Spring 1984

Taking Precedents in the Tidelands: Refocusing on Eminent Domain

W. Wade Berryhill
University of Richmond, wberryhi@richmond.edu

CLINICAL EDUCATION—A GOLDEN DANCER?

*W. Wade Berryhill**

In the play, *Inherit the Wind,* a conversation takes place between Henry Drummond, the great lawyer, and Bertram Cates, his client. While both await the return of a jury verdict, Drummond, being in a reflective mood, relives a part of his past:

> Sometimes I think the law is like a horse race. Sometimes it seems to me I ride like fury, just to end up back where I started. Might as well be on a merry-go-round, or a rocking horse or Golden Dancer. . . . That was the name of my first long shot. Golden Dancer. She was in the big side window of the General Store. . . . I used to stand out in the street and say to myself, "If I had Golden Dancer I'd have everything in the world I wanted." I was seven years old, and a very fine judge of rocking horses. Golden Dancer had a bright red mane, blue eyes, and she was gold all over, with purple spots. When the sun hit her stirrups, she was a dazzling sight to see. But she was a week's wages for my father. So Golden Dancer and I always had a plate glass window between us. But—let's see, it wasn't Christmas; must've been my birthday—I woke up in the morning and there was Golden Dancer at the foot of the bed! Ma had skimped on the groceries, and my father'd worked nights for a month. I jumped into the saddle and started to rock—and it broke! It split in two! The wood was rotten, the whole thing was put together with spit and sealing wax! All shine, and no substance! Bert, whenever you see something bright, shining, perfect-seeming—all gold, with purple spots—look behind the paint! And if it's a lie—show it up for what it really is![1]

---

* Assistant Professor of Law, T. C. Williams Law School, University of Richmond. The author also serves as faculty supervisor for chemical studies conducted at T. C. Williams Law School in conjunction with the Attorney General's office of the Commonwealth of Virginia. Research for this article began in the fall of 1975 during the author's LL.M. studies at Columbia University Law School. A version of this aritcle was submitted in the Seminar in Legal Education. The author thanks Professors Walter Gellhorn and Randle Edwards of Columbia University Law School, as well as those representatives of the 102 law schools answering the survey questionnaire, for their invaluable contribution to the preparation of this article. He also appreciates the cooperation and assistance of Professor Steve H. Nickles, University of Arkansas Law School (Fayetteville) in the preparation and circulation of the author's and Professor Nickle's questionnaires in the survey. Full responsibility for the opinions expressed herein remain with the author.

1. J. Lawrence & R. Lee, *Inherit the Wind* (1951), in BEST AMERICAN PLAYS 401 (J. Gasser ed. 1958).

Clinical education is acclaimed by its advocates to be the salvation of the wayward and sick soul of the legal profession.[2] Others, the staunch defenders of the more traditional academic methods, believing it to be nothing more than spit and sealing wax, shake their heads and murmur "is nothing sacred?" The purpose of this paper is to take a good "look behind the paint" of clinical education.

Before any revealing analysis of clinical education can take place, it is necessary, as well as helpful, to look briefly at the history and criticisms of legal education which spawned the emphasis in clinical programs. These efforts will be followed by an analysis of the recent clinical movement. The most predominant American law school programs generally termed "clinical" experience will be identified, described and critiqued. Section four of this article discusses the results of the author's survey *QUESTIONNAIRE: Classroom Teaching Techniques and Programs of Clinical Education.* Deans, or clinical faculty members if the law school had an ongoing clinical program, plus certain law students of every American Bar Association approved law school in the nation were asked to respond to the questionnaire. The aim of the survey was to determine the nature and extent of, the attitudes toward, and effectiveness of clinical programs employed in the law schools. The final section presents some conclusions on the effectiveness and future of clinical programs. Also, some changes in classroom teaching techniques designed to enhance our success in addressing the problem of lawyer competence are proposed.

I.

Although Theodore Dwight's appointment in 1858, as head of Columbia's School of Jurisprudence, stirred an idea for the institutionalization of legal education,[3] it was 12 years later before the major change in American legal training took place—Christopher Columbus Langdell introduced the case method of instruction at Harvard Law School. Seeing law as a science, he created the scientific approach to law study with the case method as its core.[4] Prior

2. Burger, *A Sick Profession,* 27 FED. B. J. 228 (1968).

3. Stevens, *Legal Education: Historical Perspectives,* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 43 (1973).

4. *Id.* at 4. Although Langdell is remembered as the primary mover, others shared his view that legal training should have a place outside the law office. "In eighteenth-century England,

to this time, apprenticeship, accompanied by readings in the law office, was the predominant means of training American lawyers.[5] Law schools existed both at universities and as independent proprietary entities, but were merely supplements to apprenticeship training.[6] Law study, being tied closely to the study of philosophy, political economy, and societal concerns, was viewed by many as a liberal art and was aimed at preparing students for law practice.[7]

The case method of teaching rapidly became a kind of religion—the analysis of legal rules became an end in itself.[8] To train one "to think like a lawyer" became the foremost objective of almost every law school.

To permit students to master the principles of all areas of substantive law, the drive for expansion of institutional law study to a three year period followed on the heels of the creation of the case method.[9] By 1920 most all schools had followed Harvard's lead of a three year course of study; however, only a small minority had reached Langdell's second goal of a college degree as a prerequisite to law study.[10] Not all were pleased, however, with the change of

---

training for a legal career was entirely in the hands of the practitioners. While courses in law, on what today would be considered an undergraduate basis, were given in the universities, they were not prerequisites, or even a usual route, to entry into the profession. Blackstone deplored the 'pernicious consequence' of the English system. He rejected 'the custom, by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them, in its stead, at the desk of some skillful attorney, in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business.' His exhortations went unheeded in England, but they had great effect in the United States." (footnotes omitted) Note, *Modern Trends in Legal Education,* 64 COLUM. L. REV. 710, 712 (1964) citing 1 BLACKSTONE COMMENTARIES 31-32; "The period of academic professors began in 1779 when Thomas Jefferson created a professorship of law at William and Mary College." *Id.* at 713.

5. Grossman, *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL ED. 162, 163 (1974).

6. *Id.* "Dean Langdell's innovation swept away both types of law schools, . . . Instead of studying systematic treatises of the law, or studying law as an abstract social science, law students were to study selected appellate opinions and distill from them the evolution of legal principles. The lawyer's training was to be provided by the mental process involved in the analysis, synthesis and distinction of appellate opinions, honed through the 'Socratic' method of classroom teaching which created a dialogue between student and teacher designed to elicit the underlying reasoning and principles involved." *Id.*

7. Note, *Modern Trends in Legal Education,* 64 COLUM. L. REV. 710, 713 (1964).

8. Stevens, *supra* note 3, at 45.

9. *Id.* at 45-6.

10. *Id.*

direction that legal education had taken.[11] As legal training became more and more academic and as it became obvious that all areas of substantive law could not be taught in three years, Langdell's approach was seriously questioned.

Educators, judges and practitioners became concerned over the neglect of training in skills necessary to perform the tasks that lawyers must actually do.[12] Concurrently, as the social sciences came of age, alarm was expressed over the absence of the societal concerns in legal study[13]—"the functional consequences of the rules of law,"[14] which were forsaken for intellectual pursuits.

Studies[15] were ordered and the debate between the Realists[16] and Langdellians, which was to characterize the 30's and 40's, was well on its way. In the mid-30's, a student appraisal survey showed extensive dissatisfaction:

> [a]fter the first year the case method lost its value; it should be dropped in the second and third years; lectures should be reintro-

---

11. *See* Stevens, *supra* note 3, at 49.

12. *See generally* Grossman, *Clinical Legal Education: History and Diagnosis,* 26 J. LEGAL ED. 162 (1974).

13. *Id.*

14. Morris, *Comment, Roundtable on Curricular Reform,* 20 J. LEGAL ED. 422 (1968).

15. The first was by Joseph Redlich, "who was invited by the Carnegie Foundation to study the case method, and whose report was published in 1914. While deeply impressed by the case method, he did raise doubts about its efficiency and about the effect it had on students, . . . and on faculty, who neglected systematic scholarship in favor of the production of case books." Stevens, *supra* note 3, at 49; *See* Redlich, *The Common Law and the Case Method,* CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULL. no. 9 (1913); The Reed Report, published in 1921 and sponsored by the Carnegie Foundation, was to do for the legal profession what the Flexner Report, the parallel report on the medical profession, had done for the uniform medical school. Reed disappointed legal leaders, as he believed that "different types of law schools should service different types of lawyers." Stevens, *supra* note 3, at 47; *See also* Reed, *Training for the Public Profession of the Law,* CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULL. no. 15 (1921); Reed tried again in 1928, recording similar conclusions as in 1921. Stevens, *supra* note 3, at 50; *see* Reed, *Present Day Schools in the United States,* CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULL. no. 21 (1928).

16. *See* Grossman, *supra* note 12. "A judicial opinion, according to the Realists, is not determined by a logically consistent set of legal rules based on precedent, and cannot be studied by considering only the reasons which the judge gives for the opinion. Rather, according to the Realists, it is essential for an understanding of judicial behavior that the student look beyond the words of the opinion to the social and psychological forces which were at play upon the judge as an individual, and upon the institutional and professional system at the time of the opinion." *Id.* at 167 citing Rogat, *Legal Realism,* in ENCYCLOPEDIA OF PHILOSOPHY 420 (1967).

> duced; discussion should replace the existing socratic method which consisted of a dialogue between the professor and a handful of students; something should be done to discourage the decline of interest in the third year and all students should have an experience akin to law review.[17]

In the same period of years, in spite of the alleged defects in this newly developed method of legal training, law school attendance became compulsory under the guise of upgrading the ethical and professional standards of the profession.[18] Although some period of apprenticeship was still necessary, no longer was law school attendance voluntary and merely an alternate route to the bar. Institutional legal education had gained academic respectability.[19]

Today only a handful of jurisdictions even permit admission to the bar by way of apprenticeship.[20] The Second World War deferred the energies of dissatisfaction and when complaints returned in the 50's, the emphasis had shifted.[21] The dominant voice in this era was the Neo-Realist.[22] Although sharing the view with the Realist as to the importance of the social consequences of the law, he lacked the concern over practical law skills the Realist showed. Neo-Realists were predominantly interested in training law students as "social architects" rather than practitioners.[23]

One effect of this effort, however, was either the creation or an increased emphasis on moot court, practice court, seminar classes and research to relieve the tension between the competing interests of lawyer training and scholarship.[24]

The content of subsequent complaints of major proportion di-

---

17. Stevens, *supra* note 3, at 51.

18. *Id.* at 48.

19. Grossman, *supra* note 12, at 163.

20. *See* GROSSMAN, CLINICAL LEGAL EDUCATION: AN ANNOTATED BIBLIOGRAPHY 3 (1974).

21. Grossman, *supra* note 12, at 167.

22. *Id.*

23. *Id.* at 168-69; *See* Boden, *Is Legal Education Deserting the Bar?*, 37 INS. COUNSEL J. 97, 98-105 (1970).

24. *See* Grossman, *supra* note 22, at 171-72 (practice court simulation); Stevens, *supra* note 3, at 52 (research and seminar); "[T]he educational reforms of the 50's and 60's—normally heralded by some phrase about 'integrating law and the social sciences'—did not in general achieve the goals of their sponsors." *Id.* at 53; *But see* Boden, *supra* note 23; *See generally* Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?* in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 54 (E. Kitch ed. 1970).

rected at legal education was not as novel as was the source, as the late 60's witnessed the arrival on campus of the student activists.[25] Neither silent, nor content to be scholars as their predecessors in study, they began immediately to demand more of the law school.[26] With a heralded government-initiated "War on Poverty" in full swing, legal services to the poor became a common rallying point.[27] Thus, the stage was set for the emergence of a redefined[28] clinical component to legal education.

