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## Clinical Legal Education: A Student Perspective

Michael Cozens\*

*Fiscal restraint has forced many law schools to reconsider funding clinical education programs. Using the Dalhousie Legal Aid Service (DLAS) as an example, the educational effectiveness of clinical legal education is examined. Clinical education provides a context in which students can learn and apply the traditional law school curriculum. There is a danger, however, that clinical education will focus on technical skills without honing analytical skills such as ends-means analysis. The supervisor plays a crucial role in structuring the clinical experience into an educational one, from which students develop approaches to solving legal problems in practice. If the pitfalls are avoided, clinical education can be invaluable to the student and can enhance traditional programs. Although there are weaknesses in DLAS's program, its educational value warrants its continued existence.*

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*La contrainte fiscale a imposé à de nombreuses facultés de droit une reconsidération de la question des fonds donnés au programme d'éducation clinique. En se servant de l'exemple de "Dalhousie Legal Aid Service" (DLAS), l'efficacité pédagogique de l'éducation clinique légale est examinée. L'éducation clinique procure aux étudiants un contexte où ils peuvent apprendre et appliquer le curriculum scolaire traditionnel en droit. Il existe, toutefois, un danger que l'éducation clinique se concentre sur des aptitudes techniques sans aiguïser les aptitudes analytiques telle l'analyse "fins et moyens". Le surveillant joue un rôle crucial, à savoir, structurer l'expérience clinique pour qu'elle soit une expérience éducative, d'où les étudiants développent des approches à la résolution de problèmes légaux à travers la pratique. Si les pièges sont évités, l'éducation clinique peut fournir des avantages inestimables pour l'étudiant, et peut même rehausser des programmes traditionnels. Bien que le programme DLAS ait des points faibles, sa valeur pédagogique justifie sa continuation.*

On January 31, 1991 the immediate future of Dalhousie Legal Aid Service (DLAS) was decided in a vote by Faculty Council. The current economic position of Dalhousie Law School, as well as Dalhousie University itself, had forced many programs to be eliminated or cut back. Faced with either the option of closing DLAS entirely or allowing it to continue to function essentially unchanged for three more years, Faculty Council voted for the latter. The vote

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\* Dalhousie Law School, LL.B. 1992.

was not an overwhelming show of support for DLAS, however. The debate was emotional, and polarized both faculty and students into three camps: one for continuation of DLAS, one against, and a third group who simply felt that they did not understand the real issues involved well enough to take a position. The result is that the future of DLAS still hangs in the balance; an overall Senate Review of Dalhousie Law School, including a critical look at DLAS was recently completed, with recommendations released in August 1992. The Review Committee recommended that the Law School significantly reduce its financial contribution to DLAS and consider a merger with other legal aid providers in Nova Scotia.<sup>1</sup>

During the "great debate," I was one of the students who was not sure which was the best solution. I had already decided to register in DLAS and ultimately completed a summer term there in August 1991. It was my feeling, however, that the clinical debate had been somewhat "skewed." Many of the real issues were shoved to the sidelines by both sides during the dispute.<sup>2</sup> Those opposed to the continuance of the DLAS perceived its value primarily as a social program for the community with a secondary benefit to the students. Many of those in favour of its continuance spoke of the exceptional experience they had at DLAS and emphasized the "liberal" social consciousness component of DLAS's mandate.<sup>3</sup>

To me, the ultimate issue was the educational value of a clinical course to the student body as a whole. This was based on my belief that the bottom line in any program offered by the law school should be its educational value; the social or practical value had to be measured in terms of education provided. Was the expense of operating DLAS justifiable from an academic perspective, or would the student body be better served by funds being diverted to other areas such as the hiring of more faculty and the introduction of additional courses? The academic value of DLAS to the law school remained largely undefined, however, and thus was not the focal point of the debate as it should have been. The reason for this was that few people were aware of the educational

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<sup>1</sup> *Senate Review of the Faculty of Law, Final Report* (Dalhousie University, 1992) at 11 [unpublished].

<sup>2</sup> Condlin's comments describe quite accurately the atmosphere which surrounded the law school during this time: "Convincing our schools to offer clinical courses is seen as roughly akin to winning elections. We organize constituencies, lobby undecided voters, and seek out economic and political leverage. It is no wonder that we have sometimes been described as anti-intellectual." R.J. Condlin, "Clinical Education in the Seventies: An Appraisal of the Decade" (1983) 33 *J. Legal Educ.* 604 at 609.

<sup>3</sup> Lorene Clark, the DLAS Director at this time, expressed the DLAS mandate as threefold: first, to provide legal services to the poor; second, to provide students with practical experience; and third, to act towards community development and law reform.

philosophy of clinical education and resorted to other arguments with which they felt most comfortable, either practical, social, or personal.

By considering the educational nature of the experience offered, I will attempt to define the value of clinical legal education in general. This evaluation will assist in assessing the worth of DLAS to Dalhousie Law School in particular. It is not my intent, however, to do a technical analysis of DLAS within the overall law school structure. My focus is the philosophy of clinical methodology as an educational tool. Until this is understood, any attempt to determine DLAS's value to the law school's educational program is futile.

Much has already been written about clinical education, albeit mostly from an American perspective.<sup>4</sup> There is little value, therefore, in repeating it. Having spent a term at DLAS, however, there is much I want to say as a student, about what is being posited by the clinical theorists concerning the nature and function of clinical education. The theory of clinical legal education and the actual practice of it must be brought face-to-face to see if they are reconcilable. In today's difficult economic times, clinical programs will be eliminated or downsized unless it is clearly proven that they provide the student with an adequate legal education, and are effective in doing so. This is the practical reality of legal education and, in fact, of most education today. If clinical programs are seen to be necessary, then law schools will have to find ways to incorporate them into their curricula or they cannot say that they are providing students with a fulfilling legal education.

In short, I am asking what clinical education is, whether we need it, and whether we are providing it at Dalhousie Law School. It is in this context that the future of DLAS, as well as other clinical programs at the law school, is considered.

## **WHAT IS WRONG WITH LEGAL EDUCATION?**

In order to determine if legal education is seriously flawed it is first necessary to

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<sup>4</sup> It is important to recognize the differences between the United States and Canadian Bar admission systems at the outset. In the U.S. the law schools and Bar requirements vary from state to state. Often, students go straight from law school to a difficult set of Bar examinations and then into practice, while in the more uniform Canadian system, students leave law school to enter an articling period of one year with less difficult (at this time, although this is also changing) Bar examinations incorporated into their time as articling students. Many of the U.S. concerns about turning students essentially untrained in technical and practical skills directly into practice are not as applicable in Canada. However, the philosophical tenets of clinical legal education are transferable to a study of the legal education which the Canadian student is receiving. In Canada, the central questions are: (1) what is the aim of clinical education; and, (2) is such an experience lacking in a student's articling period?

have an image of what a legal education is supposed to be; it can then be determined whether the law schools' curricula achieve these predetermined objectives. What then is the consensus within law schools as to what a legal education should be and should do? Here we see the first signs of a problem: legal educators cannot reach an agreement on this fundamental question.

Legal educational theorists are either in the camp of those who believe that legal education's primary purpose is to train students to be practitioners or of those who believe that its purpose is to cause students to question the theoretical and philosophical underpinnings of the law as we presently understand it. Barnhizer puts it this way: "After more than one hundred and fifty years of existence, American law schools are still caught astride a chasm that separates the Scylla of the academic university from the Charybdis of the practicing profession."<sup>5</sup> Stranded in this chasm are the students who are unsure of what to make of the situation and settle quickly into disillusionment. Generally, students come to law school with a degree of anticipation. They are excited about being there and have a desire to learn and study law as a discipline. First-year students are "fired up." By third year they just want out, not so much because they are looking forward to the articling phase of their experience but because they are bored and frustrated with the educational phase.

A major factor contributing to this student alienation and apathy is the lack of leadership from the law school. This is because the law school itself is unsure of its direction. Klare claims that:

Law school education does not, by and large, train students either to practice law or to engage in serious legal scholarship. Rather, the law-school curriculum disenfranchises students intellectually and disables and incapacitates them professionally.<sup>6</sup>

This is because the primary function of law schooling is to prepare and socialize students to enter into a very narrow range of careers. He also has three additional claims in this regard. First, law schools generally ignore the training for the practice of law, assuming that this will occur when the student is actually practicing. Only a few large firms and government can provide this on-the-job training. If the poor receive first-rate legal services the law schools should receive little credit. Second, the students are disabled and socialized by the law schools: (a) systematically manufacturing a false consciousness; (b) dictating

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<sup>5</sup> D. Barnhizer, "The University Ideal and Clinical Legal Education" (1990) 35 N.Y.L.Sch.L.Rev. 87 at 92.

<sup>6</sup> K.E. Klare, "The Law-School Curriculum in the 1980s: What's Left?" (1982) 32 J. Legal Educ. 336 at 337.

what social and moral attitudes are acceptable; and, (c) ignoring the necessary technical-intellectual and interpersonal capacities which are needed. Third, the curriculum is designed to protect the interests of and legitimize the power of law teachers.<sup>7</sup> He is right. As students, we emerge from law school without being challenged intellectually, without having to learn how to think creatively or constructively, and we feel robbed because when we entered law school we were looking forward to these challenges. We also leave without a solid foundation in the practical skills necessary for good lawyering and enter practice still carrying many of the fears which we had when we entered law school.<sup>8</sup> As Barnhizer says, it is perhaps the worst deficiency of law schools, that they "...fail on both ends, dealing neither with the deep metaphysical and structural substances of the law, nor with the applicational aspects of law and lawyering."<sup>9</sup> Unsure of what to give students, law schools give them very little at all.

It is no wonder, therefore, that students give little back to their educational experience. Acting Dean Philip Girard at Dalhousie Law School commented that he would like to "abolish third-year syndrome" saying that "If I could, I would mandate a year off for all students between third year and articles. I realize that having a job sewn up is very comforting but it certainly affects one's interest in law school."<sup>10</sup> There is no doubt that most third year students are not interested in law school. Their lack of interest is not because they have jobs to go to, however, but because there is very little in law school to interest them.<sup>11</sup> Third-year attrition<sup>12</sup> does not happen because most students are lazy; it happens

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<sup>7</sup> *Ibid.* at 337-338.

<sup>8</sup> "For most recent graduates, the first year of practice traditionally is a crash course in everything they didn't learn in law school: writing and communication skills, creative problem solving, giving advice and law practice management." "The Making of a Professional" (1990) 76 A.B.A. J. 43 (1990) in J.T. Younger, "Legal Education: An Illusion" (1991) 75 Minnesota Law Review 1037 at 1038. See also F.W. Munger, "Clinical Legal Education: The Case Against Separatism" 29 Clev. St. L. Rev. 715 (1980) at 723-726. Keep in mind the differences between the Canadian and American systems. The Canadian articling period allows for some of these practical skills to be acquired. Lost, however, is the academic environment within which these practical skills may be scrutinized for larger purposes than the task at hand.

<sup>9</sup> *Supra* note 5 at 115-116.

<sup>10</sup> *Weldon Times*, Vol. 15, No. 7 (April 1992) at 6.

<sup>11</sup> The only students I was aware of who were looking forward to their third year were those who were doing a term at DLAS or in the Criminal Clinic. All the rest were simply looking forward to finishing.

<sup>12</sup> This attrition is documented. See "Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education of the American Bar Association" (1980) at 38-39. In M.A. McDiarmid, "What's Going On Down There in the Basement: In-House Clinics Expand Their Beachhead" (1990) 35 N.Y.L.Sch.L.Rev. 239 at 287. See also Committee on Educ. Planning and Dev. of

because students see the law school curriculum as not being relevant to their present or future interests. Law school becomes a hoop to jump through before one can get on with one's life. Rebecca Veinot, a former Dalhousie Law School student, pointed to certain factors such as mastery of the skill required to write law school exams,<sup>13</sup> the motivational depressant of the Bell curve, the irrational relationship between effort expended and the resultant marks, and the tension in the student-teacher relationship<sup>14</sup> [particularly in Socratic style classes] as some

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Harvard Univ. School of Law, *Interim Report* 17 (1980):

A student's last semesters in law school are disorganized, ill-designed, monotonous, passive, repetitive, de-energizing, dissatisfying and apathy producing. It has been said that particularly in that third year there is little value in classroom activity, an overall formlessness in the curriculum, a paucity of informative comment or feedback on student progress, a restricted and unhelpful method of evaluation of students, and deeply troubling negative aspects of faculty-student relations.

