inclusion in the law school curriculum. Even though educators have sought vainly to remedy the problem of teaching professional responsibility, public dissatisfaction with lawyers has mounted and spilled over into almost every conceivable medium in recent years.

Central to the abject failure experienced by legal educators in their endeavours is the unquestioned assumption that legal education, in its present form, produces professionally competent lawyers: morality is a matter which is peripheral to legal practice and therefore to legal education, and ethics can be taught simply by transmitting the stated norms of the profession. Following this nostrum, educators have approached the problem by attempting to correct apparent deficiencies in lawyers by familiarizing students with the Canons of Ethics or by completely inundating students with ethical problems of the type that might be found in practice.\textsuperscript{201} It is respectfully submitted that these attempts have failed because they address the wrong issue.

Present methods which have been used to instill legal ethics have failed primarily because they gloss over more deep-seated problems in the educational system. Legal education is itself narrowly confined and restrictive, and as such, does not easily lend itself to instruction in professionalism. In the Holmesian tradition, legal education thought it necessary to separate law from its social and moral operation.\textsuperscript{202} Modern legal education reflected this goal and hence law was taught without reference to its moral, social or historical roots. Thus, the process of alienation inherent in the educational system served to lay the groundwork for the production of the "amoral" lawyer.

Legal education, confined by a definition of morality which excluded moral notions relating to law and its effect on society, characteristically restricted the moral ambit of the role of the lawyer. Because morality for the lawyer was confined to the lawyer-client relationship, a need did not exist to develop a more cohesive notion of morality which would include a total concept of

\textsuperscript{201} James R. Elkins, pp. 18-19. Elkins points out that professional responsibility courses tend to reflect the Code of Professional Responsibility, concentrating in a legalistic manner on the "do's" and the "don'ts" of professional conduct as stated therein.

\textsuperscript{202} Oliver Wendell Holmes, "The Path of Law", (1898) 10 Harvard Law Rev. 457 at 459.
the lawyer as a professional. As a result of this very limited definition of morality, the lawyer's conscience took on an equally narrow expression in practice. Legal education saw no need to delve into broad moral areas relating to justice, fairness, law reform and social conscience. The difficulty with the prevailing view of morality in legal education is not in its absence, but in its restrictive nature. As a result, a complete and realistic interpretation of professional responsibility is practically non-existent in modern legal education.

In the late nineteenth century Christopher Columbus Langdell determined that law was a science and that truth must be ferreted out by objectivity and neutrality.\textsuperscript{203} It has since been conceded that law is not an exact science and cannot be taught without reference to the social milieu in which it operates.\textsuperscript{204} Objectivity and academic neutrality, the justification for the lack of moral reflection in legal education, have been attacked in recent years because these features simply do not stand up to critical evaluation.\textsuperscript{205} The law schools' unquestioned acceptance of the scientific method allowed for years of indoctrination of its students — an indoctrination process that was in constant conflict with the stated norms of the profession. Nonetheless, the scientific approach to teaching the law lingers on in legal education.

The case method and the Socratic method, traditionally the most widely used techniques, reflect the scientific approach to legal study. That these instructional techniques have pernicious effects on lawyers is undeniable. In the name of teaching students how to "think like lawyers", these methods isolate students from their own moral and emotional growth. In the process, objectivity is elevated and subjectivity is minimized; amorality is reinforced and students are taught to distrust their own innate intuitions of right and wrong. These consequences create a startling finding in light of Lawrence Kohlberg's theories of moral development which posit that justice, as the very essence of morality, resides within us and that educational systems should be devoted to the process of nurturing

\textsuperscript{204} Edward J. Bloustein, pp. 402-408.
\textsuperscript{205} Ibid., p. 401. The author argues that the traditional concept of academic neutrality is irrelevant to a decision about the teaching of skills and further that the adoption of a specific "curriculum which includes one or another set of skills represents a corporate or faculty decision about the needs of a society, a decision precluded in principle by traditional notions of political and social neutrality".
moral development. It is trite to state that the Socratic method, now used chiefly as a demolishing technique, pales in comparison to the role it could play in legal education.\footnote{Mark Weisberg, “Looking For Socrates: Reflections on Legal Education”, (1980-81) 6 Queens L.J. 587 at 599. Weisberg suggests that present methodology in legal education must be broadened to include attention not only to the breadth of the material but also to variety and depth. He further suggests that improvements in the use of the Socratic technique need not be confined to clinical courses.}