II.

> The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.[29]
>
> —Alfred Z. Reed
>
> The modern law school is not fulfilling its basic duty to provide society with people-oriented counselors and advocates to meet the expanding needs of our changing world.[30]
>
> —Warren E. Burger

American legal education is under attack, perhaps the most severe in its history.[31] Indeed, if legal education were a Western fron-

25. "In the late fifties, for instance, it became clear that lawyers were playing a vital role in the civil rights movement. By the early sixties, the law was beginning to attract social activists, a process which was often encouraged—perhaps out of a sense of vanity—by some law schools. When in the mid-1960's, O.E.O founded its Legal Services Program, the law school became the place 'where the action was.'" Stevens, *supra* note 3, at 53.

26. *See* Stevens, *supra* note 3, at 53. "Yet as the War in Vietnam and tension in the cities contributed to the alienation of a generation and ultimately brought chaos to the campus, the law schools gave the impression of not being well-equipped to cope with the demands made on them." *Id.*

27. Grossman, *supra* note 12, at 173.

28. Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?* in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 54 (E. Kitch ed. 1970). "[T]he word 'clinical' is undergoing something of a redefinition much the way legal aid is expanding. . . . The law reform or policy perspective of legal education generally has immensely broadened what law students are permitted to research and study." *Id.* at 74.

29. Brickman, *CLEPR and Clinical Education: A Review and Analysis* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 56 (1973) quoting from Reed, *Training for the Public Profession of the Law* 281, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULL. no. 15 (1921).

30. Burger, *The Future of Legal Education* in CLEPR, SELECTED READINGS IN CLINICAL EDUCATION 49, 52 (1973).

31. Johnstone, *Student Discontent and Educational Reform in the Law Schools*, 23 J. LEGAL ED. 255 (1970).

tier fort, the occupants—being reasonable souls—would have recognized their habitat as unsafe and surrendered long ago. Fortunately, legal educators have not been quick to learn white flag waving, but are a stubborn lot.

That massive criticism has been aimed at legal education is not new.[32] Neither is criticism unique to American legal education,[33] nor, in fact, to legal education—educators from all the arts and sciences are being asked to take a new "look behind the paint."[34]

However, the critics of modern day legal education can not be taken lightly—one of the most severe critics is Chief Justice Burger:

> When I first reached some tentative conclusions some years ago, my appraisal of courtroom performance was so low that I began to check it with lawyers and judges in various parts of the country, as I attended meetings, to see whether I had misjudged. From time to time, in meetings with judges, I would ask what proportion of the cases tried before them were properly presented. The highest figure ever stated was 25 per cent; the lowest was 10 per cent. From that general and sweeping proposition, I began to probe for the specific reasons why trial judges—the best available observers—took such a dim view of the performance of lawyers in the courts. The answers covered the entire range of the acts performed in the courtroom.
>
> . . .
>
> The first and larger part of the defect is lack of adaptability and lack of adequate technical and practical training. The second category has to do with manners and ethics.[35]

The Chief Justice is not alone in his opinion of the inadequacy of today's trial bar and consequential indictment against legal educa-

32. The words above of Alred Z. Reed were uttered over fifty years ago, yet they appear to be a timeless indictment as they are echoed today wherever legal minds gather. Brickman, *supra* note 29.

33. *See e.g.*, Milner, *Legal Education and Training in Nigeria*, 17 J. LEGAL ED. 285 (1965); Peden, *The Role of Practical Training in Legal Education: American and Australian Experience*, 24 J. LEGAL ED. 503 (1972); Metzger, *Legal Aid and the Law Student in the Developing Nations* in CLEPR, SELECTED READINGS IN CLINICAL LEGAL EDUCATION 324 (1973).

34. *See e.g.*, N. POSTMAN & C. WEINGARTNER, TEACHING AS A SUBVERSIVE ACTIVITY (1969); C. SILBERMAN, CRISIS IN THE CLASSROOM (1970).

35. Burger, *A Sick Profession*, 27 FED. B. J. 228, 229 (1968); the Chief Justice has continued to manifest this opinion through present date.

tion.[36] A brief review of any current bibliography on legal education reveals that the present dissatisfaction has produced a massive number of works registering complaints of various sorts.[37] It becomes immediately apparent that to review each complaint would be an overwhelming—perhaps impossible task in the time allotted to scholarly research.

Upon close scrutiny of the major criticism, however, it appears that the essence of such modern criticism is that a good number of practitioners are now allegedly deficient in professional responsibility. The problem is further complicated in that the term "professional responsibility" has enjoyed increasing use, but has rarely been defined.[38] "It can mean as little as obeisance to the Canons of Ethics or as much as stimulating students to enter poverty law as a career."[39] The most complete definition, however, incorporates three concepts: (1) high quality services; (2) professional ethics; and (3) a perception of the legal system's role in society.[40]

A. *High Quality Services*

Although some critics have perceived that the bar and law school share the responsibility for the present state of affairs, many have been eager to blame legal education.[41] In fact, some have been most "energetic in calling attention to the shortcomings of legal education."[42] The main import of such criticism is that "law graduates are generally not equipped to practice law"[43] and that it is the law school's duty to remedy this deficiency. Or as one recent writer has stated:

---

36. Boden, *supra* note 23, at 97: "Nor has recent criticism of the bar, in its ability to perform the task for which it is licensed, been limited to courtroom performance. There has been a general dissatisfaction with the quality of service rendered in the office as well as in the courtroom." *See also* Tauro, *Law School Curricula Must Change to Give Bar More Trial Lawyers*, 4 Trial 48 (Oct.-Nov. 1968).

37. *See, e.g.*, GROSSMAN, CLINICAL LEGAL EDUCATION: AN ANNOTATED BIBLIOGRAPHY (1974).

38. Redlich, *Perceptions of A Clinical Program*, 44 S. CAL. L. REV. 574 (1971).

39. *Id.* at 585-86.

40. *See* Cowgill, Hoerger & Ridberg, *Report of Student Participants*, CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 29 (E. Kitch ed. 1970).

41. *See* Boden, *supra* note 23.

42. La France, *Clinical Education: "To Turn Ideals Into Effective Vision,"* 44 S. CAL. L. REV. 624, 627 (1971).

43. *Id.*

> The bar should not tolerate, and indeed is beginning to be unable to afford, an educational arm disdainful of training for the practice and operating under a theory that law schools cannot turn out reasonably competent practitioners.[44]

While "its validity is by no means universally accepted,"[45] most law schools agree that the fundamental purpose of legal education is to train individuals for the legal profession, but the current controversy centers on "methodology, on the criteria of competence, and most importantly, on the priorities within and the scope of such training."[46] The lines dividing these competing interests are thin and ill-defined at best.

It is not surprising that much of the criticism directed toward the law school closely parallels the complaints directly toward the trial bar for alleged professional responsibility deficiencies. Also, most purported flaws in present legal education find their roots in the disputes among competing interests which characterized the 30's, 40's, and 50's.

Probably the most bitter, as well as most insistent, criticism of legal education is that it fails to provide training in lawyering skills.[47] This argument, arising almost simultaneously with the introduction of the case method, has found new emphasis in Watergate and the recent charges from the bench. Judge Kaufman recently has urged that:

> [L]aw schools must give up their disdain for the practical. Instead of being trivia around the perimeter of legal education, the teaching

---

44. Boden, *supra* note 23, at 106.

45. Note, *Modern Trends in Legal Education,* 64 COLUM. L. REV. 710, 710-11 (1964).

46. *Id.*

47. "Students trained under the Langdell system are like future horticulturists confining their studies of cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. . . .

The trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly over-simplified. Something important and of immense worth was given up when the legal apprenticeship system was abandoned as the basis of teaching in the leading American law schools. . . . [T]he law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do." Frank, *Why Not a Clinical Lawyer-School?* 81 U. PA. L. REV. 907, 912-13 (1933); "What the law schools have done is to refuse to teach those techniques which are most directly related to the life of the lawyer in practice." CLEPR NEWSLETTER vol. II, no. 1 (Sept. 1969) at 2.

> of trial and appellate advocacy should become a hub, a focal point. The old so-called fields of the law—contracts, torts, agency, conflicts—will, of course, remain important; and lawyers skilled in legal theory *and* public policy analysis are an asset to the profession. But the question becomes one of emphasis and direction. . . . [I suggest] that law schools play a greater role in teaching lawyering skills. . . .[48]

In 1944, the Curriculum Committee of the American Association of Law Schools, chaired by Karl Llewellyn, reported it was:

> . . . of the opinion that whatever else a lawyer needs, he needs as a minimum a reliable craftsmanship.[49]

Another educator, in listing the major criticisms of legal education today noted:

> . . . [T]raining is by scholars for scholars, with greater and greater emphasis on content minutiae rather than on what will be experienced in practice.[50]

One jurist has observed:

> [Today's law graduates] know more law after coming out of a University [Law School] than . . . former students ever knew, but . . . know less about the method of its application, and how to handle and use it.[51]

This argument, in summary, is that "[l]aw graudates do not simply need to know. They must, as well, be able to act."[52]

Since it cannot be seriously contended that a law school graduate should possess all the tools of a seasoned practitioner, the question becomes what are the minimum skills that a student should possess

---

48. Kaufman, *Advocacy as Craft—there Is More to Law School than a Paper Chase* in CLEPR NEWSLETTER vol. VII, no. 3, p. 22 (Sept. 1974) at 23.

49. Committee on Curriculum, Ass'n of Am. L. Schools, *The Place of Skills in Legal Education,* in 45 COLUM. L. REV. 345, 346 (1945).

50. Freeman, *Legal Education: Some Farther Out Proposals,* 17 J. LEGAL ED. 272, 273 (1965).

51. Frank, *supra* note 47, at 919 (quoting Judge Crane of the New York Court of Appeals).

52. La France, *supra* note 42, at 630.

upon graduation. Although some writers have attempted to list these minimum skills, the question has eluded a definite answer.[53] This question has been made even more difficult by the fact that it goes to the very roots of the purpose of law school attendance.

Many have proposed a shift in emphasis from the "how to think like a lawyer" to the "how to of doing" like a lawyer.[54] This has been opposed strenuously by many, who see such a move as a return to the past.[55]

Others raise the traditional arguments of whether these skills can, and if so, should be taught in the law school.[56] This question is loudly answered by those skills advocates who insist that the closing of the "gap" between the law school graduate and the competent legal practitioner must not be left to practice.[57]

The argument over the proper place of skills training is old, but it remains a valid and much disputed concern to which modern legal education must respond.

---

53. One of the most vocal critics of legal education has listed those minimum skills which he believes law schools should equip each graduate:

> . . . examine a title; write a deed, and other customary instruments; close a real estate deal; institute and prosecute suits, including the statutory proceedings of his jurisdiction; defend a criminal; prepare individual, partnership and fiduciary tax returns, work out an estate plan; prepare and probate a will; administer an estate, with federal and state returns, etc.; and form, operate and dissolve an individual proprietorship, a partnership, and a corporation. . . .

Cantrell, *Law Schools and the Layman: Is Legal Education Doing Its Job?* 38 A. B. A. J. 907, 909 (1952); One educator has suggested a curriculum designed to provide at least minimal training in the following areas: (1) Dialectical: a. Fact Discrimination, b. Case Analysis, c. Statute Analysis, d. Legal Synthesis, e. Issue Analysis, f. Issue Disposition. (2) Technical: a. Legal Advocacy: Adjective, b. Legal Advocacy: Argumentative, c. Legal Draftsmanship, d. Legal Research and Legal Writing. Strong, *A New Curriculum for the College of Law of the Ohio State University,* 11 OHIO ST. L. J. 44, 46-7 (1950); It has been contended that clinical education provides "the teaching of standards for performance of the basic skills involved in service to a client and a cause by a lawyer. By this we mean such skills as interviewing, collecting facts, counseling, writing certain basic documents including pleadings, preparing for trial, and conducting trial matters. . . ." CLEPR NEWSLETTER vol. II, no. 1 (Sept. 1969) at 2.