Quoted in M. Stickgold, "Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools" (1989) 19 *New Mex. L. Rev.* 287.

<sup>13</sup> The examination structure serves to motivate students to learn how to write exams and actually discourages them from attempting to do all their assigned class readings. One of the most valuable lessons students learn in law school is that you often receive better marks if you do no more than is necessary. I, as did many others, virtually stopped doing any of my casebook readings for any of my classroom courses. I simply borrowed sets of "cans" (condensed annotated notes) from former students (preferably on disk) and reorganized them, supplementing them with my class notes. From these I wrote my examinations and received good marks. The better I learned how to utilize this method, the better my marks got. Meanwhile students who read everything often received lower marks for their efforts. Is this only an indication that I, and these others, are lazy students? If so, then it is the system which has made us lazy by not making us accountable, because when we first started law school we read everything. It only took us to first year Christmas exams to realize that this was not only unnecessary but also counterproductive.

<sup>14</sup> Bellow states that:

We still do not have any explicit criteria of good teaching (although we purportedly know it when we see it or know when we don't), any adequate measure of teacher effectiveness, or any agreement on the purposes of legal education which can be expressed in terms of explicit contents or observable learning outcomes.

G. Bellow, "On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology" in *Clinical Education for the Law Student* (New York: Meilen Press, 1973) 374. Younger comments that "before we loose any [teachers] on students, in addition to natural gifts, we should insist on demonstrated ability in both learning *and* using the law." Younger, *supra* note 8 at 1041. See also J. Frank, "Why Not a Clinical Lawyer School?" (1933) Vol. 81 No. 8 *Univ. of Penn. L. Rev.* 907 at 915.

of the causes of declining student interest and involvement in law school.<sup>15</sup>

These curricular weaknesses are part of the problem, but there is another more deeply rooted defect. Students are still being taught the law outside the contexts necessary to understand, interpret, and apply the law. Amsterdam states that:

Legal education in those days [late 20th century] was too narrow because it failed to develop in students ways of thinking within and about the role of lawyers - methods of critical analysis, planning, and decision-making which are not themselves practical skills but rather the conceptual foundations for practical skills and for much else, just as case reading and doctrinal analysis are foundations for practical skills and for much else.<sup>16</sup>

To isolate the law and attempt to teach it to students without situating the students within the law is to doom such effort to failure. The law is a massive structure comprised of many interrelated parts, of which the student is one, and the law school environment should give recognition to as many of these as possible. Unfortunately, in law school they all too often "...eschew the place of personal values and feelings in favor of dispassionate, sometimes calculated amorality. Neither the law nor the people it serves are amoral or value free."<sup>17</sup> In today's informed and troubled society students are aware that life is complicated. A curriculum which does not reflect this indeterminate nature of society leaves students feeling that what they are doing is not relevant to "real" life. Hence they are less motivated to engage themselves in the process.

As a result, students become alienated from many of the values which they possess; they suppress their instinctive reactions and fail to question whether the legal system is just, instead learning to accept the legal hierarchy as being the proper "lawyer-like" way to think.<sup>18</sup> "Justice" becomes a forgotten word as the student is conditioned to think in the proper way.<sup>19</sup> Klare is more blunt:

From this powerful set of symbolic messages law students learn that the only lawyer-like way to view the world is

<sup>15</sup> R. Veinott, "Clinical Legal Education: The Implementation and Success of Theoretical Models at Dalhousie University Law School" (1990) Unpublished paper for DLAS.

<sup>16</sup> A.G. Amsterdam, "Clinical Legal Education - A 21st Century Perspective" (1984) 34 J. Legal Educ. 612.

<sup>17</sup> N. Gold, "Legal Education, Law and Justice: The Clinical Experience" (1979) 44 Sask. L. Rev. 97 at 108.

<sup>18</sup> Klare, *supra* note 6 at 341.

<sup>19</sup> "[J]ustice as a criteria for decision is often dismissed in the first three days of classes as soft-headed and unrealistic." G. Bellow, "On Talking Tough to Each Other: Comments on Condlin" (1983) J. of Legal Educ. 619.



*moderately*, through the window of moderate conservatism or liberal reformism...the only lawyer-like way to think about social change is in terms of atomized, marginal, incremental reform through governmental regulation of private conduct...[and] they learn that lawyers do not possess intellectual skills and preoccupations appropriate to discussion and analysis of fundamental issues of social and political organization and thoroughgoing social change.<sup>20</sup>

If this is what is required in order for one to “think like a lawyer”, many students don’t want it. Their interest in learning the law diminishes, their motivation disappears and they quickly become bored with the entire process. Most students come to law school with something to say. First-year classes are often hotbeds of discussion on any number of topics. It doesn’t take long, however, for them to figure out that few people, in particular the law school hierarchy, care about what they have to say. By the time they reach third year they have stopped talking. They may not have accepted the narrow vision of the law school curriculum, but they have learned how to survive within it.

If law schools were to incorporate into their curricula and methodology the findings and practices of other fields of study, as some have suggested,<sup>21</sup> the initial level of student interest and motivation would have a better likelihood of surviving. Sociological, psychological and anthropological concepts could provide a context for the determination and application of justice. This would open the door to what Barnhizer calls the critical element of “...principled inquiry into conditions of justice and injustice as actually manifested in real societal arrangements.”<sup>22</sup>

Acknowledging the context in which the principles of law are practiced and experienced would require that law schools take a critical look at their own failures and weaknesses and move to rectify them.<sup>23</sup> The Harvard Law School Committee considered that legal education had a responsibility to society which included the recognition that society’s problems are legal in nature.<sup>24</sup> In order to

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<sup>20</sup> *Supra* note 6 at 339.

<sup>21</sup> *Supra* note 14 at 334-335.

<sup>22</sup> *Supra* note 5 at 123.

<sup>23</sup> Bellow, *supra* note 19 at 622.

<sup>24</sup> (Report of the Committee on Educational Planning and Development, Harvard Law School 3 (Tent. Final Draft Apr. 21, 1982), in B.Q. Clemmons, “Updating Legal Education: A Proposed Curriculum Emphasizing Clinical Education” (1989-90) 12 *George Mason Univ. L. Rev.* 57 at 63:

The Harvard Law School Committee...presented a threefold objective of legal education....First, legal education is undertaken for the sake of future clients...Second, legal education is undertaken for the sake

ameliorate societal conditions it is necessary that they be identified. To effect this, legal education must become involved in the human underpinnings and machinations of society.<sup>25</sup> New methods of teaching and new areas of instruction need to be developed because society is ever changing and unpredictable. Creative educational ideas are needed to challenge the ossification and inertia which tend to cause intellectual developments to stagnate before their potential is realized.<sup>26</sup>

It is here that clinical theorists enter into the picture, claiming that clinical legal education can alleviate many of the shortfalls mentioned above. Barnhizer points out that clinical faculty operate according to a set of themes based on integrating larger societal concerns into the students' educational experience. This is achieved through the practical concept of justice in action and through creating a sense of responsibility within the student.<sup>27</sup> The end result, according

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of society. Here is a recognition that legal education does not take place in a vacuum, but must address society's problems and view them as legal in nature...Third, legal education is undertaken for the sake of the students...We must arouse students' intellectual curiosity and assist in the development of important personal and professional goals.

<sup>25</sup> Gold, *supra* note 17 at 121:

The letter of the law is in practice rarely singularly honored or applicable without reference to essentially non-legal, but extremely relevant attitudes, actions and perceptions. On a fundamental level law cannot be predicted and the meandering of legal processes cannot be prophesied without reference to the human factor. In its operation, the law is not a restatement or working out of positive rules.

<sup>26</sup> C. Axelrod, *Studies in Intellectual Breakthrough* 2,3 (1979). In Barnhizer, *supra* note 5 at 98-99.

<sup>27</sup> *Supra* note 5 at 123. And, at 89-90:

The primary themes that have characterized the work of clinical faculty include:

- (1) the importance of developing and implementing practical conceptions of justice;
- (2) seeking to develop new forms of knowledge, particularly those relevant to basic law practice;
- (3) challenging the extreme formalization and professed neutrality of traditional legal education;
- (4) providing legal services to disadvantaged groups, and instilling in law students a desire to help the disadvantaged throughout their professional careers;
- (5) a desire to teach law students the practical skills of law practice;
- (6) an interest in teaching professional and/or moral values to law students;
- (7) the responsibility of law faculty to challenge courts, legislatures,

to these theorists, is that the basic core of knowledge by which law schools operate is extended and transformed through the clinical experience.<sup>28</sup> The positive attributes of clinical legal education therefore have a ripple effect which elevates the entire law school educational experience for all students. These are powerful claims and, if true, cannot be ignored. After a brief look at the historical emergence of clinical legal education, I consider the validity of these claims.

### THE HISTORY OF CLINICAL LEGAL EDUCATION

The presence of clinical legal education programs in most Canadian and American law schools is a result of a radical shift in the late 1960s and early 1970s within the legal educational structure. The coming of age of the baby boomers, the Vietnam War, and the general societal upheaval, along with other factors, created a society fermenting with dissatisfaction. The relevance of law schools was questioned because they were seen to be ignoring the needs of the poor within society, and ineffectual at equipping law students for practice.<sup>29</sup> The

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administrative agencies, and political executives concerning actions that appear unjust;

(8) a desire to socially "engineer" American society, primarily to reflect the liberal political vision of a just society;

(9) a wish on the part of many clinical faculty to combine the practice of law with academic reflectiveness; and

(10) an interest in researching and/or litigating specific areas of political/legal conflict.

Identifying a specific set of themes that has been pursued by clinical faculty is, therefore, not intended to suggest that they invented them, but simply that clinical faculty represented a crudely coherent critical mass that shifted interest from what was at the time an individualized idiosyncratic context to a larger-scale political and programmatic focus.

<sup>28</sup> *Ibid.* at 98.

<sup>29</sup> M. Spiegel, "Theory and Practice in Legal Education: An Essay on Clinical Legal Education" (1987) 34 U.C.L.A. L. Rev. 577 at 605.

[T]here was some need, perceived by people during the 1960's to try to create a new vehicle of education that would be sensitive to what some have called "humanism" that is, putting the person back into the center. What was envisioned was that learning can be a vital experience involving what we learn about ourselves individually, what we learn about our role as attorneys, what we translate from that back into the legal curriculum, what content that puts back into course structures, and the materials that we work from.

D.R. Barnhizer, "Remarks on Teaching and Testing Clinical Skills," in F.N. Dutile, ed., *Legal Education and Lawyer Competency: Curricula for Change* (Indiana: University of Notre Dame Press, 1981) at 33,34. In Veinott, *supra* note 15 at 7.

goal of the revisionists was to "bring the world back into the classroom, so that law schools had to deal with it, discuss it, confront its realities."<sup>30</sup> The legal profession was not considered to be professionally responsible, and the cry went out for change.

The thinking of the time was that professional responsibility should extend beyond the individual lawyer-client relationship and require the profession as a whole to ensure that legal services were provided to all those who needed them. Students, with their evident social concerns, were seen as a valuable source of manpower able to assist the legal profession in achieving an acceptable standard of professional responsibility.<sup>31</sup> The emergence of the Council on Legal Education for Professional Responsibility (C.L.E.P.R.)<sup>32</sup> provided the clinical theorists with the financial support necessary to begin developing clinical programs in some law schools.

The primary obstacle that faced the clinical theorists was the traditional entrenchment of the Langdellian casebook method in the law schools. Professor Langdell<sup>33</sup> believed that the study of law should be a scientific study, conducted on a theoretical basis to find the underlying principles that the student was required to learn. He developed the casebook method because it was akin to the scientific method.<sup>34</sup> To this end he opposed the use of practitioners as teachers, feeling that their interaction with the legal system would cause them to have a narrow vision of the academic pursuit of the study of law. Pure academics would be able to present the philosophical concepts of law, untainted by the apparent realities of practice. Professors using Langdell's casebook method used the Socratic method of analytical study<sup>35</sup> to create a dialogue between the

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<sup>30</sup> *Supra* note 19 at 622.