Although there is substantial recognition that the case method and the Socratic method possess many inherent disadvantages for the law student, these methods are the mainstay in legal education. The often repeated justification for the continued use of the case method and the Socratic method is that these methods teach sophisticated legal analysis. The accepted consensus is that the lawyer must be adept at critical analysis and that the ability to critically analyse is the most important skill in the lawyer’s repertoire. Ironically, there is little direct empirical support for this belief.\footnote{Francis K. Zemans, Victor Rozenblum, \textit{supra}, note 87; and see as well the L. L. Baird study, \textit{supra}, note 87. These studies clearly indicate that lawyers believe other capabilities are far more important in the daily practice of law. Practical skills such as negotiation and counselling skills, the ability to prepare and argue a case, and skills related to oral presentation were prominent among the responses received.}

Indeed, the plight of lawyers has been seriously aggravated by the one-dimensional educational system to which they are subjected. Adequate skills training has never been included in the law schools’ self-defined conception of professional responsibility. Clinical law programs have the capacity to fulfill the need for skills acquisition which is not now being met either by the articling experience or by exposure during the first years of practice. Clinical programs have the capability of broadening legal education to include technical skills, which to date, have not been recognized as a necessary adjunct to legal professionalism.

Additionally, clinical education speaks to the morality of the lawyer — an issue which has either been inadequately dealt with or improperly handled in modern legal education. Clinical programs take students out of the “ivory tower” and makes them accountable for their actions. The stress in clinical programs is on responsibility — or as Lawrence Kohlberg would say — on the search for the true reversibility of one’s own judgments.\footnote{Lawrence Kohlberg, p. 211. Kohlberg argues that reversibility is at the core of moral judgments that are in equilibrium.} The process of evaluating
the moral factors in the decision-making process relates initially to an appreciation of justice and in the long run to a better society. Justice, in itself, is non-indoctrinative and as a guiding moral principle has the opportunity in the clinical setting of being the central goal in modern legal education. Thus, the emphasis in legal education may yet in truth and in fact be on the production of lawyers with a professional character who are more than soulless purveyors of legalese and who are indeed worthy of moral approbation.

The disheartening failure experienced by legal educators in the last thirty years in trying to improve the lot of lawyers has shown that current approaches being used to teach morality can have little or no actual effect on the real problem underlying the lack of professionalism among lawyers. In the past, law schools have tried to remedy the problem by “tacking on” courses in ethics or by the use of pervasive techniques. These efforts have failed mostly because the basis upon which these courses were predicated was in error and because an inherent conflict existed between these courses and the inherent values in legal education. On a larger scale, therefore, these attempts have met with continual failure because the educational system is not only foreign to the more ethereal ethical dilemma but more importantly, because it is foreign to any matter which bespeaks the human condition. Failure, it is respectfully submitted, will be the dominant theme in legal education until massive efforts are undertaken to humanize methodology and content in legal education.

209. Ibid., pp. 28, 176. Here Kohlberg maintains that justice is “content-free” — that is, it merely prescribes that principles should be impartially applied to all. Kohlberg says as well that the teaching of justice is non-indoctrinative because it moves students along through developmental stages “in a natural direction” rather than moving students to accept the teachers’ values or someone else’s values. The teaching of justice, therefore, avoids preaching and didacticism which is linked to the teachers’ authority. The view that the teaching of justice is non-indoctrinative differs from previously held views which posited that the teaching of justice may not only be inherently indoctrinative but also socialistic in origin. See generally, Jerold Auerbach, “What Has Law Teaching To Do With Justice”, and see also Joseph E. Olson, “Teaching Justice: But Whose?”, p. 612. Olson questions Auerbach’s request that justice be taught in the law schools. Olson appears to equate justice with socialism and he indicates that the teaching of socialism is wrong and he further indicates that the law schools should continue to be devoted to “neutrality”. This position, of course, ignores the inherent bias toward the corporate elite in modern legal education.
The Dalhousie Law Journal

Editorial Committee

Faculty

John A. Yogis, Q.C.
Chairman and Editor

Hugh M. Kindred
Associate Editor and Articles Editor

Norman G. Letalik
Comments Editor

C. L. Wiktor
Book Review Editor

R. St.J. Macdonald, Q.C.

Students

Joel Bakkan
David Chodikoff
Kelly Gartner

Editorial Assistant

Stephen G. Coughlan

The Dalhousie Law Journal is published by the Faculty of Law of Dalhousie University. Communications having to do with editorial matters should be addressed to The Editor, Dalhousie Law Journal, Faculty of Law, Dalhousie University, Halifax, Canada, B3H 3J5. The Editorial Committee welcomes the submission of material for possible publication and advises potential contributors that a style sheet is available from the Editor. Views expressed in a signed contribution are those of the writer, and neither Dalhousie University nor the Faculty of Law accepts responsibility for them.

This issue of the Journal was printed by Earl Whynot and Associates. All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7. The price of an individual copy is $12.50 “Indexed”: Index to Canadian Legal Periodical Literature.