54. Note, *Modern Trends in Legal Education,* 64 COLUM. L. REV. 710, 721 (1964).

55. *See* Brickman, *supra* note 29.

56. *See* La France, *supra* note 42, at 630, for discussion of these issues.

57. Cowgill, Hoerger & Ridberg, *supra* note 40, at 30. "The law schools with their fixed claim to every lawyer's first three years, are in the best position to bridge the growing gap between schooling and practice. The most obvious approach is the introduction, or expansion, of clinical programs in the law school curriculum." *Id.*

B. *Professional Ethics*

The concern over the proper role the law school should play in the instruction of ethical conduct of tomorrow's bar has been another controversial question. The law school has been accused of both misfeasance and malfeasance. With the odor of Watergate lingering in the public nostril and bar grievance complaints on the upswing, this issue has taken on a new seriousness.[58] Putting aside, as unanswered, the question whether honesty and integrity are teachable in law school, recent voices have declared that law schools must make greater attempts to instill and inspire ethical conduct to students.[59] One writer, voicing one of the prevalent attitudes of the times, has stated:

> One frequently voiced objection to special instruction in professional responsibility must be recognized and met. Some say that if a person does not have a sense of ethics and morality by the time of entry to law school, no amount of instruction will change that person's moral perceptions. This oversimplistic approach fails for two reasons: professional responsibility, as a product of a complex and significant body of law, cannot always be divined without formal study; and the idea that persons in their early twenties (or for that matter any age) are no longer receptive to moral persuasion runs against the very premise of higher education.[60]

Improper emphasis, or lack of proper emphasis, has been a favorite target of critics espousing ethical concerns. This same writer has handily condensed the major arguments:

> A part of this blame must be borne by the emphasis on the Socratic method of teaching—where a student is shown that the quickest wit

58. COMMITTEE ON GRIEVANCES, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ANNUAL REPORT (1974-1975).

59. Clark, *Teaching Professional Ethics,* 12 SAN DIEGO L. REV. 249, 253 (1975):

> Our law schools . . . must shoulder the burden of 'teaching' honesty because there is simply no one else to do the job. The sad fact of the matter is that integrity is the sort of virtue that once was more or less reliably developed through the joint socializing influences of the Church, the family, schools, and peer groups. For a number of reasons, however, the first two contributors to this process have drastically diminished in importance in this country. . . .

See generally "Legal Ethics and Professionalism Symposium," 12 SAN DIEGO L. REV. 245-358 (1975).

60. Goldberg, *How Lawful Is the Practice of Law?* 2 LEARNING AND THE LAW 43, 45 (1975).

and the best prepared carry the argument regardless of which side is advocated.

Another part of the blame is to be placed on the "intellectualist" attitude of law schools both in their admissions and awards policies. . . . Once the student, reduced by impersonalization to a "number," is received in school, the lesson quickly communicated is that grades are the most important concern of the students.

The largest part of the blame for professional irresponsibility and students' misconceptions about the profession must be accounted to a long-standing lack of emphasis in law schools on training in professional responsibility. Students receive a 'negative message' from this lack of emphasis—the message that professional responsibility is really not important.

As long as we stress intellectual achievement alone, we will continue to turn out of our law schools many attorneys whose primary goal will be material success.[61]

Other writers have laid blame at the feet of present teaching methods:

One casualty of a curriculum focused primarily on casebook instruction has been professional ethics. This failure is predictable since professional ethics is the kind of diffuse phenomenon least susceptible to reduction within the artificial confines of a single course. Some law schools have attempted to solve the problem by abandoning the single course in favor of the pervasive approach to teaching legal ethics. Under this approach, the responsibility is parceled out among all professors who, it is hoped, will each discuss the ethical issues latent or patent in the subject matter of their courses. The major difficulty with the pervasive method is that it postulates an ideal, but nonexistent uniform commitment on the part of each faculty member. In addition, whether reliance is placed upon one or upon a multitude of courses, ethical conflicts seldom appear full-blown in appellate cases.

If professional ethics are to be instilled before the graduate is unleashed upon the real world, it must be done through a mechanism other than the pedagogically inadequate casebook.[62]

---

61. *Id.*
62. Cowgill, Hoerger & Ridberg, *supra* note 40, at 30.

C. *Legal System's Role in Society*

Another area of concern is the absence of effective social responsibility instruction. This criticism should actually be seen as a combination of multiple criticisms, which sometimes appear greater than the sum of their parts. A manageable mechanism for analytical breakdown is difficult, as like most complaints directed at legal education, the lines separating these views are dim and ill-defined.

The first call for increased social awareness is a continuation of the ideas made popular, or unpopular, by the Realist.[63] The student should study law in the context in which it is made, not the bare and cold facts of appellate opinion. He should be aware of the social consequences of the rules of law. An early advocate declared:

> [L]aw teaching needs to be integrated with the social sciences. The law student should be taught to see the inter-actions of the conduct of society and the work of the courts and lawyers. . . . [He] is graduated with . . . an insufficient feeling of the inter-relation between law and the phenomena of daily living, and an artificial attitude towards "Law" as something totally distinct and apart from the facts.[64]

Chief Justice Burger has added:

> In appellate opinions the facts have been determined . . . but in the trial courts the facts are more often "the whole ball game."[65]

A second group, sensitive to the ideas first expressed by Professors Lasswell and McDougal, insists that social considerations should provide the primary approach to law study.[66] In 1948, its first advocates expressed this far-reaching approach:

> The proper function of our law schools is, in short, to contribute to the training of the policy makers for the ever more complete achieve-

63. *See* Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL ED. 162 (1974).

64. Frank, *supra* note 47, at 921-22.

65. Burger, *The Future of Legal Education* in CLEPR, SELECTED READINGS IN CLINICAL EDUCATION 49, 53 (1973).

66. *See* Note, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 710, 722 (1964); *See also* Grossman, *supra* note 63, at 167.

> ment of democratic values that constitute the professed ends of American polity.[67]

The approach was to consist of "two clear steps: (1) the social sciences were to be harnessed to provide an analytical framework (2) within which the lawyer, in his practice, would delicately balance the competing values and reach proper social, economic, or political decisions."[68] Although this movement has lost much of its momentum, it does explain a lingering element in legal education today.[69]

There has also been much talk that law students should have a firmer grasp of understanding the close relationship between law and its function in society. This fundamental premise has been expressed:

> Since law is a means of social control, it ought to be studied as such. . . . If men are to be trained for intelligent and effective participation in legal processes, and if law schools are to perform their function of contributing through research to the improvement of law administration, the formalism which confines the understanding and criticism of law within limits fixed by history and authority must be abandoned, and every available resource of knowledge and judgment must be brought to the task.[70]

The Chief Justice in his address before the American Bar Association put forth the view:

> Today you lawyers are more important to the functioning of an orderly, organized society, therefore, than the police or the courts who are the coercive instruments. This may seem an extravagant appraisal but I believe it is true because, as lawyers, you can exercise the crucial function of "peace makers"—providing solvents and lubricants which reduce the frictions of our complex society and make it work. But to do this lawyers must be adequately trained not only as technicians but also as specialists with a proper understanding of their true role in a modern society.[71]

---

67. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 206 (1943).

68. Note, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 710, 722 (1964).

69. *But see* note 23 (author views present schools as still suffering from an overdose of social interest concerns).

70. Currie, *The Materials of Law Study*, 3 J. LEGAL ED. 331, 334 (1951).

71. Burger, *supra* note 65, at 52.

Another member of the bench expressed an analogous view:

> Knowledge of the other social disciplines will help the lawyer to be useful to his clients. Moreover, it will enable him to take his place as a constructive member of the community. As draftsman of legislation, as lobbyist, as a member of a legislative body, as advocate, as judge, as statesman, the lawyer should be adequately "socialized."[72]

Far from calling for an increased place for social concerns in legal education, another group has contended that the policy-oriented law schools have badly missed the mark and issued a call for law schools to get back on the right track. One recent champion of this cause has stated that these social pursuits have deluded the curriculum, have led the law school away from technical competence and have converted the law school "into an interdisciplinary mishmash under the label of social engineering."[73]

Another faction has alleged that the law student should be more sensitive to those persons directly involved and affected by the legal process, as well as understand the interpersonal relationships between lawyer and client.[74] It is suggested that since a lawyer spends much of his time dealing with people on a first hand basis, a greater effort should be made to develop some human-relation skills. The bench has concurred with this view:

> The shortcoming of today's law graduate lies not in a deficient knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made. It is a rare law graduate, for example, who knows how to ask questions—simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly—in or out of court. Today, in many courtrooms, cases are being inadequately tried by poorly trained lawyers, and people suffer because lawyers are licensed, with very few exceptions, without the slightest inquiry into

72. Frank, *supra* note 47, at 23.

73. Boden, *supra* note 23, at 100. "Why would lawyers, albeit academic lawyers, set out upon a deliberate course to destroy the professional character of a law school and to convert it into an interdisciplinary mishmash under the label of social engineering?" *Id.*

74. *See, e.g.*, Stone, *Legal Education on the Couch*, 85 HARVARD L. REV. 392 (1971).

> their capacity to perform the intensely practical functions of a counselor or advocate.[75]

The case method, being unrivaled as a machinery for basic training of analysis and legal reasoning, has remained free of criticism as a first year teaching method until very recent years.[76] It provides an enthusiasm in first year students which is envied in all of higher education. It has never enjoyed, however, such complimentary status in the second and third years of law school.[77] Once the technique of analyzing, distinguishing and synthesizing cases has been mastered, which has been estimated as six months time,[78] boredom sets in.[79] It is further alleged that case instruction is a most "slow and wasteful method of imparting information about rules of law."[80]

One author, handily outlining the principal accusations against the case method, stated that it does not train students in:

> legal skills other than case analysis (fact investigation, planning, drafting, research, trial strategy and tactics, advocacy);
> human-relations skills (interviewing, counseling, negotiating, communications and emotional understanding in general);
> the ethical and social responsibilities of the profession;
> knowledge of current substantive law.[81]

Although the case method has been one of the prime targets of legal skeptics, no aspect of legal education has escaped their pen. Law teachers, lacking practical experience in their fields, have been accused of being unappreciative and insensitive to problems of the

---

75. Burger, *supra* note 65, at 53-4.

76. Committee on Curriculum, Ass'n of Am. L. Schools, *The Place of Skills in Legal Education*, COLUM. L. REV. 345, 346 (1945).

77. *See* Gellhorn, *Second and Third Years of Law Study*, 17 J. LEGAL ED. 1, 4 (1964):

> Part of the weakness of upperclass years is a by-product of casebook instruction, one of the main strenghs of the first year in law school.

See also Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL ED. 162, 166 (1974): "[t]he case method . . . few propose its elimination—at least not in the first year of legal education."

78. J. FRANK, COURTS ON TRIAL 237 (1949).

79. *See* Gellhorn, *supra* note 77; Robertson, *Some Suggestions on Student Boredom in English and American Law Schools*, 20 J. LEGAL ED. 278 (1968).

80. Committee on Curriculum, Ass'n of Am. L. Schools, *The Place of Skills in Legal Education*, COLUM. L. REV. 345, 367 (1945).