<sup>31</sup> G.S. Grossman, "Clinical Legal Education: History and Diagnosis" (1974) 26 J. Legal Educ. 162 at 173.

<sup>32</sup> (C.L.E.P.R. substantially funded the American clinical legal education movement until its demise in 1980.) See M.J. Kotkin, "Reconsidering Role Assumption in Clinical Education" (1989) 19 New Mex. L. Rev. 185 at 189-193. The view at this time was that clinical legal education would reform legal education and encourage the development of professional responsibility. J.A. Barrette, "Content in Context: A Process of Clinical Teaching and Learning" (1987) 14 Ohio Northern Univ. L. Rev. 45 at 51.

<sup>33</sup> Appointed Dean of Harvard Law School in 1870.

<sup>34</sup> Spiegel, *supra* note 29 at 581-583.

<sup>35</sup> The focus of this style of teaching is on skills and methods of analysis as opposed to lecturing and rote memorization of material. *Supra* note 15 at 3. The Socratic method is in decline; lectures with voluntary response now seem to be the norm. As the classes are generally large, there are only a limited number of students who take up this challenge, and these tend to be the same students in each class. The result is that the majority of students are not brought into the type of analytical educational experience that is supposed to be the goal of the casebook teaching methodology. In essence then, law schools are utilizing the Langdellian casebook methodology of teaching law but without

student and professor that was designed to get at the underlying reasoning and principles of the law as contained in the casebook selections.<sup>36</sup>

Langdell's principles have come under considerable attack from many legal educational theorists. From a purely practical perspective, less than one percent of legal matters end up in appellate courts. Therefore, most lawyers do not use the type of reasoned argumentation that they learn through the casebook methodology.<sup>37</sup> Frank pointed to the lack of a context reflecting the unpredictable fluctuations of social interaction in Langdell's casebook method, citing Langdell's almost total lack of exposure to the complexities of actual practice.<sup>38</sup> He states that:

Where the Langdell system is most seriously at fault is in its naive assumption of the inviolability of the *stare decisis* doctrine and its corollaries, in its implied belief that in a study of the precedents and nowhere else is to be found the answer to the question, "How does a court arrive at its decisions?"<sup>39</sup>

While Langdell's theory of law as a science with predictable and empirically measurable infrastructures has been repudiated, his methodology has survived in a different form. No longer are the principles of the law rooted out through an examination of experimental case data; instead, students are taught to think like lawyers.<sup>40</sup> Gold has summed up the nature of traditional legal education as follows:

[T]raditional legal education (1) pursues the learning of legal facts, (2) through a process of analysis, (3) which teaches students to think like lawyers, (4) then asks questions about underlying, fundamental principles, (5) and about policies. Almost all of this study engages the rational mind in an essentially objective analysis.<sup>41</sup>

It was this objective nature of legal education, with its accompanying aloofness from the human dynamics of society, which gave impetus to the cries for

one of the foundational pillars.

<sup>36</sup> *Supra* note 31 at 163.

<sup>37</sup> McDermid, *supra* note 12 at 239.

<sup>38</sup> Frank, *supra* note 14 at 908.

<sup>39</sup> *Ibid.* at 912. Frank further asks, at 913:

But is it not plain that, without giving up entirely the case-book system or the growing and valuable alliance with the co-called social sciences, the law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do?

<sup>40</sup> Spiegel, *supra* note 29 at 582.

<sup>41</sup> *Supra* note 17 at 107.

change.<sup>42</sup> Realist theorists arose advocating that students had to be taught to look beyond the technical structures of judicial 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.”<sup>43</sup> Besides a comprehension of the social setting, students also needed to be trained by exposure to practice.<sup>44</sup> This exposure would let them see the “law in action” and create in them a sensitivity to the actual impact of the law upon society and society upon the law, as well as an awareness of their role within this larger scheme of legal endeavor.<sup>45</sup> The end result of Realist theory was to make law an “applied science based on practical considerations” as opposed to “an inductive science based on the case method.”<sup>46</sup>

Realist theory was marginalized by the traditionalists until the upheaval in the late 1960s that opened the educational doors to new ideas. Given the opportunity to implement their ideas, clinical theorists were quick to respond. The result was to bring about, in Klare’s words, “[t]he only truly seismic change in modern curriculum.”<sup>47</sup> These early clinicians were largely drawn from practice<sup>48</sup> and “conceived of themselves as public interest advocates acting on behalf of minorities and other disadvantaged groups in American society.”<sup>49</sup> This emphasis on social issues, coupled with the rejection of the distinction between legal and social issues,<sup>50</sup> gave the early clinical movement a political dimension. Unfortunately this political momentum did not foster academic or intellectual discipline, as Barnhizer states:

Clinical faculty had impact because they were part of a more or less focused political movement. As children of the civil rights movement and anti-war efforts of the 1960’s, however, the first generation of clinical faculty shared a naive and superficial vision of justice that often rejected “intellectual elitism.” As a result of their values, experience, and background, clinical faculty were largely unwilling, and, in a

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<sup>42</sup> “The Langdell model of a graduate program in pure law taught by the case method insulated the law professorate from the rest of the academic community, justified its professional role, and, very important at the time, neatly tied in with nativist and class prejudice.” Klare, *supra* note 6 at 342.

<sup>43</sup> Grossman, *supra* note 31 at 167.

<sup>44</sup> *Ibid.* at 168.

<sup>45</sup> *Ibid.* at 171.

<sup>46</sup> Spiegel, *supra* note 29 at 589 quoting C. Woodard.

<sup>47</sup> *Supra* note 6 at 342.

<sup>48</sup> This distinction between clinical faculty and traditional faculty has given rise to numerous difficulties, some of which will be discussed later in this paper.

<sup>49</sup> Barnhizer, *supra* note 5 at 106.

<sup>50</sup> *Ibid.* at 109.

few instances, unable to compete on an intellectual as opposed to a visionary level. Because of these factors, the clinical movement was increasingly overtaken, and then surpassed, by more intellectually driven movements, themselves propelled by political visions, in which there was a better understanding of the use of intellectual arguments as strategic weapons.<sup>51</sup>

The result was to prevent the clinical movement from becoming entrenched in the law school curriculum on an equal basis *academically and intellectually* with the traditional curriculum. Non-clinical faculty, having lost the struggle to keep clinical education out of the schools, now turned their energy to keeping it from being recognized as having any significant academic value.<sup>52</sup> Stickgold points to two grounds of opposition to clinical programs: first, there was the elitist “ivory tower” view that devalued any experientially-based learning that took place outside of the traditional classroom; second, there was the often valid argument that there were serious deficiencies in the academic structuring of these programs.<sup>53</sup> The failure to develop a solid pedagogy for clinical legal education ultimately has had the effect of leaving the movement without a well developed root structure. Most clinical programs are not necessarily threatened with complete eradication from the curriculum;<sup>54</sup> they are, however, threatened with either a restructuring, which will eliminate the more expensive live-client in-house clinics, such as DLAS, or an ideological shift in the clinical methodology. Such a shift will relegate clinical programs to a “controllable” secondary status within the law school hierarchy.

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<sup>51</sup> *Ibid.* at 107.

<sup>52</sup> In large part this was to protect their own position of power within the law school hierarchy. The traditional curriculum was designed and maintained the way that it was (and still is to some extent) because it justifies and entrenches the power of professors, and because it is what they do best. Klare, *supra* note 6 at 342.

<sup>53</sup> Stickgold, *supra* note 12 at 290-291. Meltner stated that “So long as the critical role of practice-based learning is allowed to remain invisible and unplanned, the learning that comes out of this relationship will be ad hoc and capricious.” M. Meltner, “Healing the Breach: Harmonizing Legal Practice and Education,” (1986) 11 *Vt. L. Rev.* 377 at 385. Much early clinical education was ad hoc learning due to the social service emphasis of the movement. Some clinicians actually thought that such learning was a sufficient academic educational experience.

<sup>54</sup> In the summer of 1987 the Clinical Section of the Association of American Law Schools sent a questionnaire to its member schools. This study was conducted over a 2.5 year period. According to the author, the study indicates that the health of live-client, in-house clinics is more robust than at any time since the inception of these programs. The study demonstrates a growth of in-house clinics in proportion to clinical offerings available, continued good student/faculty ratios, high student demand, increased pedagogical sophistication in law school clinics taught by law school employees, and an exposure of students to practicing with real clients. McDiarmid, *supra* note 12 at 241.

The modern clinical movement is now in the position of being assailed from three fronts: from without as the financial pressures upon universities are forcing law schools to take a serious look at cost-cutting measures; from other faculty who are still resisting the experiential-learning based clinical programs on the basis that they are insufficiently academic; and from within, as clinicians are struggling to develop a clinical methodology that will prevent clinical legal education from becoming just another "skills based" course in the curriculum. The next part of this paper will examine the goals of clinical methodology, its values and pitfalls, and whether these goals are in fact being realized in the clinical programs as offered.

### CLINICAL METHODOLOGY

One of the major problems confronting clinical legal education is that it is not recognized as being a distinct methodology within a larger progressive scheme. There is a tendency to define it in terms of its goals instead of its pedagogical method.<sup>55</sup> Non-clinical faculty tend to view clinical programs in terms of their technical skills benefit to the students.<sup>56</sup> Students, both those who take clinical programs and those who do not, also focus on technical "preparation for practice" aspect, along with the social utility function, as being the reason for clinical legal education. Hence, the notion that clinics such as DLAS are only for those who comprise the "left-wing" social consciousness of the law school.<sup>57</sup>

What is happening is that certain *goals* of clinical legal education are being used to define the *content* of this type of educational experience. By its nature, clinical legal education cannot be defined this way. Its "real-life context", "emphasis on roles", "world perspective that is egalitarian and reformist...and [its] concern with ethic" make it a part of the overall transition of both the

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<sup>55</sup> Bellow, *supra* note 19 at p 624-625.

<sup>56</sup> See, e.g., C.Eliot, "Eliot on the Scientific Schools" in R. Hofstadter & W. Smith, eds, *American Higher Education: A Documentary History* (Chicago: University of Chicago Press, 1961) at 624, 634-635. Cited in Barnhizer, *supra* note 5 at 92.

<sup>57</sup> The lack of student support for clinical programs such as DLAS stems in large part from this misconception. Business-oriented students, for example, argue that the funding which is directed at DLAS would be more equitably distributed throughout the school if it was instead used to hire additional professors to broaden the curriculum. Others tend to agree. If clinical legal education was understood in terms of its educational value as a methodology for educating students in legal concepts in the context of a real world, many of the bases for disagreement would be swept away. The values of a functional clinical pedagogy should extend to every area of the law school curriculum. That they do not, and are still generally considered to be limited to poverty law areas, is indicative of clinician's failure to structure a sound pedagogy or the non-clinicians refusal to listen, or both.



student and the entire legal system.<sup>58</sup> While many of these goals are important, they are only a part of the larger goal of developing in students the capabilities to function effectively within the legal system and to change it where necessary. Clinical legal education attempts to bring a “holistic approach to the educational process.”<sup>59</sup>

Although it is fine to speak of clinical legal education as a method, it is fundamental that the precise purposes and goals of the method be articulated.<sup>60</sup> The basic features, according to Bellows, are:

1) the student’s assumption and performance of a recognized role within the legal system; 2) the teacher’s reliance on this experience as the focal point for intellectual inquiry and reflection; and 3) a number of identifiable tensions which arise out of ordering the teaching-learning process in this way. What is envisioned is a mode of education which involves the systematic interaction of pedagogical technique and the psychological dynamics involved in role adjustment and definition.<sup>61</sup>

Barnhizer adds to this by arguing that the clinical method has to integrate three factors:

1. A substantial, but restricted, volume of actual client representation by the student.
2. The clear assumption by that individual student of “primary” responsibility for the process and outcome of that representation.
3. An individualized teaching relationship between the student and clinical teacher, using the student’s clinical experiences as its focus.<sup>62</sup>

The result is that the student functions in an active role with all of the basic responsibilities that accompany the role. This change from the previous passive classroom involvement provides a considerable motivational lift to the student. It also provides a whole new decision-making structure, bringing the student into a confrontational environment, not only with the other parties in the process, but also with him or herself. This “stirring of the dust” creates a “charged” atmosphere of kinetic tension. What makes the clinical experience educational,

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<sup>58</sup> LaFrance, A.B., “Clinical Education and the Year 2010” (1987) 37 J. Legal Educ. 352 at 362.