81. Grossman, *supra* note 63, at 166.

practitioners.[82] The curriculum has been condemned as irrelevant and the subject of improper emphasis manipulation.[83] Others have criticized this same curriculum for failure to provide students solid social and psychological interdisciplines.[84] Still others have charged that the curriculum suffers from too many social courses.[85] Law study has been criticized as too long and costly,[86] while opposition has asserted the need to add still another year.[87] The Socratic method has been denounced as demeaning and dehumanizing as well as destructive to interpersonal development.[88] Other teaching

82. One writer, in offering a reason why many law schools have been nonsupportive of past clinical efforts, stated that "the orientation of law teachers towards research rather than practice, thereby resulting in a decided preference for empirical research and field internships over the provision of actual practice experience." Brickman, *CLEPR and Clinical Education: A Review and Analysis* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 56, 58 (1973). In response to the survey question—whether practical skills should be taught in law school, one educator wrote:

> Law schools are too theretical plus the fact that few, if any, law professors could try and win a traffic court case.

Another educator responded:

> Problem is not enough law school professors have sufficient practice background to teach such courses. . . .

This is not, by any margin, the only view. Two law review students made the following comments in response to the survey:

> Students who want practical experience can get it easily within or outside the law school.
>
> [The emphasis on practical skills training is part of a] more general trend toward so-called 'relevancy' in education. An overemphasis on the nuts-and-bolts we are all going to become only too well acquainted with anyway. A myopia approach to education.

83. Boden, *supra* note 23.

84. *See* Bellow & Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664, 669 (1971). *See also* Stone, *supra* note 74.

85. *See, e.g.*, Boden, *supra* note 23.

86. *See, e.g.*, Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL ED. 37 (1973); *See also* Stevens, *supra* note 3, at 45.

87. Freeman, *Legal Education: Some Farther-Out Proposals*, 17 J. LEGAL ED. 272 (1965); Morse, *Let's Add Another Year*, 7 J. LEGAL ED. 252 (1954).

88. *See* Stone, *supra* note 74; Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. OF LAW AND SOCIAL ACTION 71 (1970); Nader, *Crumbling of the Old Order: Law Schools and Law Firms*, THE NEW REPUBLIC, November 15, 1969, at 20:

> Harvard Law's most enduring contribution to legal education was the mixing of the case method of study with the Socratic method of teaching. . . [T]hese techniques were tailor-made to transform intellectual arrogance into pedagogical systems that humbled the student into accepting its premises, levels of abstractions and choice of subjects. Law professors take delight in crushing egos in order to acculturate the students to what they called "legal reasoning" or "thinking like a lawyer." The process is a highly sophisticated form of mind control that trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage.

techniques have been deemed either ineffective or superficial.[89] The teaching of substantive law, a chief inspiration for the institutionalization of law training, has been challenged as a proper objective of legal education.[90] Few legal educators have remained silent to the barrage of faultfinding. Less have denied that is the law school's duty to train competent practitioners.[91] The majority of educators,

---

89. *See* Freeman, *supra* note 87; *See also* Note, *Modern Trends in Legal Education,* 64 COLUM. L. REV. 710 (1964), for an excellent discussion of methods.

90. The classical indictment against this objective was phrased by Llewellyn:

> We suggest that there has naturally but unfortunately slid into the curricular picture a somewhat curious error in orientation. What we are training students for is not knowledge of the law, but practice of the law. Practice is an activity, a skilled activity, an activity to be carried on according to craft-traditions and craft-standards of ideals and skills. . . . Now it is very queer that a training for such a skilled professional action should insist on centering its conscious thought primarily on the acquisition of a single one of the many tools for such action: to wit, on knowledge of the law. And it is even queerer that the centering of a training for a life-work should be upon what experience shows to be the least permanent of all the tools of practice.

Committee on Curriculum, Ass'n of Am. L. Schools, *The Place of Skills in Legal Education,* in 45 COLUM. L. REV. 345, 367 (1945), One law school educator, responding to the author's recent survey, expressed the opposite view:

> I believe law schools should concentrate on teaching 'substantive' law. . . . [L]aw school is the one chance to expose students to the substantive materials. They will have ample opportunity to learn 'lawyering skills' later on.

91. McClain, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in the Law Schools,* 6 J. LEGAL ED. 302, 302-3 (1954):

> . . . I deny that [practical training] can be adequately provided in law school, and I believe that to attempt to do the whole job in law school not only would result in failure but would seriously impair the primary function of a law school, *viz.,* to provide a scientific and systematized knowledge of the law. If practical training is to be restored in full, it must be done by the bar and under actual conditions of law practice.

See also McClain, *Is Legal Education Doing Its Job? A Reply,* 39 A.B.A.J. 120, 121 (1953): "A law school graduate who passes his bar examination is not a lawyer."; Vukowich, *The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change,* 23 CASE W. RES. L. REV. 140, 152 (1971):

> Considering that practical techniques and expertise can best be acquired while practicing, and that substantive law and theoretical knowledge can best be learned in the institutional setting, the prevalent attitude of educators seems correct—that the law school should not take the full responsibility of training students in practical matters, but should leave such skills to be acquired after graduation.

Others completely disagree. McClain, *Legal Education: Extent to Which "Know-How" in Practice Should Be Taught in Law Schools,* 6 J. LEGAL ED. 295 (1954): "[Skills] must be taught and practiced fully *prior to admission to the bar.* . . . The law student must know the 'why' as well as the 'how.' "; *See* Cantrell, *supra* note 53; *See* authorities cited in note 47 *supra;* McClain does not contend that "no practical training can or should be given in law school." 6 J. LEGAL ED. 302, at 303. It thus appears that the real issue is a matter of emphasis and priority.

disagreeing as to how to accomplish this objective, have offered proposals as numerous as the complaints.[92]

One exasperated dean, after considering the pressure of these competing interests and approaches, concluded "that if we were to teach in our law school everything that everybody would like us to teach, we should have in literal fact a Ten Year Curriculum, and to quote Mrs. Malaprop, we should be like Caesar's wife, all things to all men."[93]

Nevertheless, case instruction in individual fields of substantive law, with supplements—the most notable being law review, remains the predominant teaching mechanism for instructing students.[94] It is the standard by which all deviating proposals are judged. Clinical

92. *See* authorities cited in notes 82 to 90 *supra; See* Brown, *Teaching the Low Visible Decision Processes of the Lawyer,* 25 J. LEGAL ED. 386 (1973) (role-playing, mock law office, client counseling competition, and pervasive teaching approach); Bryson, *The Problem Method Adapted to Case Books,* 26 J. LEGAL ED. 594 (1974); Capriles, *A Report on the Inter-Professions Conference,* 1 J. LEGAL ED. 176 (1948) (return to apprenticeship, clerkships and legal aid); Conference, New York University L. Center, *Prelegal Education,* 6 J. LEGAL ED. 340 (1954); Gellhorn, *The Second and Third Years of Law Study,* 17 J. LEGAL ED. 1 (1964) (upperclass instruction reform); Dresnick, *Uses of the Videotape Recorder in Legal Education,* 25 U. MIA.L. REV. 543 (1971) (audio-visual instruction); Jarmel, *The New Jersey Skills Training Course,* 17 J. LEGAL ED. 432 (1965) (continuing legal education); Johnstone, *Student Discontent and Educational Reform in the Law Schools,* 23 J. LEGAL ED. 255 (1970) (specialization and differentiation of national and local law schools); Katsh & Katsh, *Preventing Future Shock: Games and Legal Education,* 25 J. LEGAL ED. 484 (1973) (games and simulations); Kelso, *Programming Shows Promise for Training Lawyers: A Report on an Experiment,* 14 J. LEGAL ED. 243 (1961) (programmed instruction); Lovett, *Economic Analysis and Its Role in Legal Education,* 26 J. LEGAL ED. 385 (1974) (interdiscipline courses); Manning, *Law Schools and Lawyer Schools—two-Tier Legal Education,* 26 J. LEGAL ED. 379 (1974) (two-tier law schools); H. PACKER & T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972) (paralegals and specialization); Peszke, *What Kind of Psychiatry in Law Schools,* 23 J. LEGAL ED. 309 (1970) (psychiatry instruction in law school); Rabinovitz, *Negotiation and Drafting in a Substantive Course in Acquisitions and Mergers,* 23 J. LEGAL ED. 470 (1971); Reed, *Specialization, Certification, and Exclusion in the Law Profession,* 27 OKLA. L. REV. 456 (1974) (specialization and licensing of lawyers); Robinson, *Drafting—its Substance and Teaching,* 25 J. LEGAL ED. 514 (1973); Rohan, *Some Basic Assumptions and Limitations of Current Curriculum Planning,* 16 J. LEGAL ED. 289 (1964) (curriculum reform); Rombauer, *First-Year Legal Research and Writing: Then and Now,* 25 J. LEGAL ED. 538 (1973); Smith, *Louisiana's Unique Adjunct to Law School Training,* 1 J. LEGAL ED. 600 (1949) (research service and statutory drafting institute); Watson, *Some Psychological Aspects of Teaching Professional Responsibility,* 16 J. LEGAL ED. 1 (1963) (interrelations training); Zusman, *Law and the Behavioral Sciences—revisited: A Third Survey of Teaching Practices in Law Schools,* 26 J. LEGAL ED. 544 (1974) (behavioral sciences instruction in law school).

93. Prosser, *The Ten Year Curriculum,* 6 J. LEGAL ED. 149, 155 (1953).

94. *See* note 167 *infra.*

education is no different—it will have to find its place within such a system.

III.

> Technique without ideals may be a menace, but ideals without technique are a mess—[95]
>
> —committee on Curriculum of the Association of American Law Schools
>
> I hear, and I forget;
> I see, and I remember;
> I do, and I understand—[96]
>
> —old Chinese Proverb

Modern clinical education was born in 1968, with the creation of the Council on Legal Education for Professional Responsibilities, sired by grants from the Ford Foundation.[97] Although the concept of clinical training was not new[98]—a few law schools had placed and maintained students in legal aid and defender's offices—most law schools had disdained any such efforts.[99]

Created in the era of awakening interest in the poor and pressure from student activists, provision of legal services to the poor became a primary goal of clinical education.[100] Attention to the three major aspects of professional responsibility discussed earlier completed the quartet of primary objectives to which clinical education addressed itself.

During the process of formulating its goals, the Council consistently maintained that heavy emphasis should be placed on the education of law students in professional responsibility broadly defined as:

---

95. Committee on Curriculum, Ass'n of Am. L. Schools, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 346 (1965).

96. SILBERMAN, *supra* note 34, at 216.

97. *See generally* Grossman, *supra* note 63; *See also* Pincus, *CLEPR: The President's First Biennial Report* (1970) in CLEPR, SELECTED READINGS IN CLINICAL EDUCATION 25 (1973).

98. *See* J. BRADWAY, CLINICAL PREPARATION FOR LAW PRACTICE (1946). This book is a step by step manual for students participating in Legal Aid Clinic.

99. Brickman, *CLEPR and Clinical Education: A Review and Analysis* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 56, 58 (1973).

100. *See* Grossman, *supra* note 63, at 173.

> [n]ot limited to matters of professional ethics, such as the responsibility of the lawyer for dealing honorably with clients, courts and other tribunals and colleagues. Professional responsibility also involves the lawyer's obligation for law reform and for helping to insure that adequate legal services are provided for the indigent and the unpopular. It also includes the responsibility of the lawyer for community service and for participation in public affairs, whether as a public official, or as a leader of community action and opinion.[101]

Using as a starting point the alleged primary purpose of law schools—the training of students to engage in the practice of law—it was insisted that law schools could discharge this obligation better through actual client contact under skilled supervision than by the traditional approach—appellate opinion analysis.[102] The term clinical legal education has traditionally meant "different things to different people."[103] Therefore, one of the principal differences between modern clinical education and clinical efforts of the past is its narrow definition—the actual performance of lawyer tasks by the student—under supervision, in an actual lawyer-client relationship.[104]

The most praised benefits, the value of which is also the most controversial, are those which can only be derived from exposure to an actual attorney-client relationship.[105] The student is allowed to act like a lawyer rather than just confined to think like a lawyer. It provides, in short, "the practice of practice before practice,"[106] much

---

101. Brickman, *supra* note 99, at 57.

102. *Id.* at 63; *See also* Pincus, *supra* note 97.