<sup>59</sup> Veinott, *supra* note 15 at 8.

<sup>60</sup> Bellow, *supra* note 14 at 378.

<sup>61</sup> *Ibid.* at 379.

<sup>62</sup> D. Barnhizer, “The Clinical Method of Legal Instruction: Its Theory and Implementation” (1979-80) J. Legal Educ. 67 at 72-73.

however, is the dynamic of the student-teacher relationship as it is structured around this tension. Whether the clinical experience of the student is transformed into an enduring educational experience depends on the effectiveness of the teacher in exploiting the learning opportunities created by the clinical methodology.<sup>63</sup>

Amsterdam points to the kinds of questions which students should be asking and encouraged to reflect upon with supervisory input:

What were my objectives in that performance? How did I define them? Might I have defined them differently? Why did I define them as I did? What were the means available to me to achieve my objectives? Did I consider the full range of them? If not, why not? What modes of thinking would have broadened my options? How did I expect other people to behave? How did they behave? Might I have anticipated their behavior - their goals, their needs, their expectations, their reactions to me - more accurately than I did? What clues to these things did I overlook, and why did I overlook them? Through what kind of thinking, analysis, planning, perceptivity, might I see them better next time?<sup>64</sup>

What clinicians are trying to teach students is a way of thinking, a way of problem-solving and decision-making, in a context which most closely parallels the environment in which the student will have to act once in practice. It is not so much the right answer that is being taught, as it is a methodology for determining the right or best answer when faced with a particular situation. Given the complexities which lawyers in practice face, it is more practical to be able to know how to find an answer than to attempt to know all the answers.<sup>65</sup> Amsterdam states that "a major function of law schools is to give students systematic training in effective techniques for learning law from the experience of practicing law."<sup>66</sup> A proper law school education should not be a "self-

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<sup>63</sup> *Infra* note 81 at 239. See also F.S. Bloch, "The Andragogical Basis of Clinical Legal Education" (1982) 35 Vand. L. Rev. 321 at 330-332.

<sup>64</sup> *Supra* note 16 at 617.

<sup>65</sup> See, e.g., Spiegel, *supra* note 29 at 600.

<sup>66</sup> *Supra* note 16 at 612-613. Also, see J. Motley, "Self-Directed Learning and the Out-Of-House Placement" (1989) 19 New Mex. L. Rev. 211 at 219-220. See also Barrette, *supra* note 32 at 51-53:

The purpose of legal education should be to train students to become effective problem solvers in the legal context. This requires effective learning - knowing how to learn from experience, to avoid repeating mistakes, and to improve performance with practice ... In other words, traditional legal education's goal is teaching students *how to learn* and apply the law ... The primary purpose of clinical courses,

contained and terminal educational episode.”<sup>67</sup> If properly instructed in techniques for learning, the student’s years in practice can be “a reflective, organized, systematic learning experience.”<sup>68</sup> Law schools must remember that they are training students for a professional career.

The dynamic which is the catalyst for differentiating clinical legal education from other forms of legal education is the introduction of the live client.<sup>69</sup> Being responsible for the legal problems of a client makes the entire learning process relevant for the student. The motivational problems which are so apparent in upper year students do not exist for the clinical student. The student has a “need to learn.”

Not only do the client demands provide this incentive to the student, but also the similarity of the clinical experience to the student’s vision of future practice causes him or her to value success in the clinic. If a student cannot cope with the demands of the clinic, there is a sense that he or she will not be able to handle practicing law after graduating. This contrasts greatly with how the students view the non-clinical course offerings. Because of the apparent lack of relevance of the traditional curriculum to what students perceive as being the practice of law, a weak performance in one of these courses is not viewed by the student as indicative of what he or she will be able to do in practice.

Another tension created by the introduction of the live client is supervisory conflict. The needs of the client and the needs of the student are not always best met by the same course of action. Therefore, the supervisor is faced with the dilemma of educational responsibility versus responsibility to the client.<sup>70</sup> How the supervisor resolves this conflict, the balancing of priorities and responsibilities, can be a valuable learning experience for the student, particularly in the area of teaching professional responsibility. One of the greatest fears that the student has is that they will handle a situation in an unprofessional manner to the detriment of the client and their own embarrassment. The supervisor stands as a role model for the student and has

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like substantive courses, is to develop students’ ability to learn from their experience.

<sup>67</sup> *Supra* note 16 at 616.

<sup>68</sup> *Ibid.*

<sup>69</sup> It is acknowledged that not all of what is termed “clinical legal education” involves the use of live clients. An example is simulation exercises. However, despite the common labelling, I feel that the concept of clinical legal education in its purest form relies on the live client experience. This seems to be the perspective of most clinical theorists.

<sup>70</sup> There is more discussion on this point under the heading Intervention later in this paper. Bellows speaks of the tension which exists between the natural randomness of role enactment and the need for the supervisor to limit this spontaneity in the interests of protecting the clients and others. Bellows, *supra* note 14 at 391.

the ability through dialogue to influence the way that the student thinks about what constitutes professional conduct.<sup>71</sup>

Law schools have a responsibility to teach students to think critically not only about what the law is, but about what it should be. Barnhizer points out that:

The intellectual relationship between law faculty and the profession includes the obligation to serve society through challenging and questioning the abuses of the legal system (and its judiciary) – far more than simply “giving the profession what it wants.”<sup>72</sup>

This is the strength of what clinical legal education has to offer. Its potential to make students reason and choose in context creates the best opportunity for educators to instill in them the concepts of professional responsibility, thus making the profession as a whole more responsible. Universities cannot hide behind their “academic” status to claim that this is not their responsibility. Societal concerns are clearly an important consideration to be factored into the educational process as it is society which funds these educational facilities. Bellows says that:

The radical potential of the clinical method, however, lies in its capacity to deal with these [societal] problems in a more total way - in its basic intention to infuse law study with experience and knowledge of the legal system in operation, and in its capacity to erode or at least foster examination of the rigid distinctions between theory and practice, fact and value, the subjective and the objective, which underlie the dysfunctions of modern social life.<sup>73</sup>

Clinical faculty must re-evaluate their methodology to ensure that the educational goals of clinical training are being accomplished. Furthermore they must find a way to reopen the dialogue between the traditional academics and themselves to show that the work of the clinical education program is enhancing

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<sup>71</sup> J. Motley, *supra* note 66 at 218. Redlich comments, however, that because of the large number of other factors which are exerting pressure on the student that “as a role-model for a value system of professional responsibility, the clinician is a far less dominant figure than is the traditional law teacher in a Socratic-method traditional law course.” The difference is that the traditional law teacher bears most of the responsibility for the success of the traditional classroom experience, whereas in the clinical experience the student carries a much larger portion of that responsibility. N. Redlich, “The Moral Value of Clinical Legal Education: A Reply” (1983) 33 J. Legal Educ. 613 at 615.

<sup>72</sup> *Supra* note 5 at 129.

<sup>73</sup> Bellows, *supra* note 14 at 377-378. See also at 394-395.

the work of the “casebook” teachers.<sup>74</sup> The following portion of this paper analyses the structure that clinicians have incorporated into their programs. It considers the optimum ways in which these structures can be used to allow the values of clinical methodology to be realized and to minimize the possible pitfalls.<sup>75</sup>

## THE STRUCTURE OF CLINICAL PROGRAMS

### Foundation for the Structure

#### Technical Skills

Before an effective structure for clinical education can be designed and implemented, the inevitable tension which exists between technical training and critical reflection<sup>76</sup> must be clearly understood by the clinician, so that these two components of clinical legal education can be made to work in harmony toward the same purpose. The performance dimension of clinical education has resulted in the natural equating of it with skills training for practical ends.<sup>77</sup> There is nothing unacademic about the idea that clinical legal education is primarily skills training. The danger arises, however, when the term “skills” is defined or conceptualized as “technical” skills alone.

Many outside of the clinical sphere consider skills training in the technical sense to be the only educational goal of clinical education and question whether it is the function of a university to provide what is essentially the equivalent of “trade-school” training.<sup>78</sup> To them the university mandate is to teach substantive law and theoretical knowledge and to leave the development of practical

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<sup>74</sup> “[E]xposure to real problems may lead to better student recognition of the relevance of classic legal education as a necessary base for the resolution of real problems.” (1968) Clinical Committee of UCLA School of Law, *Report*, in *Clinical Legal Education in the Law School Curriculum* 7, 22 (CLEPR ed. 1970). In R.A. Gorman, “Clinical Legal Education: A Prospectus” (1971) 44 S.Cal.L.Rev. 537 at 551. The students at Dalhousie’s Criminal Clinic whom I spoke with found that their clinical experience has increased their interest in the traditional courses they are taking concurrently. By becoming aware of the overall structure and dynamic of the legal system through immersion in it, the relevance of these hitherto unconnected courses became apparent.

<sup>75</sup> Eleven values and pitfalls of clinical legal education can be found in Gorman, *ibid.* at 551-561.

<sup>76</sup> Gross, S.R., “Clinicalism Realism: Simulated Hearings Based on Actual Events in Student’s Lives” (1990) 40 J. Legal Educ. 321 at 337.

<sup>77</sup> *Supra* note 74 at 589-591.

<sup>78</sup> Grossman, *supra* note 31 at 188. If the primary educational function of a clinic like DLAS is to teach skills, then I admit that simulations provide the same training more cost effectively. Properly supervised, however, skills training should only be one part of the real educational experience, which is exposing the students to themselves in the judicial environment in a situation where there is the guidance to learn from this confrontation.

techniques and expertise to post-graduation experiences.<sup>79</sup> Unless clinicians can demonstrate that clinical programs do more than what these critics say they do, there is a strong likelihood that clinical education will be marginalized within the law school curriculum. Spiegel argues:

The way to ensure that clinical education has minimal impact within the law school world is to equate it with skills training. Skills training, by definition, is a marginal activity within academic circles. Moreover, viewing clinical education as skills makes simulation, the least expensive form of clinical education, a more viable competitor to clinical programs with real world practice components.<sup>80</sup>

There is concern among clinical theorists that clinical legal education is gradually falling into this "technical" trap. Hathaway states that "[c]linical education, rather than increasing the capacity of students to grapple with tough conceptual and contextual questions, has become an exercise in the acquisition of lawyering skills."<sup>81</sup> There is concern that the clinical movement has abandoned its reformist roots in order to move from outside to inside where it is "safer" (or more comfortable).<sup>82</sup>

This is often the nature of radicalism. For many, radicalism on their part is more of an expression of dissatisfaction with the way things are presently than a commitment to an internal vision of the way that things could be. Once they achieve a level of success that alleviates some of their personal discomfort, it is easy to buy into the system. This internal migration is encouraged by the entrenched dominant system which recognizes that a movement too powerful to defeat through confrontation can eventually be controlled through the allocation of "power"; the discontents are given just enough power to let them think that

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<sup>79</sup> Vukovich, "The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" (1971) 23 W. Res. L. Rev. 140 at 152. In Grossman, *supra* note 31 at 190.

<sup>80</sup> *Supra* note 29 at 606-607.

<sup>81</sup> J.C. Hathaway, "Clinical Legal Education" (1987) 25 Osgoode Hall L.J. 239 at 244. He adds:

While skills training can be provided by bar admissions courses, articling programmes, and professional life, none of these settings can replicate the opportunities for reflection, self-consciousness, and a more complete understanding of the legal order which an ordered program of clinical education can provide.

<sup>82</sup> Dean Hill Rivkin during a panel discussion at the Catholic University Law School Conference on Clinical Education, October 18, 1986. Panel Discussion, "Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future" (1987) Cath. Univ. L. Rev. 337 at 340-343.

they are accomplishing something, but not enough to substantively alter or detract from the status quo. For them, it is easier to take the “safe” route than to be out on the edge all the time, and often this seems to be the reasonable thing to do. Progress, however, follows on the heels of what is generally considered by the peer group of the time to be unreasonable action.