103. Gorman, *Clinical Legal Education: A Prospectus,* 44 S. CAL. L. REV. 537 (1971).

104. *See* authorities cited note 97 *supra; See* Stolz, *supra* note 28.

105. *See* Stolz, *supra* note 28; *See* Ferren, *Goals, Models and Prospects for Clinical-Legal Education* in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 94 (E. Kitch ed. 1970); *See* Grossman, *supra* note 63, at 187: The most commonly-cited educational justification for the clinical method is "skills training." For an extensive treatment of the other benefits as well, *see* Pincus, *The Clinical Component in University Profession Education,* 11 OHIO ST. L. J. 283, 290 (1971); *See also* Leleiko, *Legal Education—some Crucial Frontiers,* 23 J. LEGAL ED. 502, 511-12 (1971). One panel, concluding that listening and observing are no substitute for doing as a mode of learning, stated:

> When you sit there and listen while somebody else interviews a person, you don't get one-tenth the benefit that you get when you are actually participating, sitting down and talking to a person and hearing his problems.

Pemberton, *Report of the National Law Student Conference on Legal Education,* 1 J. LEGAL ED. 221, 226 (1948).

106. In response to the survey question of can and should practical skills be taught in the law school, one educator stated that "practical skills should be 'practiced' before they're practiced."

as a football team does before it takes the field for the big game. This is the one factor which no other teaching device has been permitted to boast. Since one is alleged to learn best by doing rather than thinking, it should be a preferred method of instruction. Genuine practical skills are given a chance to be developed by actual experience.

The clinical experience also is most valuable in the development of sound and moral judgment.[107] Clinic places the student in the situation where ethical problems arise. As the conflicting interests compete for the allegiance of their captive, the student lawyer must recognize impropriety and apply his ethical standards. The value of clinical experience in teaching ethics is steeped in the same basis as is skills training—one may think he knows how he will react in a given situation, but until one is placed in the actual decision making role, it is merely speculation.

Clinical education is said also to provide an understanding and sensitivity to the social concerns of the "real" world which can best be acquired through actual client contact and with those immediately affected by legal process.[108] One clinical student, commenting on the value of his clinical experience in understanding social problems, wrote:

> No amount of classroom time, nor reading, could force upon an individual as strongly the dichotomy between ostensible policy and actual result, between apparent statutory intent and actual practice, as the parade of desperate mothers, incarcerated fathers and frightened girls that populates the Madison legal aid office daily.[109]

Another oft-cited attribute of clinical education is that, while confrontation with the demands of commercial practice and an overwhelming caseload is absent, the rudiments of practice are learned under a guiding hand.[110] Others have advanced the proposition that clinic does much to restore the psychological injuries in-

107. Vetri, *On Teaching Professional Responsibility Through Clinical Legal Education Programs* in CLEPR CLINICAL EDUCATION FOR THE LAW STUDENT 70 (Buck Hills Falls Conf. 1973).

108. Redlich, *Perceptions of A Clinical Program,* 44 S. CAL L. REV. 574 (1971).

109. *Id.* at 610.

110. Brickman, *supra* note 99, at 64.

curred from the Socratic experience of the students' first year and contributes to the development of necessary interpersonal relationship skills.[111]

It further contributes to the dexterity in the handling of data since "facts do not come prearranged in neat bundles labelled 'prima facie tort' . . . except in casebooks, but rather originate in unsorted . . . bunches, . . . [the] collection [of these facts] being cumbersome and confusing."[112]

Since students learn from observation of professionals in action, modeling and shaping experiences are provided in clinical programs.[113] Clinic also serves as an outlet for the energies of student activists.[114]

MODELS:

Although some would disagree, there are three basic concepts of clinical programs, each with its own minor individual modifications.[115] No discussion of clinical education is complete without mention of each and its individual pecularities.[116]

A. *In-House*

1. Neighborhood Clinic—in this model a clinic is operated within the confines of the law school. Faculty members, generally hired for this specific purpose, serve as the supervising staff for clinical participants. These clinics handle typical cases for indigents with the caseload generally consisting of domestic relations problems, landlord-tenant conflicts, consumer and welfare cases.[117] Students interview clients and complete the legal process, appearing before municipal

111. *See* Stone, *supra* note 74.

112. Brickman, *supra* note 99, at 66.

113. Vetri, *supra* note 107, at 78.

114. Ferren, *The Teaching Mission of the Legal Aid Clinic* in CLEPR, SELECTED READINGS IN CLINICAL LEGAL EDUCATION 156 (1973).

115. *See* Ferren, *Goals, Models and Prospects for Clinical-Legal Education* in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 94 (E. Kitch ed. 1970); *See* Grossman, *supra* note 63; *See* Gorman, *supra* note 103.

116. For excellent discussions of the various clinical programs and their characteristics, *see:* Philip G. Schrag, "My Clinical Teaching—a Review," Memorandum to the Faculty of Law of Columbia University, unpublished, August, 1975.

117. Ferren, *supra* note 115, at 98.

courts or administrative agencies as the situation and local student practice rules permit.[118]

2. Law Reform—this clinic also operates with the confines of the law school, but the caseload and resultant student responsibilities are entirely different than the neighborhood clinic. In this clinical program, aggressive supervisors make efforts to obtain test cases representing community interest groups.[119] The faculty supervisor actually tries the case with the student assisting in preparation and observing those functions in which court rules prohibit his participation.[120] This, like neighborhood in-house clinic work, is supplemented by seminars or discussion sessions directed by faculty sponsors to assist in interpreting, planning, and understanding of clinical happenings.[121]

B. *Farm-Out or Placement*

1. Legal Aid—in this clinical situation students are placed under staff attorneys' supervision in a neighborhood law office sponsored by a governmental agency, often OEO or VISTA.[122] These offices offer a wider range of caseload diversity but suffer less direct faculty supervision, if any faculty supervision at all. Also, a heavy caseload may prohibit reflection and educational objectives from being explored.[123]

2. Defender's, Prosecutor's and Private Law Offices—in this arrangement, students are placed under the direct supervision of individual or governmental offices to perform assignments as handed down by the supervisor. This approach shares most of the characteristics of its legal aid counterpart as to caseload and supervision, but has the added danger that students may merely provide cheap slave labor.[124]

---

118. *Id.*

119. *Id.*; *See* Redmount, *The Transactional Emphasis in Legal Education*, 26 J. LEGAL ED. 253 (1974).

120. *See* Redmount, *supra* note 119.

121. *See* Miller, *Living Professional Responsibility—Clinical Approach* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 99 (1973):

> We should not underestimate the results of peer discussion regarding all of the problems of professional responsibility that arise in the clinic association. In our law office students have an opportunity to get together, sit down and discuss with each other the problems. . . . The lively discussions between these groups, . . . are of greater benefit than any classroom discussion that you could have. . . . They take the opportunity to exchange ideas.

Id. at 109; *See also* Ferren, *supra* note 115, at 104.

122. *See* Ferren, *supra* note 115, at 98.

123. *Id.* at 100.

124. *See* Gorman, *supra* note 103, at 543-4.

C. *Simulation*

This model is not really a true clinical component because of the absence of the actual student lawyer-client relationship.[125] It is included hereunder because it is thought a form of clinical education by many and generally involves more comprehensive duties and responsibilities than moot or practice court.

The primary advantage of simulation is also its chief clinical defect—the absence of a real client.[126] This, however, permits a controlled experiment. Introduction to learning processes are assured through manipulation of case development by the supervisor. It also permits video-taping of interviews, negotiations and arguments which may not be permitted in live client situations. These tapes can be extremely helpful to educational efforts. A further advantage is that the supervisor is freed from responsibility for the case's outcome with simulation and may devote his efforts entirely to educational objectives.

SHORTCOMINGS:

Clinical education, as with all other recent proposals in legal education, has its share of opposition. Some view it merely as the current champion of the old Realists and Neo-Realists feud.[127] Others, seeing it as a return to apprenticeship and a step into the past, declare the battle to remove legal training from the law office and give it academic respectability was too long and too hard to send legal education back there now.[128] Still others suspect it is the wrath of the practitioner as vengeance for improper destruction of apprenticeship.[129] Since some advocates claim clinical education to be a teaching methodology,[130] providing the foundation for all of law

125. *See* Metzger, *supra* note 33, at 326-7.

126. *See* Schrag, *supra* note 116; *See also* Grossman, *supra* note 63, at 184.

127. *See* Grossman, *supra* note 63, at 188.

128. *Id.* at 188-9; *See also* Stevens, *supra* note 3. One educator, responding to the questionnaire, stated:

> [l]egal education should serve the function of providing the student with analytical and intellectual skills necessary to become an accomplished practitioner if he so chooses. Law schools should not be turned into a summarized apprenticeship program. While the student should be introduced to the lawyering skills while still in school, he has the rest of his professional career to develop these skills.

129. *See* La France, *Clinical Education: "To Turn Ideals into Effective Vision,"* 44 S. CAL. L. REV. 624 (1971).

130. Pye, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education*

school studies, it is feared it may take over and toss all the cherished traditional methods overboard.[131]

Most educators can tick off the major criticisms against clinical education:

1. It is a duplication of skills learned easily in the first years of practice.[132] What happened anyway to the old argument—it's not the law school's job to make practitioners, but to provide a foundation on which bar experience can be built.
2. The practice skills that are learned in clinic are not the same the graduate needs for real practice later.[133] Poverty case experiences are not profitable or transferable to private practice.
3. One may develop bad habits and skills as well as good ones.[134]
4. Cynicism may be the actual result rather than social sensitivity from early exposure to the troubles and woes of clients.[135]
5. Because of the high costs of supervision and administrative processes, this method of training students is financially unfeasible.[136]
6. Due to the lack of adequate supervision in most programs, the time of the student can be employed better in functions back at the law school.[137]

To the first four of the above, a demurrer, in effect, is proposed by those advocating that a law school graduate should possess a semblance of competence before the bench and in the law office.[138] Indeed, it is difficult to follow a rationale that a student is more susceptible to develop bad habits participating in clinic under supervision than later when thurst into the sink or swim situation of

---

as Methodology in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 21 (Buck Hills Falls Conf. 1973).

131. One educator, in response to the author's survey question—whether practical skills should find increased emphasis in your law school—answered: "I hope we don't go overboard."; Ferren, *supra* note 115, at 94: "But law faculties are not yet believers. Many law teachers perceive clinical experience at best as . . . acceptable."

132. *See* Brickman, *supra* note 99, at 69; *See also* Grossman, *supra* note 63, at 188-93.

133. *See* Stotz, *supra* note 28, at 74: "It was doubtful that there was any transferability between the skills learned in a legal aid office and the skills of those giving legal advice to the commercial world."

134. *See* H. PACKER & T. EHRLICH, *supra* note 92, at 42.

135. *See* Redlich, *supra* note 108.

136. *See* Brickman, *supra* note 99, at 71.

137. *Id.* at 76.

138. *See, e.g.,* Frank, *supra* note 47.

actual practice. This position is directly opposite of the major arguments for instruction in ethics.

Neither is it convincing that duplication of later practice skills is of no value, since almost every other educational school maintains that practice makes perfect. Those preparing for teaching careers are required to undergo a period of practice teaching, while under supervision, in an actual classroom in their chosen field. The medical schools, of course, have been often a source of comparison.

Others reject this analysis.[139] The time of a law student can be better spent and time for all competing interests is already critically short.[140] Until something is done to alleviate the second and third year boredom this argument loses much of its sting.[141]

The last two administrative criticisms of clinical programs, however, are very real and cannot be dismissed so easily. No one denies that the legal clinic is one of the most expensive forms of legal education.[142] Nor does anyone dispute that for it to function properly, adequate supervision must be provided. This costs money. In fact, it may be impossible for some schools to implement and maintain effective clinical programs. Others, having to make do with resources at hand, have depended on individuals outside the law school to provide supervision—not recognized as one of the better arrangements.[143] Such programs bear little resemblance to educa-

139. *See, e.g.,* Grossman, *supra* note 63, for a comprehensive treatment of arguments.