There has been a cost accompanying this shift in emphasis towards technical training in the form of simulations, etc. Tomain and Solimine argue that what has been sacrificed is political sensitivity and awareness. They argue that clinical education has been bought off by skills training as follows:

Skills training is significantly more cost-effective than live-client clinics (true). Skills training is non-partisan (false). Skills training, some argue, is more susceptible to measurement and to empirical study (maybe - but largely irrelevant). Thus, the siren call of efficiency, neutrality, and scientific objectivity promised to legitimize skills training by making it academically respectable. Morally, politically, and intellectually, these were dubious reasons. “Efficiency” is an excuse for expediency; “neutrality” a mask for self-interest; and “scientific objectivity” - when lawyers are measuring lawyers - an empty tautology. Combined, these reasons deny the necessity of political accountability, subvert public-spiritedness, and ignore the connection between personal growth and professional development. All of which is to say, skills training ignores moral education.<sup>83</sup>

The continued equating of clinical education with skills training in the technical sense serves several purposes. It allows traditional academics to continue to marginalize clinicians, thereby reinforcing the security of their own positions. Students, trying to prepare for competition in a tough job market, want law school to train them in basic skills. Clinical courses are the most visible forum for this type of training in most law schools; therefore, students consider skills training to be the essential element within clinical programs. The intellectual component is considered to be of secondary importance, and is often seen as an inconvenient intrusion into their schedules.<sup>84</sup>

The existence of this tension between the practical and the intellectual was very apparent during my term at DLAS. As a group, the students resented the simulations and classroom demands, in particular the paper requirement of the course. What papers we did submit were the minimum necessary to discharge

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<sup>83</sup> J.P. Tomain and M.E. Solimine, “Skills Skepticism in the Postclinic World” (1990) 40 *J. Legal Educ.* 307 at 315.

<sup>84</sup> *Supra* note 82 at 345; see also Spiegel *supra* note 29 at 607.

what we saw as a “token” academic requirement. To us, the demands of the clients and the performance aspects were considered important, and the “school” part was seen to be consuming valuable time. On reflection, we failed to properly value the existence of this tension and what it had to offer us. What the clinic attempted to offer us was an atmosphere where we could, firstly, realize the existence of this tension, and, secondly, work towards developing a strategy for handling these different pulls with the assistance and guidance of a supervisor, an opportunity we will not have once we enter practice.

Finally, clinicians also find a value in allowing clinical programs to become forums for technical skills training. They have an interest in satisfying the demands of their students and, to a degree, a responsibility to do so.<sup>85</sup> It was difficult enough for clinicians in the days when their primary obstacle was to convince the traditionally-oriented faculty members of the value of their work. Today, even students are forsaking the social and intellectual emphasis of the clinic and demanding pure skills training. Together with the financial and time constraints on clinicians, it is little wonder that clinicians are capitulating to pressure. The comparative ease with which technical skills can be taught in contrast to the more ambiguous “soft” goals of clinical education makes abandoning them an appealing form of retreat.<sup>86</sup> Also, the acceptance of skills training by traditional faculty alleviates some of the tension which exists between them and the clinicians, making the workplace more comfortable.

This trend in clinical programs exacts a cost from everyone involved. The fundamental values that are forsaken by the focus on technique<sup>87</sup> detract from the clinical promise of linking means and ends to provide a whole educational experience to the student.<sup>88</sup> The traditional faculty member loses the benefits of the clinical spillover into their classroom, such as increased student motivation due to a greater awareness of the value of traditional education. The student loses the opportunity to see how technique and human values can be interwoven to provide a moral educational experience which will help guide their subsequent years in practice.<sup>89</sup> The clinician suffers the loss of the opportunity to provide students with such an education, and the loss of the opportunity to fulfill their initial vision to make legal education socially responsible.

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<sup>85</sup> Spiegel, *supra* note 29 at 607.

<sup>86</sup> *Ibid.* at 608. Barnhizer feels that the demise of C.L.E.P.R. in 1980, loss of initial energy, the “me” generation of students, and static resources of law schools led the clinicians to focus on the technical legal skills acquired through the clinic experience as justification for the continuation of clinical education. *Supra* note 5 at 120.

<sup>87</sup> Barnhizer, *ibid.* at 121.

<sup>88</sup> Tomain & Solimine, *supra* note 83 at 313.

<sup>89</sup> *Ibid.* at 319.



Tomain and Solimine point out that skills education "...is an empty vessel, neither good nor bad, neither wrong nor right. Rather, its efficacy and worth depend on how we use it and, more significantly, on the ends to which it is used."<sup>90</sup> It cannot be used to justify the existence of clinical programs,<sup>91</sup> but it can be used to maximize the clinician's potential to develop the thinking capabilities of the student. "Inexorably, the teaching of skills, in able hands, leads for a quest for intellectual penetration of the process in which practical skills are but surface manifestations and this is precisely where the unique contribution of clinical teaching may lie."<sup>92</sup> The intellectual component of clinical methodology consists of analytical skills which is discussed in the following portion of this paper.

### Analytical Skills

Amsterdam states that three kinds of reasoning are not taught in traditional law courses: (1) ends-means thinking; (2) hypotheses formulation and testing in information acquisition; and, (3) decision-making in situations where options involve differing and often uncertain degrees of risk and promises of different sorts.<sup>93</sup> These are the very skills which are required in the day-to-day practice of law. The clinical method, "with its concern for the interpersonal, intuitive and introspective aspects of experience"<sup>94</sup> provides these pedagogical possibilities. The immersion of the student in the role of "lawyer" provides an experiential base for reflective analysis from which meaning and generalizations can be drawn.<sup>95</sup>

It is fundamental that the clinician provide guidance through these experiences so that the student may develop a method for resolving crises and making decisions that is based on a consistent personal philosophy of lawyering.<sup>96</sup> If the student's experiences are uninterpreted, they may "promote reflexive behaviour based upon expediency or accepted (although not

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<sup>90</sup> *Ibid.* at 320.

<sup>91</sup> See Barnhizer, *supra* note 5 at 122-123.

<sup>92</sup> Grossman, *supra* note 31 at 191.

<sup>93</sup> Amsterdam, *supra* note 16 at 614-615.

<sup>94</sup> Bellow, *supra* note 14 at 385.

<sup>95</sup> *Ibid.* at 389.

<sup>96</sup> Gold points out that the various forces which exert pressure on the student result in tensions being created. These give rise to confrontations with a number of questions linked to professional responsibility and the validity of the legal system. The student's behaviour has both a direct impact on the situation and how it is perceived by others. These stresses produce energy which must be channeled into constructive advice and representation. *Supra* note 17 at 105.

necessarily acceptable) practice.”<sup>97</sup> It is just this type of ad hoc problem-solving that causes problems of professional responsibility. The complexities of actual practice offer numerous opportunities to short-cut one’s way to a solution. The student needs to appreciate the nature of the consequences that arise when this kind of narrow thinking is used in problem-solving. Gold points out that:

By focusing on both objective analysis and subjective reaction the clinical teacher may facilitate a kind of learning by both student and teacher that maximizes an understanding of the complex inter-relationship between law as rules and law as a process, within a dynamic system, and of the feelings and emotions evoked in the student, teacher and client.<sup>98</sup>

The clinical integration of the broader spectrum of the social dynamic into the student’s educational experience, coupled with its emphasis on the effect of the relationship between peoples in the legal system,<sup>99</sup> affords the only accurate context for the student to learn to cope with questions of personal and professional identity.<sup>100</sup>

Proper ends-means analysis requires that all the factors which may affect a decision be considered; the student must observe a situation from both an objective and subjective analytical perspective. It is only as the student’s technical skills are developed in a contextual and conceptual environment with the interaction of the supervisor as observer/participant, that the student is able to visualize his or her actions as part of the larger professional and social dynamic.<sup>101</sup> Through this visualization, the student develops a methodology for formulating consistent and effective courses of action.

The development of such a methodology helps the student to avoid the trap of simple acceptance of legal reasoning as a guiding instrument for decision-making. Klare believes that traditional teaching reinforces the erroneous belief that legal reasoning leads to legal results, as though legal doctrine had a determinate meaning. This kind of reasoning ignores the political, moral, and cultural context of legal rules, without which the political and ethical meaning of the doctrines cannot be properly understood. Only the student who possesses the tools of interdisciplinary social analysis can exercise the kind of doctrinal inquiry which is capable of revealing the indeterminate character of legal reasoning.<sup>102</sup> This kind of student can use the legal system to seek justice, as

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<sup>97</sup> *Ibid.* at 105.

<sup>98</sup> *Ibid.* at 105-106.

<sup>99</sup> Bellow, *supra* note 19 at 621-622.

<sup>100</sup> Bellow, *supra* note 14 at 393.

<sup>101</sup> See Tomain & Solimine, *supra* note 83 at 310.

<sup>102</sup> Klare, *supra* note 6 at 339-341.

opposed to perpetuating injustice where the system is deficient. The clinical methodology's merger of technical and analytical skills not only debunks the myth of legal reasoning, but also provides the student with contextual reasoning to take its place.

It is important, therefore, that the technical skills component of clinical legal education not be separated from the analytical component. Both are integral parts of the practice of lawyering, and the clinical program must be structured so as to keep the two constantly pivoting off of each other. An understanding of the contextual implications of these two types of skills will help the student integrate them with those acquired through the traditional casebook-based courses. It is not so much a question of which skills are important, but what balance of skills will result in the student receiving the best legal education possible.<sup>103</sup>

## **The Structure Itself**

### The Role of the Supervisor

The potential of clinical legal education rests in the hands of the supervisor responsible for overseeing the students' clinical experiences. Bellows states that all the pedagogical learning possibilities of clinical education are "possibilities directly related to the interventions of a teacher into the student's experience."<sup>104</sup> The tendency for things that are left to themselves to degenerate into chaos is true of the clinical experience for the student. The supervisor is possessed with the ability to place the student's experiences into a coherent learning structure so that they make sense to the student. Without this intervention the educational experience will consist of the ad hoc type of learning which is unpredictable and unrelated to the larger picture.<sup>105</sup>

While bearing ultimate responsibility for the success or failure of clinical programs, clinical teachers are also beset with numerous difficulties. These

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<sup>103</sup> See Amsterdam, *supra* note 16 at 615.

<sup>104</sup> Bellow, *supra* note 14 at 386. And at 386-387:

The function of clinical teaching, whether in one-to-one relationships, small groups, or the large classroom, is to enlist the motivations, impressions, and relationships of role performance in efforts to enhance self-reflection, self-consciousness and a more encompassing understanding of those phenomena of the legal order which are the focus of pedagogic inquiry.

<sup>105</sup> It is supervision which distinguishes clinical training from the unstructured experiences students receive after graduation, and thus justifies the expense of clinical programs. P.T. Hoffman, "Clinical Course Design and the Supervisory Process" (1982) *Ariz. St. L. J.* 277 at 280.

difficulties come from without and within, although many of the internal problems are rooted in external pressures.<sup>106</sup> Some of these can be resolved by the clinician acting alone; others require the cooperation of those outside the immediate clinical sphere. Unless these problems are resolved, however, the effectiveness of clinical education will be diminished or ultimately destroyed.

The greatest danger arising from these difficulties is that the innovative qualities that characterize clinical education will be subsumed by the "work" component, with the result that "the clinical process and subject matter will become rigidly self-contained, anti-intellectual, and suffocating."<sup>107</sup> In order for clinical education to continue to grow and develop, its methodology needs to be creatively expanded to include other areas of the law school curriculum. Condlin has criticized the clinician's failure to develop an intellectual theory that can guide clinical education towards the future:

In our zeal to establish ourselves physically and financially we have neglected the intellectual dimension of our work. We have not developed a theory that allows us to criticize, in a fundamental way, the existing arrangements and procedures of law practice and legal instruction (including clinical legal instruction). We have allowed our potentially important contributions to these fields to become mechanical and technical, and to remain at the level of "methodology." Even at this level, our lack of a critical perspective has caused us to replicate many objectionable practices to which our movement was a formative response. We have lost sight of our roots, our objectives, and our potential, and we do this at our peril.<sup>108</sup>

The failure to develop the intellectual component of clinical work can be traced to a more fundamental problem facing the clinician. The lack of support for clinical programs has forced the clinician to operate in a variety of roles from fundraiser to administrator to educator. The operational demands of clinical education can consume so much of the clinician's time and energy that little is left to ensure that the quality of supervisory input is maintained at a high level.<sup>109</sup>

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<sup>106</sup> The historical conflict between traditionalists and clinicians has led to many of these difficulties. See discussion, *supra* on the history of clinical legal education. See also McDiarmid, *supra* note 12 at 246; Barnhizer, *supra* note 5 at 87-95; S.F. Befort, "Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s" (1991), 75 Minn. L. Rev. 619 [hereinafter "Musings"].

<sup>107</sup> Barnhizer, *supra* note 5, at 105. And *ibid.*: "[M]any legal academics have greatly expanded their intellectual horizons in the 1980's while active clinical faculty and the clinical movement generally do not seem to have progressed, often retreating into technique and instrumentalism."

<sup>108</sup> Condlin, *supra* note 2 at 604.

<sup>109</sup> Hathaway, *supra* note 81 at 244. Veinott points to her DLAS experience to say that

Trying to find an answer to these basic difficulties facing clinicians is beyond the scope of this paper. At present, the best that clinicians can do is realize that these dangers exist, and continually re-evaluate their activity to keep the clinical program on course. A careful structuring of the clinical program with respect to goals and specific ways to achieve those goals will do much to ensure that the clinical program maintains its educational focus.

### Structure in Terms of Goal Definition

Although clinical programs must be designed to operate within the scope allowed by the law school's resource base, it is important that the program be part of a planned instructional process with specific educational goals in sight.<sup>110</sup> This will increase the benefit of the student's educational experience in the short term, and will create a solid foundation for the possible expansion of the clinical program in the long run. Hoffman mentions three separate but interrelated steps which should guide the progression of a clinical course:

- (1) the determination of course objectives, (2) the selection of learning experiences to accomplish the course objectives, and (3) the arrangement of those learning experiences to maximize the achievement of the course objectives.<sup>111</sup>

What is happening through these steps is that the student's specific experiences are given a generalized meaning so that, through "structured inquiry, reflection and analysis,"<sup>112</sup> the student is given the opportunity to develop principles of lawyering. Every component of the clinical experience that is under the control of the clinician must be designed so that it forms part of an interrelated structure that achieves the course objectives. There are enough unpredictable variables within the clinical experience to provide the random day-to-day excitement which the student finds motivational. The only way these can be given meaning

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"The difficulties encountered with respect to supervision are traceable to a variety of factors including inherent defects in all systems of supervision, time pressures requiring that certain tasks are performed immediately, and most acutely, lack of funding which results in a more or less chronic shortage of lawyers to provide supervision." *Supra* note 15 at 13.

<sup>110</sup> Hoffman, *supra* note 105 at 278. See also Hathaway, *supra* note 81 at 246-247.

<sup>111</sup> Hoffman, *supra* note 105 at 278. Bellow raises some questions which clinical educators must address when planning a clinical program: (1) what is the level of self-consciousness about learning which is attempted to be generated, (2) what level of complexity are students to be confronted with, (3) what should be the scope of what is being taught from social policy to statistical, empirically based data etc., and (4) what is the appropriate role of sequence and progression in the content conveyed? Bellow, *supra* note 14 at 399-401.

<sup>112</sup> Gold, *supra* note 17 at 98.

is if the remainder of the program is carefully designed.

Although the specific goals of clinical education may vary according to the nature of different clinical options, the fundamental goal of creating a process through which the student will “learn how to learn” is common to all. It is important that the student be made aware at the beginning of their clinical enrollment, if not before, of these course objectives. This awareness will alleviate the problem of student resistance to skills training courses, seminars, etc., which they feel are not related to the clinical objectives.

It is in the selection and arrangement of learning experiences that there is the greatest potential to create a successful clinical experience. To achieve this, clinicians need to have an understanding of the educational theory that underlines the methods that they incorporate into the clinical program. Certain kinds of learning are enhanced by the use of specific educational methods, and clinicians must recognize these differences in order to maximize their effectiveness.

### Learning Theory

There are two basic types of learning: (1) information assimilation - *passive* learning, and (2) experiential learning - *active* learning.<sup>113</sup> Traditional legal education, especially with its shift towards the lecture format, emphasizes the transfer of knowledge approach to education which is characteristic of passive learning.<sup>114</sup> Also known as expository teaching, this type of learning is best at conveying information for the purpose of transferring knowledge, although not necessarily at enabling the student to comprehend exactly how the knowledge interacts to produce results. It is not effective at developing abilities to apply, analyze, synthesize, or evaluate knowledge.<sup>115</sup> This kind of learning experience also incorporates the “banking” method of learning through which the student deposits information unquestioningly into his or her mental data banks.

Clinical education, with its heavy emphasis on the interaction between student and teacher, is essentially experiential learning,<sup>116</sup> although it does rely on some elements of passive learning in the early stages.<sup>117</sup> The ability of clinical education to make the knowledge that the student has received through

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<sup>113</sup> Barrette, *supra* note 32 at 62-63.

<sup>114</sup> Gold, *supra* note 17 at 105.

<sup>115</sup> Hoffman, *supra* note 105 at 301.

<sup>116</sup> Barrette, *supra* note 32 at 47.

<sup>117</sup> Introductory seminars via the classroom component into the operation of the clinical program, administrative structures of agencies the student will be dealing with, basic skills in interviewing, negotiating, and litigation, all rely on passive learning to provide the student with enough knowledge from which to begin to learn experientially.

expository teaching meaningful by contextual application, enhances the nature of the student's passive learning experiences, and provides them with the motivation to acquire more knowledge related to these experiences.<sup>118</sup> The supervisor's responses to specific issue-related questions that the student raises also illustrates expository learning. The problem with this method is that the learning process tends to be haphazard as neither the student nor the supervisor want to enter into lengthy discussions at this time.<sup>119</sup> However, subsequent generalization by the supervisor through structured student-teacher dialogue can give a spatial connection to these specific learning experiences.

The clinical process can be reduced to two essential parts: "(1) the student acting in the role of a lawyer representing a real or imaginary client, and (2) the student and teacher then engage in a dialogue designed to enable the student to learn from the lawyering experience."<sup>120</sup> Hoffman points out that role assumption coupled with supervision, is a powerful pedagogical tool to achieve several educational objectives. These include: (1) lawyering skills, including higher forms such as application, analysis, synthesis, and judgment, as well as the realities of the legal practice; (2) general knowledge about the legal environment which the student is about to enter; (3) motivation within the students entering the clinical experience creates the "need to know" which leads to more effort and more learning; and, (4) increase in professional identity and responsibility.<sup>121</sup>

The assumption of the role of "lawyer" is one of the major factors which leads many students to engage in clinical programs, hoping to try on the mantle in a protected environment, as opposed to during their articling period when their chances of being rehired depend on their performance. The role assumed by the student has to be carefully designed, however, so that there is adequate time to allow students opportunity for reflection and debate on their activities within the role.<sup>122</sup> It is therefore important that the caseload of the student be well balanced in order to avoid too heavy a workload or one that does not encompass a broad enough spectrum of experience.

During my term at DLAS the students operated under a heavy volume of cases (25-35) and a shortage of supervision. The result was that we spent most of our time dealing with the basic requirements of client service. Little opportunity was available for development of the analytical, reflective skills

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<sup>118</sup> Hoffman, *supra* note 105 at 303.

<sup>119</sup> *Ibid.* at 304. The dialogue is important. Otherwise the student will be unable to transfer the application of this knowledge to other situations.

<sup>120</sup> Kotkin, *supra* note 32 at 186.

<sup>121</sup> *Supra* note 105 at 284-286.

<sup>122</sup> Hathaway, *supra* note 81 at 252.

which are so important to clinical work. Also, there was considerable duplication of files in areas such as family benefits and divorce, with the result that the range of experiences, especially in litigation, was limited. For us, it felt like the service factor for the community was the driving force behind DLAS, and not the educational advantages offered by the clinical method. This view was based on the student perception of what clinical law was supposed to be about, and on the time constraints on the supervisors, which hindered their attempts to expand the educational base.

### Intervention

Another important factor in determining the student's ability to learn from acting in role is the degree of intervention by the supervisor into the student's responsibilities within the role. For the student to derive educational benefit and meaning from their actions in role, they must bear primary responsibility for the exercise.<sup>123</sup> The supervisor, while "letting go" of responsibility to the student, must intervene systematically to ensure that the student is learning through his or her experience. This tension between the supervisor and the student becomes even greater when the supervisor considers intervention in order to protect the interests of the client.<sup>124</sup> The timing and extent of intervention by the supervisor greatly affects the student's learning experience in role; therefore, the nature of intervention must be clearly understood by the supervisor.<sup>125</sup>

Intervention takes place on two levels. The first begins in the early stages of the student's acceptance of responsibility within the role and continues throughout the duration of the role. At this stage, intervention is in the nature of guidance only, answering student inquiries, and posing questions about alternative courses of action to stimulate the student to think expansively and creatively. This intervention allows the student to take on the responsibilities of the role to the extent that he or she is capable. It also allows the supervisor to get a sense of the student's capabilities so that the student is not given more responsibility than he or she can handle. This type of intervention requires that good communication be maintained between the student and the supervisor, and that the supervisor knows what is going on and has a sense of where things

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<sup>123</sup> Barrette, *supra* note 32 at 55. "[I]t is the responsibility they are given...for the consequences which turns mere observation into a clinical experience." A. Boone; M. Jeeves; and J. MacFarlane, "A Working Model for Clinical Legal Education" (1987) 21 *The Law Teacher* 172 at 179.

<sup>124</sup> Barrette, *supra* note 32 at 63.

<sup>125</sup> "The dilemma presented to the clinical teacher is the nearly simultaneous integration of an educational 'process' with content and the providing of competent, professional legal service." *Ibid.* at 56.



should be going.

The second level involves direct intervention by the clinical teacher into the process in a manner that replaces the student's control of the situation with that of the teacher. This type of intervention "changes the experience for all concerned,"<sup>126</sup> and "disturbs the student-teacher and student-client relationships in ways that can produce undesired and unintended consequences."<sup>127</sup>

Critchlow presents five factors which should be considered in any decision by a supervisor to intervene directly into the student's control of a case.<sup>128</sup> (1) The nature of the student-client relationship. The supervisor must take into account who the client believes has primary responsibility for their case as the confidence of the client is not automatically transferable to the supervisor. (2) The degree of informed consent the client gives to being represented by the student should increase the latitude that the student is given to bear the responsibilities of representation. This also depends on the availability of alternative opportunities for representation for the client. (3) The teacher's familiarity with the student should provide him or her with an accurate assessment of the ability of the student to maintain control of the situation. The less familiar the supervisor is with the student, the lower the threshold should be before intervention occurs. (4) The supervisor's familiarity with the file should be considerable before they choose to intervene. If the supervisor is not aware of all the details, his or her generic capabilities will not necessarily result in a more efficient handling of the situation. (5) If the continued exercise of control by the student is likely to have an adverse affect on the client's emotional status, or duties owed to opposing counsel and third parties, the supervisor should not be afraid to intervene. Reference to these factors by the supervisor before deciding to intervene will enhance the student's ability to maximize his or her learning in the role and provide responsible representation of the client's interests.

My own experience with supervisor intervention on this level illustrates the dangers involved in the second level of intervention. I represented a client in a wrongful dismissal dispute where the supervisor intervened into the ongoing

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<sup>126</sup> G. Critchlow, "Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene" (1990-91) *Gonzaga L. Rev.* 415 at 419.

<sup>127</sup> *Ibid.* at 416. *And*, at 428:

There are two standards for intervention at this level: (1) only to avoid irreparable harm to the client; and, (2) when there is a serious departure in the student's work from the standard which the teacher would practice. The first focuses on the educational experience of the student foremost and questions whether the teacher's ideas are necessarily better than the student's. This view is held by more teachers than lawyers. The second standard is practised by more lawyers than teachers.

<sup>128</sup> *Ibid.* at 430-437, note 165.

negotiations to unilaterally bring them to an end, undermining the position that I had taken with the opposing counsel. Although there may have been valid reasons for her concern that the negotiations were taking too long, thus prejudicing my client, I was taken aback when I opened the file to see that action had already been taken without any discussion between us, or between the client and the supervisor. I was disturbed by this and embarrassed by the thought that the opposing counsel must now consider me to be incompetent.