140. In response to the survey question—should there be more emphasis in law school on lawyering skills—one faculty member replied:

> [Law school] is about the only place the theoretical skills will be learned.
> The practical skills *can* be learned later.

Another responded (to question—can and should practical lawyering skills be taught in law school):

> [They should be taught] to whatever degree it can short of extending program to a [fourth] year.

See also supra note 128.

141. In response to the survey question—should practical lawyering skills be taught in the law school—one law review member wrote:

> While they do infringe on time for learning substance, they prepare the student for practice and even more importantly, sustain his interest during humdrum classroom courses.

142. *See* Putz, *Including Clinical Education in the Law School Budget* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 101 (Buck Hills Falls Conf. 1973); Swords, *Including Clinical Education in the Law School Budget* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 309 (1973).

143. *See* Brickman, *supra* note 99, at 76.

tion and differ little from first year practice after graduation.[144]

Clinical advocates insist that increased cost is not too great a price to pay for its benefits. Someone must pay and it is better for the law school to bear the burden rather than inadequately served clients.[145] Service to the community and poor is also added to the credit side of the ledger.[146]

Although a strong supporter of clinical programs, Chief Justice Burger's remarks apparently pertain to the seasoned practitioner at the appellate level, as well as neophytes.[147] One wonders what value a brief encounter in law school will have that years of practice cannot instill.

In final analysis, it appears that the clinical question depends on the value given to clinical experience to future practitioners and the actual objectives ascribed to legal education. Both sides have been loud and have enjoyed their own substantial audiences.

IV.

After a thorough search, it was discovered that little actual data is available revealing the extent the foregoing diverse opinions are espoused.[148] Thus, all American law schools were surveyed.[149] Law

144. *See, e.g., id.* at 69.

145. In response to author's survey question—can and should practical lawyering skills be taught in the law school—one faculty member wrote:

> Once the graduate has been admitted to practice he is expected to be able to handle all of the details involved in the practice of law without further study.

One law review editor, in responding to the same question, wrote:

> Law school is supposed to produce lawyers, not Harvard Law Professors. Are they supposed to learn by screwing a few clients *(i.e.,* the school of hard knocks)? The process of learning can be done in law school just as well as in practice.

146. *See, e.g.,* Pincus, *Legal Education in a Service Setting* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 27 (1973).

147. Burger, *supra* note 2.

148. All the major organizations with primary interests in legal education were queried. One, the Council on Legal Education for Professional Responsibility, Inc. (CLEPR) has published a complete listing of all law schools providing clinical programs in CLEPR, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1974-1975 (May 1, 1975). The work helpfully provides tables showing certain specific characteristics of each program, but falls short of providing data regarding the extent and nature of current attitudes of faculty and students toward clinical programs, the teaching methodology of these legal institutions, the objectives of the educational processes of these institutions and the believed effectiveness of the clinical programs. Prior to circulating the questionnaire which was prepared for use in writing this paper, the author questioned the executive officers of both the American Association of Law

school deans, law review editors and student bar presidents were asked to participate. It was believed that these three groups would provide a thorough sampling of those presently participating in an actual law school experience as well as represent the differing viewpoints of the law school community. The most controversial areas were queried—practical skills training, teaching methods and clinical methods employed. A copy of the questionnaire is set forth in the Appendix.

Results showed that an overwhelming majority maintained that traditional lawyering skills could be taught in law school.[150] A large,

---

Schools and the American Bar Association, Section on Legal Education in an effort to locate such data, if it existed, and to inquire about any regulations concerning the survey. The author was informed that the data which the questionnaire was designed to reveal did not yet exist, but that plans were being made to accumulate such data. Beginning with the Fall 1976 Annual Questionnaire of A.A.L.S., questions regarding clinical programs have been addressed. At this writing, the 1977 questionnaire results are not yet available. *See,* A.A.L.S., Proceedings, Funding of Clinical Education (March 3 and 4, 1978) for discussion of selected data from the Fall 1976 questionnaire.

149. Questionnaires were mailed to the deans and to the student bar association presidents of all law schools on the approved list of the American Bar Association, 1973. Questionnaires also were mailed to those persons of schools which are not accredited by the A.B.A., but which are listed in the A.B.A.'s book describing enrollment statistics as of 1973. A.B.A., Section on Legal Education, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS (1973). The total number of law schools to which questionnaires were mailed was 196.

Questionnaires were mailed also to the student editors-in-chief of all law journals and reviews listed with addresses in the foreward to the INDEX TO LEGAL PERIODICALS (1975). The total number of questionnaires sent to this group was 158.

A few deans referred the questionnaire to clinical faculty members. 102 law schools participated in the survey by answering the questionnaire, and 37 states and the District of Columbia are represented. The total number of returned questionnaires is 139, with responses being received from 61 deans or faculty members, 41 law journal staff members and 37 student bar association representatives. As is usual, some of those responding chose not to answer all questions; an exact breakdown of responses will be reported in the footnotes following the question. The majority or average response to questions as used in this paper was determined by using the total number of responses to a question divided by the number of answers given each possible response. Reference will also be made to certain written responsoes to questions asking for factual information or explanation.

150. Question 1(a). Do you believe that practical lawyering skills *(e.g.,* negotiation, drafting, cross-examination, etc.) as distinguished from theoretical skills, can be taught in the law school?

	YES	NO
Faculty	42	1
Law Review	30	5
Student Bar Association	25	1

but less substantial, percent of faculty and students believed lawyering skills should be taught in law school.[151] As to "when" and "how" to best teach these skills a much more diverse opinion was reflected,[152] although clearly in law schools today, moot or practice

151. Question 1(b). Do you believe that practical lawyering skills should be taught in the law school?

	YES	NO
Faculty	40	3
Law Review	24	6
Student Bar Association	25	0

Of the faculty and law review staff members responding affirmatively to question 1(a), 8.2% believed the law school is not the proper place to teach lawyering skills. It is interesting that almost all student bar officers believed that lawyering skills both can and should be taught in the law school while most of the negative responses to question 1(b) came from law review staff, 20% of the staff members responding affirmatively to part (a) (can be taught) responded "should not be taught" in part (b).

152. Question 2. When should practical skills be taught/learned?

	FACULTY	LAW REV.	SBA
A. First year of law school	1	2	3
B. Second year of law school	9	9	7
C. Third year of law school	15	11	7
D. Throughout the student's law school experience	29	19	19
E. After graduation	12	8	2

Question 3. How can these practical skills be taught?

	FACULTY	LAW REV.	SBA
A. In actual practice of law once the student has graduated and been admitted to the bar	13	12	4
B. In actual practice of law after the student has graduated but prior to his admission to the bar	8	7	2
C. Clinical education (whereby the law student, under supervision and prior to his graduation from law school, practices before the courts with "real" clients)	27	22	20
D. Simulated practice / moot court (with actors serving as clients and witnesses in a simulated fact situation)	17	13	16
E. Separate course within the curriculum	13	4	11
F. By the faculty in each individual course (by requiring practical exercises which relate to the course material being taught)	18	11	12

court, trial advocacy courses, and then clinical programs, in their respective order of use by the law schools, are the primary methods employed to teach practical lawyering skills.[153]

Despite the fact that each of the three representative groups responding to the questionnaire favored a clinical experience with a real client as the singularly most preferred method of skills training, clinical education did not establish a majority over the total of other responses.[154] Reflecting the dichotomy of the theory and skills advocates discussed in section II of this writing, one half as many faculty and law review students chose actual practice after graduation as the best method of skills training as those who chose clinical education as the preferred method.[155]

Contrarily, student bar officers showed a strong preference for clinical education over actual practice as the best method of practical skills training.[156] Simulation exercises found a place in between clinical education and the actual practice of law—each of the three groups favoring simulation exercises more than actual practice, but preferring it less than clinical experiences for skills training.[157]

G. Other			
All of above	8		
Post graduation summer program in lieu of bar examination or in addition to bar examination	1		
Observation and critique	1		
Instruction from experienced attorneys in law school setting	1		
Summer clerkships & internships			4
Clerkship (while in law school)			2
"Give me a hint — there's got to be a better way"		1	

153. *See* responses to Questions 4, 5 and 11 *infra.*

154. *See* Question 3, *supra* note 152.

155. *See* Question 3,(A) and (C), *supra* note 152.

156. *Id.*

157. *See* Question 3, (A), (C), (D), *supra* note 152.

Question 3(B) was asked to provide opportunity for response to the suggestion by some educators and practitioners that legal education should involve an apprenticeship or internship analogous to the medical profession. This, although perhaps being the ultimate clinical experience, was not given exhaustive treatment in this writing because it does not fit within the present framework of legal education and would require a revamping of the entire system to administer such a program.

Faculty members expressed a strong preference for practical exercises to be required by faculty members in individual law courses of instruction,[158] while results showed a notable absence of attempts by faculty members to integrate the regular curriculum courses with skills teaching exercises in a pervasive manner.[159]

While almost every law school represented had some type of clinical program, with few exceptions, clinical programs reached only a small minority of the students enrolled.[160] Also, most law schools

158. *See* Question 3(F), *supra* note 152.

159. *See* Questions 6 and 7, *infra* notes 167, 168.

160. Question 4. Does your law school have a clinical education program?

	YES	NO
Faculty	42	4
Law Review	35	1
Student Bar Association	21	5

Question 4(b). What type(s) clinical program(s) does your school have?

	FACULTY	LAW REV.	SBA
A. "In-house"	28	28	13
B. "Farm-out"	29	24	13
C. Other:			
Both of above	17	4	
Prison programs		1	2
Placement with administrative agency (form of "farm-out"—ed.)	1		
Mental hospitals			1
Research service	1		
Summer "farm-out"		1	
Simulation		2	
Legislative internship		1	

Question 4(c). What percentage of third year students (or second and third year students, if applicable) participate in these programs?

	FACULTY	LAW REV.	SBA
10% or less	3	6	2
11% to 20%	4	10	6
21% — 30%	12	3	3
31% — 40%	4	2	3
41% — 50%	11	3	3
51% — 60%		1	1
61% — 70%	1	1	
71% — 80%		1	1
81% — 90%	1	1	
91% — 100%	1 (100%)		

had no clinical orientation course to prepare students for clinical exeriences.[161]

Every law school represented in the responses had a simulated moot court program.[162] Most of the programs involve the writing and oral argument of briefs[163] and 60% of the programs require the draft-

---

Question 4(d). Do faculty members or members of the local bar supervise the students participating in clinical programs?

	FACULTY	LAW REV.	SBA
FACULTY	13	15	8
MEMBERS OF LOCAL BAR	4	3	1
BOTH	21	15	11

NOTE: Inadequate data was returned to determine the criteria used to determine which students were permitted to participate in clinical programs and what criteria was used to evaluate the student's performances in these programs.

161. Question 4(a). Does your law school have a pre-clinic orientation/training course to prepare students for the clinical experience?