The supervisor's sense of duty as a practitioner over educator likely caused her to take this course of action, and quite possibly these hard-line tactics were necessary in the situation. There was, however, little educational value to me in the way that it was handled. This illustrates not only the tension among the roles within which the supervisor has to operate, but also the fact that the supervisor may not understand the educational goals of the clinical experience and his or her role in creating this atmosphere of learning.<sup>129</sup>

My supervisor's actions also had an immediate effect on my ability or willingness to operate within role under her supervision. Shortly afterwards, we were in court on another matter. In previous appearances in court under a different supervisor I had been responsible for everything and felt relatively comfortable. In this appearance, however, my supervisor appeared reluctant to grant me the same degree of control to which I was used. Unsure of my position, the result was that I withdrew from any direct function in the court proceedings and took on the role of observer only.

### Role Assumption vs. Role Modeling

The educational theory of learning in "role" has not been without its critics. Kotkin has written an article questioning the ability of role assumption to satisfy the needs of every student.<sup>130</sup> His argument is that the emphasis on role assumption within the clinical program may benefit only those students whose make-up enables them to learn from this style.<sup>131</sup> Kotkin sets out four steps in the experiential learning model: (1) an immersion in experience, (2) which provides a basis for reflection, (3) thus allowing for the formulation of abstract concepts etc., (4) the implications of which are tested in new experiential situations.<sup>132</sup> Using Kolb's teachings on learning theory<sup>133</sup> Kotkin points out

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<sup>129</sup> This was a supervisor new to involvement in an educational clinical program and she was probably most comfortable as a practitioner at this point in time.

<sup>130</sup> Kotkin, *supra* note 32.

<sup>131</sup> *Ibid.* at 186-187.

<sup>132</sup> *Ibid.* at 194-196.

<sup>133</sup> Kolb (in D. Kolb, I. Rubin & J.M. McIntyre, *Organizational Psychology: An Experiential Approach* (Eaglewood Cliffs, N.J.: Prentice-Hall, 1971) at 29) identifies four

that using the experiential model obviously creates certain problems for the converger and the assimilator. He suggests that the clinician can "...improve the learning process for some students by facilitating their ability to function in role, rather than concentrating only on the reflection and abstraction stages of the experiential cycle."<sup>134</sup>

The individual make-up of the student should be given careful consideration when they are being "placed" within the clinical structure. The nature of the student-teacher relationship in the clinical program allows for the kind of flexibility, not possible in the traditional course structure. In traditional courses, all students are evaluated on the basis of a common examination, which does not take into account the idiosyncrasies of the individuals.<sup>135</sup> Rather than reapplying the traditional evaluation method, the clinical supervisor should adjust the methodology to take account of the kind of student they are dealing with.

Kotkin suggests role-modeling as an alternative to role assumption.<sup>136</sup> Hoffman has defined role-modeling as:

[T]he acquisition of behaviors, beliefs, and values through the students' identification with the supervisor. It is like demonstration in that the student learns through observation of the supervisor's behavior and performance, but it differs in that the teaching is indirect and generally unintentional ... Due to the significant role the clinical teacher plays in the student's training, the closeness of the working relationship between student and teacher, and the authority aspect of the teacher's position, the clinical teacher will be one of the primary role models to whom students are exposed.<sup>137</sup>

While acknowledging that clinicians tend to view role-modeling as inherently unsystematic and inefficient,<sup>138</sup> Kotkin argues that this method can bridge the

types of learners: (1) converger, (2) diverger, (3) assimilator, and (4) accommodator. Kotkin argues that the converger is best at the 3rd & 4th steps above; the diverger at the 1st and 2nd; the assimilator at the 2nd and 3rd, and the accommodator at the 1st and 4th. Kotkin, *supra* note 32 at 194-196.

<sup>134</sup> Kotkin, *ibid.* at 196.

<sup>135</sup> Judging a student's qualifications to be a "good" lawyer on the basis of this evaluation method is absurd. I, and others, have felt that a course in hypothetical examination writing would be of more value than teaching substantive law, insofar as the scheme of assigning marks is designed. It almost seems that our law schools are evaluating who is competent to be professorial candidates rather than practicing lawyers. Very good students, who will and do make very good lawyers, often do not do well on law school examinations.

<sup>136</sup> Kotkin, *supra* note 32 at 199-202.

<sup>137</sup> Hoffman, *supra* note 105 at 300.

<sup>138</sup> Kotkin, *supra* note 32 at 199.

gap for students who have difficulty in immersing themselves in a role.<sup>139</sup> The student sees the supervisor bearing the same responsibilities that the student has been instructed to bear, and thus has a model for enhanced performance.<sup>140</sup>

The ability of role modeling, which takes place whether the supervisor is conscious of it or not, to operate in a constructive manner depends in large part on the nature of the teacher/student dialogue. This dialogue is also an integral part of the student's ability to learn from his or her acting in role. In many respects, this is the crux of the supervisor's responsibilities towards the student in the clinical program. The next portion of this paper examines the dynamics of this relationship.

### Student/Teacher Dialogue

The success or failure of the clinical program, from an educational perspective, is largely determined by the exchanges which take place between the student and the supervisor. In this context the student's experiences are given meaning through the creation of a schematic of lawyering. It is here that everything is sorted and, if possible, reconciled.

The exchange between the student and the supervisor makes possible what is known as the dialectic method of teaching. It consists of individual discussion and reasoning where "the teacher serves as a sounding board for the student's intellectual explorations and as a prod forcing and encouraging the student to objectively and critically examine actions and purposes."<sup>141</sup> Barrette sees the teacher's role as being that of "agent or negotiator of the interpreted experience."<sup>142</sup>

The strength of the dialectic method is in its ability to develop the "higher cognitive functions of comprehension, application, analysis, synthesis, and

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<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.* at 202:

[role modeling]...requires a discomfoting degree of self-exposure and revelation on the part of the teacher. But this is exactly what clinical teachers ask of their students, and it is on the students' ability to comply with this request that clinical teachers judge them...The solution here depends on the clinician's leading the way through honest self-reflection, which also accomplishes the function of creating a model for the students' process of self-reflection.

<sup>141</sup> Hoffman, *supra* note 105 at 306. He adds that "the frequently heard call for increased intellectual content in clinical courses is often nothing more than an unarticulated demand for greater use of the dialectic form of teaching." *Ibid.*

<sup>142</sup> Barrette, *supra* note 32 at 65.

evaluation."<sup>143</sup> It is through the connection of these somewhat more abstract concepts with the practice of lawyering in a social and interpersonal context that the student can be educated in how to develop "their own reflective system of justice."<sup>144</sup> Kreiling points out that it is through subsequent structured reflection that the learning value of an experience is maximized.<sup>145</sup> To properly reflect on an experience, it is necessary that the student consider it in context and from all perspectives. Only the dialectic method of teaching can provide the opportunity for this through the constant exertion of positive motivational pressure on the student.

Without this constant pressure forcing reflection on decisions and actions, students will think only in terms of what gets the job done quickly and easily. The result is that students will simply reinforce the characteristics, skills, and habits which they brought with them into the clinical experience. Critchlow argues that the clinical teacher has a responsibility to expand the student's resource base:

Because students tend to solve a problem any way they can, they are more likely to use their strongest skills than to try to overcome their deficiencies. They learn to survive only on these strengths unless the clinical teacher designs a system for assuring minimum proficiency over a full range of core competencies which apply to all legal tasks.<sup>146</sup>

My experience at DLAS certainly verifies this. To some extent one can get by using prepossessed skills. Unless the specific skills necessary to perform a task are developed, however, the student develops a tendency to procrastinate, because then he or she does not really know how to complete the job. The use of secondary abilities is seldom enough to complete the task. Soon, a backlog of minor details is created that ultimately results in a seemingly insurmountable workload.<sup>147</sup>

In particular, the student must be queried to force an examination of how

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<sup>143</sup> Hoffman, *supra* note 105 at 308. Hoffman points out that the dialectic method is not as effective in communicating information in the first instance (expository learning) or in providing skills training (experienced learning).

<sup>144</sup> Barnhizer, *supra* note 5 at 112.

<sup>145</sup> K. Kreiling, "Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision," (1981) 40 Md. Law Rev. 284 at 286.

<sup>146</sup> Critchlow, *supra* note 126 at 430, ff. 45.

<sup>147</sup> In the traditional curriculum, paper courses aside, there rarely is a backlog problem which cannot be resolved in three days with a borrowed set of cans. In DLAS this approach does not work, partly because of the nature of the work and partly because of the psychological pressure of having a dependent client and an implacable court.

personal values and ideas can affect their handling of situations, sometimes to the client's detriment. Barrette points out how the values which the student holds may affect the advice which he or she gives the client.<sup>148</sup> The advice is not then based necessarily on what is best for the client in the particular situation but on what the student believes is best given his or her own value system. The student-teacher dialogue has the potential to expose this tendency to the student. Upon further reflection, this should cause the student to consider this factor when making decisions in the future. The intent is not to "change" the student's methodology to a more "correct" path but to open the student's eyes to the internal factors which shape the student's responses.<sup>149</sup>

One of the greatest dangers in the dialectic method is that there is a tendency for the teacher to lead the student towards the conclusion that the teacher wants to see the student reach. This has been referred to as the "persuasion method" of teaching. Condlin argues that the power inherent in the clinical teacher's position of authority allows him or her to use "subtle manipulative techniques" to either impose his or her views on students, or at least to get them to act in accordance with these views.<sup>150</sup> He feels that this kind of dialogue is the norm between student and teacher. The problem is that unless the student feels that his or her "perceptions, attitudes, feelings, and motivations" are taken into consideration by the teacher, any attempt by the teacher to give meaning to the behaviour in question may be considered invalid or inadequate by the student.<sup>151</sup>

The pressures of clinical work create an environment which can force clinicians to adopt, perhaps unconsciously, the use of the persuasion model in their discussions with the student. Obvious factors include time constraints and administrative demands. A less apparent reason is the tension arising from the clinician's attempt to balance the development of student autonomy while still "controlling" the representation of the client. The one-sidedness of the

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<sup>148</sup> Barrette, *supra* note 32 at 47-51.

<sup>149</sup> "[W]hen the student shows emotional resistance to certain values or ideas, dialectic teaching may expose the source of resistance and resolve the difficulty." Hoffman, *supra* note 105 at 309. "Insofar as racism, class, and sexism are part of one's culture, they are also part of one's own behaviour, and no substantive vision can emerge without some consciousness of their impact on each of us." Bellow, *supra* note 19 at 621.

<sup>150</sup> Condlin, *supra* note 2 at 605. For a discussion about the characteristics of clinicians which allow for the development of these manipulative techniques and how these characteristics are developed, see 606-607. "The clinical teacher inevitably becomes an advocate, and as Aristotle remarked, the advocate (or rhetorician) is oriented primarily to the task of persuading an audience rather than that of understanding or informing." Barnhizer, *supra* note 5 at 104.

<sup>151</sup> Barrette, *supra* note 32 at 65.

persuasion method acts like a defensive mechanism to alleviate many of these tensions.<sup>152</sup> Also, clinicians do not often find it easy to let go of their own beliefs in order to engage in the penetrating type of discourse which would allow the student to develop their own. The discussion should serve to penetrate the teacher's value system as well as the student's. Barnhizer argues that "[c]linical faculty must, in fact, be far more willing than they have been to explore competing concepts of practical justice, often calling into question the legitimacy of their own beliefs."<sup>153</sup>

Students may also be less willing to engage in a discussion where they feel that they are not going to be treated as equals.<sup>154</sup> Bellows speaks about the tendency of students in the later years of their education to try to shake off the "student" label, with its connotation of subservience to a dominant authority, and emerge into a new, independent status. At the same time, the teacher validates their identity as teacher by continuing to see the student as a student.<sup>155</sup> Hoffman points out that: "Few students possess the personal composure necessary to intellectually challenge a supervisor and stay in the debate until the end, even if the end still finds the two parties at different conclusions."<sup>156</sup> Instead, students tend to listen in order to be able to assert what the teacher is saying in the case of an ambiguity.<sup>157</sup> The nature of the clinical experience should be to try to help the student in attempting to make the transition from student to whatever he or she chooses to be.