	YES	NO
Faculty	16	23
Law Review	9	12
Student Bar Association	15	11

162. Question 5(a). Does your law school have a simulated or moot court program?

	YES	NO
Faculty	46	0
Law Review	36	0
Student Bar Association	26	0

163. Question 5(b). Does your school's simulated or moot court program include:

	FACULTY	LAW REV.	SBA
A. Research and writing of briefs	45	35	25
B. Oral argument of briefs	44	36	25
C. Complete simulated trial with actors serving as witnesses and parties	33	23	10
D. Participation as a graduation requirement	26	13	12
E. Video taped trials and/or arguments	25	15	8
F. Drafting of pleadings and motions	32	21	12
G. Oral arguments of motions	32	20	12
H. Judges from the local area serving as trial judges	35	26	20

ing of pleadings and motions.[164] Yet in less than half of the law schools are such programs requirements for graduation.[165] In 48% of the moot court programs represented in the responses, oral arguments were video-taped for critique.[166]

The traditional case method, supplemented by law review if students "make" the review, remains the dominant teaching approach in the law school.[167] Few faculty members employ any audio-visual aids as a part of their classroom instruction[168] and of those that do,

---

I. Appraisal of student's performances at conclusion of the trial or appellate argument	43	32	23
J. Academic credit given for students participation	42	25	21

164. *See* Question 5(b) (F), *supra* note 163.
165. *See* Question 5(b) (D), *supra* note 163.
166. *See* Question 5(b) (E), *supra* note 163.
167. Question 6. What is the principal method of classroom instruction in your law school?

	FACULTY	LAW REV.	SBA
A. Case-Socratic	22	18	14
B. Lecture	1	1	1
C. Lecture & case-method combination	21	18	14
D. Problem	5	3	1

168. Question 7(a). Do faculty members ever employ any of the following teaching devices as part of their classroom instruction?

	FACULTY	LAW REV.	SBA
A. Video-tapes of trials (or portions thereof, *e.g.*, cross-examination segments) either actual or simulated	31	12	7
B. Video-taped lectures or class sessions of noted professors	9	5	
C. Slides or transparencies (of, *e.g.*, legal documents, pleadings etc.)	21	7	1
D. Role-playing or simulation techniques	34	17	9
E. Requiring students to draft legal documents, pleadings, jury instructions, briefs, etc.	43	26	15
F. Programmed instruction methods	6	5	2
G. Other:			
Formal class presentations		1	

Field trips (legislature and courthouse)	1	1	
Guest lectures	1		1
Empirical research	1		
Video-tape	1 (negotiation & client interviews)	1 (crim. Proced.)	
All of above	3		
None of above	2	5	6

Question 7(b). What percentage of the faculty use the above indicated devices (those indicating use in Question 7(a))?

	FACULTY	LAW REV.	SBA
10% or less	5	23	15
11% — 20%	12	5	2
21% — 30%	8	1	2
31% — 40%			
41% — 50%	6		2
	(2=5)		(1=6)
	(2=4)		(1=5)
	(2=3)		
51% — 60%	2		
	(1=8)		
	(1=6)		
61% — 70%			
71% — 80%	1	1	
	(=3.5)	(=4)	
81% — 90%			
91% — 100%			
Small or few	2	3	2

NOTE: For those responses above 30%, the corresponding responses are shown (next question) demonstrating the extent the devices are are employed by this percentage of the faculty. For example, one faculty member responded that eight members of the faculty at his law school used such devices 51%-60% of the time and another faculty member responded that six faculty members at his law school used such devices the same percentage of time.

few employ audio-visual aids with any regularity.[169]

169. Question 7(c). To what extent do these faculty members employ the above indicated devices? (those indicating use in Question 7(a) and (b))

	FACULTY	LAW REV.	SBA
1 Very Seldom	2	7	2
2	6	4	5
3	9	7	2
	(1=50%)	(1=25%)	(1=20%)
	(3=25%)	(1=20%)	(1=10%)
	(1=10—25%)	(1=10—20%)	
	(2=20%)	(3=10%)	
	(1=15%)	(1=Small)	
	(1=Small)		
4	10	5	2
	(1=80—90%)	(1=75%)	(1=20%)
	(2=50%)	(2=20%)	(1=10%)
	(1=25%)	(2=10%)	
	(4=20%)		
	(1=15%)		
	(1=05%)		
5	4	1(10%)	4
	(2=50%)		(1=50%)
	(2=20%)		(2=25%)
			(1=10%)
6	3	1(05%)	2
	(1=25%)		(1=50%)
	(1=20%)		(1=05%)
	(1=most)		
7	1(02%)	1(10%)	
8	2	1(02%)	2
	(1=60%)		(1=05%)
	(1=05%)		(1=01%)
9			1(05%)
10 In Every Class		1(10%)	

NOTE: For those responses 3 and above (use of devices 3 out of 10 class periods), the corresponding percentage of faculty members using the indicated devices to that extent is shown.

Almost all of the schools represented teach legal writing[170] and require it for graduation.[171] Yet of the schools represented less than 50% teach legal drafting, and of those law schools that do, hardly any require it for graduation.[172]

---

170. Question 8. Does your law school teach legal writing?

	FACULTY	LAW REV.	SBA
Yes	44	35	23
No	1	1	2
IF YOUR ANSWER IS YES, HOW IS IT TAUGHT?			
A. As a separate course	27	30	20
B. In conjunction with clinical education or moot court	12	10	5
C. By other methods:			
Research papers	2		
In conjunction with first year courses	8	2	
In conjunction with second and third year courses	1	1	

171. Question 9. If your law school teaches legal writing, is it a graduation requirement?

	YES	NO
Faculty	39	1
Law Review	29	5
Student Bar Association	20	6

172. Question 10. Does your law school teach legal drafting?

	FACULTY	LAW REV.	SBA
Yes	38	16	14
No	7	19	13
IF YOUR ANSWER IS YES, HOW IS IT TAUGHT?			
A. As a separate course	19	8	8
B. In conjunction with clinical education or moot court	16	7	6
C. By other methods:			
Skills oriented courses	4	5	3
Seminars	1	1	
IF YOUR LAW SCHOOL TEACHES LEGAL DRAFTING, IS IT A GRADUATION REQUIREMENT?			
Yes	4	2	2
No	3	14	10

A large majority of the law schools represented teach trial advocacy.[173] Most law schools teach it as a separate course in the curriculum.[174] Several teach trial advocacy in conjunction with clinical programs[175] and in a few law schools trial advocacy is taught both as a separate course and in conjunction with clinical programs.[176]

Student bar officers responding showed a strong preference for an increase in emphasis on lawyering skills, as distinguished from theoretical skills, than is now the case in their law schools.[177] Faculty responses reflected this opinion to a lesser degree, while law review staff members disagreed.[178] All groups, however, believed there to be a trend in law schools toward additional emphasis on teaching practical lawyering skills.[179] Despite this agreement in opinions as

---

173. Question 11. Does your law school teach trial advocacy or lawyering practice skills?

	FACULTY	LAW REV.	SBA
Yes	45	34	25
No	0	2	1

174. Question 11(b). How are trial advocacy or lawyering practice skills taught in your school?

	FACULTY	LAW REV.	SBA
A. As a separate course	44	25	20
B. In conjunction with clinical education or moot court	21	13	11
C. By other methods			
Both	7	5	6
Internship	1		

175. *See* note 174 *supra.*

176. *Id.*

177. Question 12. In your opinion, should there be more emphasis in your law school on lawyering skills as distinguished from theoretical skills than is presently the case?

	YES	NO
Faculty	23	17
Law Review	13	22
Student Bar Association	18	8

178. *See* note 177 *supra.*

179. Question 13. Do you believe there is a trend in legal education toward additional emphasis on the teaching of practical lawyering skills?

	YES	NO
Faculty	34	6
Law Review	26	6
Student Bar Association	20	5

to the direction law school instruction is moving, opinions among all groups as to the educational objectives of their law schools were conflicting.[180] Those opinions expressed are generalized and use

180. Question: In your opinion, what are the educational objectives of your law school? The following responses are representative:

Responses from deans:

"To prepare students for the practice of law."

"Preparing students to be highly qualified to practice law; preparing students to be highly qualified generalists; to foster the training of attorneys that adhere to a high ethical standard of conduct; research and education into the juridical aspects of societal problems."

"To educate men and women in the basic precepts and culture of the law."

"The prime function of a law school is to provide the basic educational training to convert the aspiring, beginning law student into an aspiring, beginning lawyer, the goal of the educational program, taught by an outstanding faculty, is to develop in the student, through unique instructional methods including the so-called 'case system,' problem-centered teaching, seminars and clinical experience, an ability to use and to understand legal method. The student does learn to 'think like a lawyer' and this involves developing analytical skills, acquisition of legal concepts and vocabulary, appreciation of legal procedure, facility in the more precise use of language and an appreciation of the intellectual discipline and heritage of the profession and its role in society."

Law review staff responses:

"To give you the basic principles of the law and to teach you to think like an attorney, so that after graduation you have learned how to learn like a lawyer."

"I do not know."

"To train (name of the state in which the law school is located) practitioners."

"To prepare people to take bar examinations in various jurisdictions and provide a general legal background in preparation for the practice of law."

"To train first-rate law professors and judges (most obvious in classroom technique); to train a large mass of corporate lawyers to work in the nation's large law firms (most obvious in curriculum and admissions); specifically: ability to read a case, ability to develop a legal argument, and ability to present it clearly."

"Very vague—turn out lawyers, perhaps. Formerly, school attempted to combine law and social sciences, which now most students feel is bullshit. Prior to that, objective was very pragmatic orientation. Perhaps now attempt to become more scholarly, and less practical."

Student Bar officers' responses:

"Unfortunately—the less than subtle objective is to produce facilitators for American business."

"We do not train lawyers, we train legal scholars."

"The emphasis is on providing a solid basis in the theoretical aspect of the law, especially the first year. Thereafter, students are encouraged to take part in clinical programs, guided research and writing seminars, to develop some practical framework on which to build. Being a city school, and even more a community law center, we have a number of programs which deal with contemporary legal problems, *e.g.*, teaching the law to high school teachers, providing input to various community based educational institutions. Specific objectives would be to prepare the student with a realistic outlook

much of the "pat language" articulated by those participating in the "trade school" versus "educational institution" debates,[181] as discussed in section II of this article.

V.

> The uses of law are pragmatic, and hence when the practical can be combined with the theoretical, there is every reason why this should be done.[182]
>
> —William C. Warren
>
> For some, unfortunately, the issue is the simplistic question of whether the [law] school will concern itself with theoretical matters or whether it will train its students to be "practical lawyers." This false issue has done incalculable harm . . . . Certainly our aim is to produce graduates who will become first-rate practical lawyers. But there is nothing of more practical use to a lawyer than a sound grounding in the *theory* of law.[183]
>
> —Charles E. Ares

Regardless of whatever else that can be said about clinical education, it has initiated a close scrutiny of all aspects of legal pedagogy. Fueled by the recent criticisms directed toward the practicing bar, this re-examining process has reached beyond the law schools. All lawyer training methods are being reappraised. This in itself is healthy. The past advances made in legal education have all followed periods of reappraisal. Consequently, law schools have refocused on some difficult issues.

Are recent law graduates really deficient in professional responsibility? Are lawyers and faculties ready to shift the burden of deciding the competency of graduates to practice law away from the practicing bar and bar examiners to the law schools? Must all

---

as to what the practice is all about, and to provide that student with the fundamental tools of the profession."

The question immediately above was question 3 on a questionnaire prepared by Professor Steve H. Nickles on examining and grading in law schools. This question was not duplicated by the author since both questionnaires were combined in one survey. The author's survey questions above, numbered 1-13, were actually questions 48 through 60 of the survey. They were renumbered for convenience and to avoid confusion to the reader. *See,* Nickles, *Examining and Grading in American Law Schools,* 30 ARK. L. REV. 411 (1977).

181. *See,* responses reported in note 180 *supra.*

182. Gellhorn, *supra* note 77, at 15.

183. Ares, *The Law School and the Future,* 8 ARIZ. L. REV. 199, 200 (1967).

law graduates be skilled in courtroom technique? What are the minimum skills which law graduates should possess? Should law teachers teach as if all students are to become practitioners and ignore that increasing number of students now entering the non-traditional law related occupations?

Obviously, legal educators are not charged with sole responsibility for determining these issues. The joint cooperation of the bar, bench and law school is required. It is, however, in this climate of introspection that legal educators must deal with the further question—what role can and should clinical programs play in the education of law students?