To facilitate a constructive dialogue with the student, the clinician needs to develop the skill of active listening. By controlling the tendency to judge, and learning to understand the student's actions from the student's point of view, the teacher is able to understand the reasons behind the student's frame of reference.<sup>158</sup> Known as the "learning mode" of teaching, this kind of dialogue causes the student to question the teacher in order to work with the teacher to clarify any ambiguity that may exist.<sup>159</sup> This kind of dialogue stimulates students to bring thoughtful consideration to every stage of the problem-solving process.<sup>160</sup> In this way, creativity is encouraged instead of conformity; the

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<sup>152</sup> Barrette, *supra* note 32 at 71.

<sup>153</sup> *Supra* note 5 at 111.

<sup>154</sup> Hoffman, *supra* note 105 at 309.

<sup>155</sup> Bellow, *supra* note 14 at 392.

<sup>156</sup> *Supra* note 105 at 309.

<sup>157</sup> S. Hartwell, "Moral Development, Ethical Conduct and Clinical Education" (1990) 35 N.Y.L.Sch.L.Rev. 131 at 148.

<sup>158</sup> Barrette, *supra* note 32 at 69-70. This empathetic understanding tears down the barrier to effective communication.

<sup>159</sup> Hartwell, *supra* note 157 at 148. See also, Barrette, *supra* note 32 at 57-58.

<sup>160</sup> Hathaway, *supra* note 81 at 254.

student becomes a part of the redefining of the law, making it better reflect the changing needs of society.

There is another aspect of the clinical structure which may be considered as an extension of the dialectic process. This aspect is the paper requirement which most clinical programs place on the student. It is the interaction with the supervisor which provides the student with the skills necessary to thoughtfully reflect on his or her experiences in the clinical program.<sup>161</sup> The paper requirement is an ideal opportunity for the student to gather those reflections and formulate them into a coherent structure.

It is important that the required paper be designed to facilitate the student's need for reflection. Therefore, it should not require legal research *per se* but should allow the student to speak openly about their personal feelings of their clinical experience. Students might then be less hostile to what they perceive as a token academic requirement.<sup>162</sup> Papers could also provide useful information to enhance the development of the program for future students. Students who wish to research a particular topic should certainly be allowed to do so; the paper requirement should embrace equally both possibilities.

Alternatively, students could extend their reflections into a post-clinical paper.<sup>163</sup> The concept of individual research papers by post-clinic students was seen as an opportunity to give back to the Clinic input that would enable it to become even more effective in the future.

It became clear to me as I researched this paper that I had not gained from my clinical experience the educational value that I could have. It had been all too easy to become caught up in the practical skills aspect of clinical work and to resent the clinicians' attempts to provide an academic atmosphere, which I construed as a hindrance in my busy schedule. Through this paper I have had the opportunity to reflect upon my experiences while they are still fresh in my mind, and I am learning more now than I did while I was immersed in the clinical program. I do not feel that this need necessarily be the experience of all clinical students; pre-clinic preparation materials could provide the student with

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<sup>161</sup> Hathaway speaks of students being provided with a "period of disengagement from clinical activities in order to reflect on and analyze the issues raised by the course objectives." *Ibid.* at 255.

<sup>162</sup> "Given the enthusiasm with which students normally embrace the experiential component, there will be resentment and withdrawal in the face of a seminar or writing requirement that is perceived to be unduly disruptive of the other facets of the clinical initiative." *Ibid.* at 255-256.

<sup>163</sup> This was an early suggestion by Gorman. *Supra* note 74 at 551. In those clinical programs which are likely to generate a protracted and reflective piece of writing from the student participants, the semester after the clinical experience could be used for the preparation of such written work.



an understanding of what they are expected to gain from the clinical experience and how. Once out of the forest, the trees are clearer, however, and a post-clinic paper will enhance the student's learning experience.

This consideration of the clinical structure is by no means comprehensive. Many of the technical details of clinical program structure are omitted by focusing on: (1) the supervisory role; (2) goal definition; and, (3) student-teacher dialogue. It is hoped that the focus of this paper will provide a solid philosophical base around which to orient the various structural details of the clinical program that any law school intends to implement.

## **OTHER KINDS OF CLINICAL LEGAL EDUCATION**

The bulk of this paper has focussed on the live-client in-house method of clinical legal education. There are, however, other clinical options available. I discuss two: simulations and externships. In light of this discussion, I then reconsider the net value of a program such as DLAS to the curriculum.

### **Simulations**

Simulations fulfill many of the objectives of clinical education. Other advantages include its cost-efficiency, its ability to focus on narrow issues and its ability to allow students to learn without the fears that accompany personal representation of a live client.<sup>164</sup> Whereas clinical programs structured around real cases are driven by the interests of the client and the legal system, the simulation is driven by the interests of the class and can be designed to fit specific pedagogical goals.<sup>165</sup> Simulations also give the student the chance to acquire fundamental skills and learn practical guidelines in a situation that has enough pressure to ensure that the student makes a conscious effort to act within the role. The student is able to learn from mistakes before they have a real effect on a real client.

At the same time, simulations are unable to reproduce the learning environment that live-client or externship programs offer. Hoffman points out:

On the other hand simulation cannot approximate the greater factual richness and uncertainty introduced by real cases. Nor does simulation cause the same intensity of emotional involvement as actual cases, thereby giving the simulation a make-believe quality. Without emotional involvement,

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<sup>164</sup> Boone, Jeeves, MacFarlane, *supra* note 123 at 172. See also Gorman, *supra* note 74 at 540.

<sup>165</sup> Gross, *supra* note 76 at 321. See also Hoffman, *supra* note 105 at 290-291, for ten reasons in support of simulations.

students are not forced to confront and resolve ethical problems, a necessary requirement in the teaching of professional responsibility.<sup>166</sup>

In short, simulations do not provide the real life context that is so important to the effectiveness of clinical programs. As a result, they should not be seen as adequate replacements for live-client clinical experience, but rather as a supplement to it.

### **Externship Programs**

Externship programs such as Dalhousie's Criminal Clinic are the most effective way to extend the scope of clinical programs within the law school curriculum. They are less expensive than live-client in-house programs,<sup>167</sup> and put little additional strain on the law school facilities. They also expose the student to the operation of the law in real life situations, creating the kinds of tensions which the clinical methodology relies on to motivate students to reflect analytically.

Because externship programs can take place in specialized areas of law, virtually all students can enjoy the benefits of clinical education. A student who is able to extern in an area in which he or she has a special interest has the motivation to learn as much as possible from the experience.<sup>168</sup> Stickgold points out:

The externship model makes it viable to consider some clinical experience for all graduating students. It promotes experimentation and flexibility in program design. It promotes integration of relationships among the academy, bench, and bar. It utilizes legal resources in a more rational and coordinated manner. Properly structured, it reduces academic arrogance, while still allowing legal educators to play critical roles around the design, implementation, and supervision of the programs, and it reduces academic impotence, since it does not demand that academic faculty do well what they cannot, or do not want to, do at all.<sup>169</sup>

Finally, externships also expose the student to areas of law that the traditional curriculum cannot. These include judges' chambers, prosecutors' offices, and corporate and government legal departments.

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<sup>166</sup> Hoffman, *supra* note 105 at 291.

<sup>167</sup> Motley places the cost of externships as being between in-house clinics and traditional courses. *Supra* note 66 at 224.

<sup>168</sup> Stickgold, *supra* note 12 at 316.

<sup>169</sup> Stickgold, *supra* note 12 at 317.

Externship programs are not without their problems, however. They take place outside of the school and under the direction of a practitioner, rather than an academic. This situation can lead to "... inequalities in experience and a difficulty in relating the experience to the aims of a particular course."<sup>170</sup> The problem of academic control of the student's learning experience affects almost all externship programs. Without this academic control, the student is subjected to the type of ad hoc learning experience that clinical methodology strives to avoid. It is important that externship programs be structured to allow the student the benefits of the clinical methodology; that is, experiential learning coupled with dialectic teaching.

### **Live-Client In-House Clinics: DLAS Revisited**

The benefits of the clinical methodology are potentially best fulfilled by this type of program. There is a much greater degree of law school control over the educational aspect of the student's experiences.<sup>171</sup> The commitment of the law school to meeting the legal needs of the poor within the community coupled with the visible statement that there should be a presence within the community "provides an ethical and social education for students that simply cannot be replicated in any other setting."<sup>172</sup>

The difficulties in setting up such a clinical program are immense in light of the constricted fiscal resources of universities today. In DLAS we have such a structural program; it would be a considerable loss to the future of clinical education at Dalhousie, not to mention the community, if DLAS was forced to close.

A major reason for DLAS's present position is that it has operated almost as a separate educational program outside of the law school. All of the clinical programs seem to operate as educational afterthoughts, at least insofar as they do not appear to be carefully structured extensions of an overall educational scheme. Munn points out that a "clinic cannot be healthy if it is operated as a mostly-severed limb of the faculty: to accomplish its educational goals it must have full support from faculty and it must be integrated into the law school curriculum."<sup>173</sup> The funding problems which clinical programs such as DLAS face will not be eliminated unless there is a clear and carefully structured educational focus to the program which integrates it into the rest of the law

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<sup>170</sup> Boone, Jeeves, MacFarlane, *supra* note 123 at 175.

<sup>171</sup> Grossman, *supra* note 31 at 175.

<sup>172</sup> LaFrance, *supra* note 58 at 354.

<sup>173</sup> M.K. Munn, "Clinical Legal Education Through the Looking Glass" (1989) 12 Dal. L. J. 505 at 520.

school's educational goals.<sup>174</sup> Among other things, this would permit more students to participate in this kind of clinical experience, thus answering one of the stronger arguments against DLAS.<sup>175</sup>

## CONCLUSION

Before I undertook to research and write this paper, I had not made up my mind that clinical legal education was a necessary part of legal education. Although benefitting from my term at DLAS, and finding it much more interesting and challenging than traditional legal education, I was conscious of the expense involved and the limited number of students who directly benefitted. I started this paper feeling that unless there was a sufficiently strong argument to be made that clinical legal education such as that offered by DLAS was an *essential* part of a legal education, the financial pressures on the law school could justify eliminating the program.

After finishing this paper my position is clear. What clinical legal education offers to the law student is a learning experience which is not available anywhere else. The question should not be whether it should exist at all within the law school curriculum; but rather, what can be done to further extend clinical opportunities to all students. To this end, not only should existing externship programs be extended, but also other clinical options should be explored and implemented. Further, the in-house clinical program, DLAS, should be maintained and better integrated into the law school curriculum. There will always be changes required, but these should be based on raising the education of students to the *best* level possible, and not simply to a tolerable level.

Educational institutions cannot shut themselves away from the social environment which surrounds them nor from the implications for society of what they are teaching students. To teach law in a societal vacuum is irresponsible, not only to the students but to the profession as a whole and to society. The constitutional entrenchment of the *Canadian Charter of Rights and Freedoms*,<sup>176</sup> which is primarily a legal instrument for social responsibility, shows the value that Canadians ascribe to the responsible interaction of law and human relations. Law schools have a responsibility to society to educate law students to be

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<sup>174</sup> Befort, "Musings", *supra* note 106 at 627.

<sup>175</sup> Currently, DLAS counts for 13 credits, the equivalent of one full term. A maximum of approximately forty-five students can take part in the program in one year. If some students were able to participate for 3-5 credits, for example, through related courses such as Poverty Law, Landlord & Tenant, or Debtor & Creditor, the level of participation could increase.

<sup>176</sup> Part 1 of *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

socially responsible lawyers. I hope that this paper has demonstrated that the only way to ensure this type of education for students is to teach them the law in the context in which it operates. This is only possible through the use of the clinical methodology in clinical programs under the control of the law schools.

While law schools have a responsibility to ensure the availability of clinical programs, clinicians have a responsibility to ensure that these programs remain educational experiences for the students. All the arguments which support the status of clinical legal education as an integral part of the law school curriculum are wholly dependent on the clinical experience providing a unique and essential educational opportunity for the student. If clinical programs offer anything less than that, they cannot justify their existence.

Students also have a responsibility. They must demand that their law school offer them clinical education courses which are properly integrated into the curriculum. It is too easy to sit back and accept whatever is handed out, and it is also irresponsible. Students, by and large, enter law school with a social conscience; they should make sure that the law school graduates them with one.