There is no clearcut answer, only hard choices. In making such choices, legal educators should give attention to the following considerations.

The educational benefit to students must be the central concern of all clinical programs. Although the needs of the local community are surely important, the service aspects of clinical programs must be secondary.[184] Those clinical advocates expounding the service to the community which clinical programs provide have sometimes mistaken the need for the call. Law schools must remain primarily educational institutions.

To ensure that students are in fact receiving the educational experiences which the clinical programs are designed to provide, adequate supervision is essential. Law schools must be careful that observation is not mistaken for understanding. Farm-out type clinical programs are the most susceptible to abuse. Faculties must be cautious in delegating the supervision of students to attorney general offices, legal aid programs and practitioners outside the law school. This should only be done upon the assurance that such experiences include adequate supervision. The programs must be monitored to guarantee that students are receiving the education and training claimed.

Ideally, clinical programs should have direct faculty supervision. Short of an in house clinic, this is virtually an impossible task. The educational benefit of clinical experiences is directly proportional to

184. *See* Binder, *Education Versus Service: Three Variations on the Theme* in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 35 (Buck Hills Falls Conf. 1973).

the amount of quality supervision. This, in turn, raises the principal obstacle to clinical programs. The greater the supervision, the higher the costs to the law school. As faculty members can supervise no more than a maximum of 10 students at any given time, clinical programs, on the average, are three to five times more expensive than traditional course offerings.[185] With 70-80% of all clinical costs going toward supervising personnel, clinical education becomes a very costly proposition.[186]

Further, if the scheduled termination of present major funding programs is punctual, clinical programs will soon undergo unparallelled stress.[187] Law schools, to continue or expand clinical offerings, will have to seek new sources of revenue. Private philanthropy can not continue the current practice of funding, for few private foundations have the resources as did the Ford Foundation in the recent decade.[188] Neither is Congress likely to raise tax dollar funding above the token level of one million awarded last year under Title XI.[189] Current attitudes of some Congressional leaders run "there are too many lawyers already," while medical and dental schools, historically funded, have witnessed recent cutbacks in educational appropriations.[190]

If law schools undertake to fund clinical programs through student tuition increases, alumni fund raising drives or out of the regular curriculum budget, dangerous levels of internal tension may result. Clinical programs will be competing with the library, fuel and electric bills and faculty salaries in an atmosphere of rising costs and runaway inflation. For many law schools this would mean a trimming of the regular curriculum to either introduce new programs, or to retain clinical programs at present levels. Law schools may not be able, nor willing, to meet such a proposition.

Despite the fact that a law school may have an effective and adequately funded clinical program, the needs of the mass of enrolled students have been overlooked. Clinical program participa-

185. *See* generally, A.A.L.S., *Proceedings, Funding of Clinical Legal Education* (March 3 and 4, 1978).

186. *Id.*

187. *Id.; See* Buckman, *supra* note 99, at 80.

188. *Id.*

189. 20 U.S.C. § 1136; 43 Fed. Reg. 2666 (Jan. 18, 1978).

190. *See* Johnson, *supra* note 184.

tion, like law review, is available to only a small minority—often the upper echelon of students. If both law review and clinical experiences are valid, some provision should be made to provide the essence of these experiences to the mass—the replacement corps of today's practitioners. Everyone can not be on law review. Neither, because of the cost, can every student participate in clinical programs at most schools.

To reconcile the bulging curriculum of law schools and the concern over the proper emphasis which social concerns should occupy, undergraduate education should be asked to play a larger role in the education of law students. A true prelaw program of study, composed of business, political science, sociology, psychology and composition courses, is a natural prerequisite to law school attendance. This would release valuable time to other educational pursuits in law school and provide a foundation of knowledge upon which law teachers could quickly build.

Law schools must begin to place increased emphasis on simulations, moot and appellate trials, and client counseling exercises. This would provide skills training to those unable to participate in true clinical programs. Its inexpensive implementation, controlled environment and availability to every student are obvious advantages.

Additionally, skills instruction through a pervasive approach should take place in the classroom. Professional ethics instruction has already made inroads into this area.[191] Writing and drafting exercises, role-playing and problem solving exercises should be increasingly used. The major problem here is the reorientation of the traditional teacher's thinking and method of instruction.

Law faculties have failed to realize the enormous potential of the audio-visual aid as a teaching device. It is alarming that only 26% of law teachers employ any audio-visual aids in their courses, and of those that do, most only use them once a year.[192] With a classroom

191. *See* Smedly, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment,"* 15 J. LEGAL ED. 435 (1963).

192. *See* note 168 *supra* (survey questionnaire results); Audio-Visual Committee of American Association of Law Schools, *Summary of Audio-Visual Materials Used in Legal Education* 15 (1967). This cannot be attributed to unavailability of materials. The librarian for the National Legal Audio-Visual Center, Indiana University, Bloomington, Indiana, was

of students groomed by television, audio-visual helps are natural teaching tools. Non-legal educators have employed them extensively for some time. Films illustrating the performance of lawyering skills (for example, the cross-examination of witnesses or the initial client interview in the law office) could be shown outside classroom hours in sessions analogous to lab periods in the undergraduate science studies. These films should be followed by faculty-led discussion and critique periods enhancing the success of students receiving the full educational benefits.

The author has offered the above suggestions not in lieu of clinical, but rather as supplements to clinical programs. The above proposals cost little to implement, fit easily in the present law school framework and can be employed on a broad scale so as to include all students.

The final conclusion to be drawn is obvious: law schools should respond to the recent criticisms of legal education by paying increased attention to teaching lawyering skills and professional responsibility. If law schools fail to initiate such changes internally, outside pressures may force law schools to do so. One jurisdiction has implemented such changes by outlining mandatory courses of study as prerequisites to bar examination.[193] No longer should law faculties show a distrust of anything couched as "how to do it." There must be a blending of the academic, theoretical and practical. Clinical education can make a significant contribution toward law schools meeting the current challenges to modern legal education and offers some real advantages over traditional classroom coursework. Clinical programs should be implemented, however, only after each law school decides its specific educational objectives, defines the minimum skills which its law graduates must possess, and evaluates the contribution clinical programs provide in the achievement of these pursuits.

---

most helpful in compiling for this author a list of readily available materials. The list (covering films only) contains 222 entries in 29 major course areas.

193. By the enactment of Rule 13 in Spring 1974 by the Indiana Supreme Court, law students desiring to take the Indiana bar examination must study a course of 54 stated hours. *Indiana Daily Student,* Sept. 29, 1975. Rule 13 has induced many complaints because of its restriction on curriculum. Many suspect its design is to steer students away from non-traditional and non-state oriented courses and to train students to be Indiana practitioners. *Indiana Daily Student,* Sept. 19, 1975.

APPENDIX

QUESTIONNAIRE

CLASSROOM TEACHING TECHNIQUES AND PROGRAMS OF CLINICAL EDUCATION

QUESTION 1.

Do you believe that practical lawyering skills (*e.g.*, negotiation, drafting, cross-examination, etc.), as distinguished from theoretical skills, can and should be taught in the law school?
can be taught in the law school: ___Yes ___No
What are the reasons for your opinion?
Should be taught in the law school: ___ Yes ___ No
What are the reasons for your opinion?

QUESTION 2.

When should practical skills be taught/learned?

___ First year of law school ___ Second year of law school
___ Third year of law school ___ Throughout the student's law
___ After graduation school experience

QUESTION 3.

How can these practical skills best be taught?

___ In actual practice of law once the student has graduated and been admitted to the bar
___ In actual practice of law after the student has graduated but prior to his admission to the bar
___ Clinical education (whereby the law student, under supervision and prior to his graduation from law school, practices before the courts with "real" clients)
___ Through simulated practice/moot court (with actors serving as clients and witnesses in a simulated fact situation)
___ Separate course within the curriculum
___ By the faculty in each individual course (by requiring practical exercises which relate to the course material being taught)
___ Other (*Please describe and explain.*)

QUESTION 4.

(a) Does your law school have a clinical education program?
___ Yes ___ No
If your answer is yes, please answer the following questions:
(b) What type(s) program(s) do you have?
___ "In-house" (a legal aid type clinic within the confines of the law school in which students under supervision receive and interview clients and follow through the legal processes as may be required)
___ "Farm-out" (a placement program whereby students are placed in the offices of practicing attorneys or under the supervision of judges and prosecutors)
___ Other *(Please explain.)*

(c) What percentage of the third year students (or second and third year students, if applicable) participate in these programs? _____

(d) Do faculty members of the local bar supervise the students participating in the program (s) ? ___ Faculty ___ Members of local bar

(e) What are the criteria used to determine which students will be allowed to participate in clinical education? (E.g., G.P.A.; top 20%, etc.)

(f) What are the criteria used to evaluate a student's performance in the clinical education program (s) ?

(g) Does your law school have a pre-clinic orientation/training course to prepare students for the clinical experience? ___ Yes ___ No

If your answer is yes, please explain:

QUESTION 5.

(a) Does your law school have a simulated/moot court program? ___ Yes ___ No

(b) If your answer is yes, which of the following does it include:

___ Research and writing of briefs
___ Oral argument of briefs
___ Complete simulated trial with actors serving as witnesses and parties
___ Participation as a graduation requirement
___ Video-taped trials and/or arguments
___ Drafting of pleadings and motions
___ Oral arguments of motions
___ Judges from the local area serve as trial judges
___ Appraisal of students' performances at the conclusion of the trial or appellate argument
___ Academic credit is given for students participation

(c) If you answered that your law school had a simulated/moot court program AND that academic credit was given for students' participation, what are the criteria used in the evaluation of the students' performances?

QUESTION 6.

What is the principal method of classroom instruction in your law school?

___ Case-Socratic ___ Lecture ___ Lecture and case-method combination ___ Problem ___ Other methods (*please explain.*)

QUESTION. 7

(a) Do faculty members ever employ any of the following teaching devices as part of their classroom instruction?

___ Video-tapes of trials (or portions thereof, *e.g.*, cross-exami-

nation segments) either actual or simulated
___ Video-taped lectures or class sessions of noted professors
___ Slides or transparencies (of, *e.g.*, legal documents, pleadings, etc.)
___ Role-playing or simulation techniques
___ Requiring students to draft legal documents, pleadings, jury instructions, briefs, etc.
___ Programmed instruction methods
___ OTHER (*Please explain.*)

(b) What percentage of the faculty use the above indicated devices? _____

(c) To what extent do these faculty members employ the above indicated devices? 1 2 3 4 5 6 7 8 9 10
Very Seldom — In every class

QUESTION 8.

Does your law school teach legal writing? ___ Yes ___ No
If your answer is yes, how is it taught?
___ As a separate course ___ In conjunction with clinical education or moot court ___ By other methods *(Please explain.)*

QUESTION 9.

If your law school teaches legal writing, is it a graduation requirement? ___ Yes ___ No

QUESTION 10.

Does your law school teach legal drafting? ___ Yes ___ No
If your answer is yes, how is it taught?
___ As a separate course ___ In conjunction with clinical education or moot court ___ Other methods (*Please explain.*)
If your law school teaches legal drafting, is it a graduation graduation requirement? ___ Yes ___ No

QUESTION 11.

(a) Does your law school teach trial advocacy or lawyering practice skills? ___ Yes ___ No

(b) If your answer is yes, how are they taught?
___ As a separate course ___ In conjunction with clinical education or moot court ___ By other methods *(Please explain.)*

QUESTION 12.

In your opinion, should there be more emphasis in your law school on lawyering skills as distinquished from theoretical skills than is presently the case? ___ Yes ___ No
Comment:

QUESTION 13.

Do you believe there is a trend in legal education toward additional emphasis on the teaching of practical lawyering skills?
___ Yes ___ No
Comment: