RESISTANCE TO LEGAL ETHICS

*Elizabeth D. Gee**
*James R. Elkins***

I. INTRODUCTION

"What is the topic of your research?"
"I am studying law school instruction in ethics."
"But isn't legal ethics an oxymoron?"

Such is the opening of many polite conversations about legal ethics and the research here reported. The consistency with which the punch line is recited reveals something of how legal ethics is perceived within the world of legal education. Much about human morality is contradictory. Take, for example, *Hurlyburly*, a Broadway hit by David Rabe. The principal characters are the embodiment of immorality: They demean people, liberally use foul language, abuse drugs, and lack commitment to anything or anyone. Although the audience laughs appropriately at the well-crafted humorous lines, it also delights at staged instances of abusiveness, meaninglessness, and helplessness even in the absence of artful dialogue. The immorality is only imagined and pretended; still, if the audience is to be entertained or amused, it must check its moral conscience at the door. Perhaps the importance of the play is not its plot or central character, but its pantomime of the audience's moral contradiction—the human tendency to divorce the self from the moral and ethical realities of life.

To be a lawyer is to struggle daily with moral choices. The lawyer's personal ethics is sometimes subordinated to the morality of others. Often the attorney must switch off personal ethical sensibilities. The intense moral contradictions faced by lawyers have become a matter of professional and public concern. The Watergate scandal brought the lawyer into the public spotlight by showing that half of the individuals indicted for Watergate-related crimes were lawyers. The fallout was immediate. The American Bar Association in 1974 voted to mandate that law schools provide instruction in professional ethics.

Over a decade later, legal ethics instruction is failing to live up to

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* The Alexandria Institute, Ed.D.
** West Virginia University School of Law, J.D.

its early promise. Ronald Pipkin, in one of the few empirical surveys of legal ethics instruction, concludes that ethics instruction is in distress and is such a failure that "it must be destroyed in its present form in order to be saved."[1] Legal ethics courses share little in common with the content, methodology, and materials of other law school courses. It is not surprising that legal ethics, an awkward newcomer to an otherwise conservative disciplinary gentry, is a growing source of dissatisfaction.

The critique of legal ethics instruction identifies wide-ranging inhibiting influences. Perhaps the most frequently cited problems are the CODE OF PROFESSIONAL RESPONSIBILITY and MODEL RULES OF PROFESSIONAL CONDUCT, which receive significant emphasis in most legal ethics courses.[2] Steven Leleiko claims the Code is ambiguous and creates potential contradictions between professional and personal ethical systems.[3] Richard Able argues that the MODEL RULES are useless in fostering ethical behavior.[4] Murray Schwartz notes that knowledge about legal ethics lacks integrating themes and a coherent theory.[5] Pipkin reports that students do not perceive moral education courses as important and worthwhile.[6] Rose Bird speculates that students find them dull because of their rule orientation.[7] David Luban suggests that student hostility may be a defensive posture in reaction to being urged to behave in ways that may work against their self-interest.[8] Andrew Watson postulates that student aggressive tendencies and psychological anxieties may compound teaching difficulties.[9] Students often do not understand about what it means to be professionally responsible and may fear that

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1. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 A.B.F. RES. J. 247, 274 (1979).

2. *Model Code of Professional Responsibility and Code of Judicial Conduct*, National Center for Professional Responsibility and the American Bar Association (1980), and *Model Rules of Professional Conduct and Code of Judicial Conduct*, American Bar Association (1983).

3. *See generally*, Leleiko, *Love, Professional Responsibility, the Rule of Law, and Clinical Legal Education*, 29 CLEV. ST. L. REV. 641 (1980).

4. *See* Able, *Why Does the ABA Promulagate Ethical Rules?* 59 TEX. L. REV. 639, 642 (1981).

5. *See* L. Schwartz, *Lawyers and the Legal Profession: Cases Materials* viii (1979).

6. Pipkin, *supra* note 1, at 274.

7. Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility*, 4 SANTA CLARA L. REV. 246, 265 (1979).

8. Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 453 (1981).

9. *See* Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL ED. R1 441 (1974).

skilled advocacy will taint their sense of right and wrong.[10]

Although leaders in American law schools agree that reform in ethics education is needed, they do not agree about the form that change should take. The emphasis tends to be on curricular inadequacies rather than on specific improvements.

II. Suggested Improvements in Legal Ethics Instruction

This article examines possible barriers to curricular reform proposed in interviews with legal education authorities.[11] The interviews identified proposals for change in legal ethics instruction and influences that obstruct or facilitate the implementation of these changes. Ten of these proposals are briefly considered in light of specific supportive or non-supportive factors.

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10. Leleiko, *The Opportunity To Be Different and Equal—An Analysis of the Interrelationship Between Tenure, Academic Freedom and the Teaching of Professional Responsibility in Orthodox and Clinical Legal Education*, 55 Notre Dame Lawyer 485, 507 (1980).

11. Proposals for change were offered by authorities on legal ethics instruction in personal interviews conducted during 1984. The following individuals were interviewed for this study: Mortimer J. Adler, The Institute of Philosophical Research; Gary Bellow, Harvard University Law School; William J. Bennett, United States Dep't of Educ.; Derek Bok, Harvard University; Daniel Callahan, The Hastings Center; Paul D. Carrington, Duke University School of Law; Roger C. Cramton, Cornell Law School; Alan M. Dershowitz, Harvard University Law School; Gerald T. Dunne, Saint Louis University School of Law; James R. Elkins, West Virginia University Law School; Paul A. Freund, Harvard University Law School; Charles R. Halpern, CUNY Law School at Queens College; Geoffrey C. Hazard, Jr., Yale Law School; Philip B. Heymann, Harvard University Law School; Jack Himmelstein, CUNY Law School at Queens College; Andrew L. Kaufman, Harvard University Law School; Duncan M. Kennedy, Harvard University Law School; Robert B. McKay, New York University School of Law; Ronald Pipkin, Dep't of Legal Students, University of Massachusetts at Amherst; Norman Redlich, New York University School of Law; David Richards, New York University School of Law; Philip G. Schrag, Georgetown University Law Center; Murray L. Schwartz, University of California at Los Angeles School of Law; Thomas L. Shaffer, Washington & Lee School of Law; William Simon, Stanford Law School; Robert Stevens, Haverford College; Alan A. Stone, Harvard University Law School; Samuel D. Thurman, University of Utah Law School; Stephen B. Young, Hamline University School of Law; Andrew S. Watson, University of Michigan Law School; Donald T. Weckstein, University of San Diego School of Law; Forest Jack Bowman, West Virginia University College of Law; John M. Burkoff, University of Pittsburgh School of Law; Leslie Pickering Francis, University of Utah College of Law; Marie Faylinger, Hamline University School of Law; and John K. Morris, University of Utah.

A. Increased emphasis on an interdisciplinary approach to legal ethics

This reform suggests the relevance of history, theology, psychology, anthropology, sociology, geography, political science, economics, and the humanities in the study of legal ethics. The growing complexity of law and the increased attention to the legal profession as an institutional molder and shaper of social conflict militates in favor of multidisciplinary investigation. Reasons most often cited by legal educators for not encouraging a greater interdisciplinary focus include the failure of similar past endeavors, lack of financial resources, and faculty anxiety about interdisciplinary teaching.

B. Increased emphasis on field placement and simulation teaching methods

This proposal would strengthen clinical programming and increase the utilization of field placement and simulation techniques. Clinical instruction has strong student backing. Students often complain that nonclinical instruction lacks vocational relevance in contrast to clinical education, which offers the opportunity for actual law practice. Professional associations and leaders of the judiciary or bar also advocate clinical teaching. Significant obstacles to increased clinical programming include the continued intellectual resistance from traditional classroom teachers and tenuous financial support.

C. Increased emphasis on moral philosophy and development of supportive materials

This reform would encourage the application of ethical theory to the analysis of legal ethics issues. An increasing number of law school faculty who teach ethics have received formal training in philosophy. Opportunities for faculty professional development in moral philosophy are becoming available. An obstacle to the use of moral philosophy lies in the pragmatic (some would say anti-intellectual) orientation of both students and law teachers. An even more fundamental concern is the apparent contradiction in legal and moral discourse. The legitimization of legal ethics tends toward a legalistic and positivist approach which is seemingly incompatible with moral discourse. Efforts to resolve ethical dilemmas by legalistic means, by reference to codes, standards, or rulings often deny the moral issues.

D. Increased emphasis on popular and classical literature

Examples of literary works seen as relevant to legal ethics include *To Kill a Mockingbird, Billy Budd* and *A Man For All Seasons.* Many law school faculty view literature that depicts lawyers behaving ethically or unethically as a tool for enhancing student sensitivity to moral concerns. Identified barriers to the use of literary sources are related to the cognitive skills of both students and teachers: The law-trained mind favors that which is explicit, precise, and rational in contrast to the non-linear, imaginative, and intuitive analysis required for literary criticism.

E. Development of law school institutional ethical commitment

This proposal takes a variety of forms and is less clearly-defined than other indicated changes. The general suggestion is that faculty, students, and school administrators collectively discuss ethical issues and problems relating to professional and educational life and attempt to develop shared standards of conduct. The law school is viewed as one kind of ethical community. An obstacle to this recommendation identified in the interviews is that faculty, administrators, and students are often negative role models for each other rather than positive ones. Another concern is the problem of developing rewards and sanctions to enforce the institutional ethic. Further, it is not clear how to bring about this transformation in a law school which is organized as a hierarchy based upon a reward system of grades, law review, and prestigious law practice. Hierarchial structures protect existing authority and discourage communication between various constituent groups with varying interests and responsibilities.

F. Increased effort to enhance student ethical self-identity

Many experts we interviewed argued that enhancing students' ethical self-understanding should be an important goal of legal education. To this end, proposals range from helping students develop personal ethical norms to encouraging their appreciation of the centrality of ethics in professional life. Psychoanalytic and humanistic theories are suggested as one basis for exploring self-identity issues. Instructional techniques used to enhance student self-identity primarily are those emphasizing self-disclosure and interpersonal communication skills, such as journal writing, role playing and clinical internships. This proposal is strongly contested by many legal educators. The emphasis on emotion and introspection are criticized as passé and outside the realm of ra-

tional analysis which has been the central mode of inquiry in law school.

G. Teaching of legal ethics in the first year

This recommendation is based upon the assumption that first year students are psychologically impressionable about their role as law students and future professionals. The first year is a socialization period in which a student's ethical sensitivity and commitment are subject to influence. Competition by other courses is regarded as the strongest barrier to this proposal.

H. Infusion of ethics into the entire law school curriculum

This proposal requires that ethics be made integral to all aspects of law school studies. The distinction between this proposal and that requiring the development of a law school institutional ethical agenda is that the former seeks to strengthen the formal curriculum whereas the "infusion" model is contextual in its involvement of social and informal educational environments. Discussion challenging this suggested change emphasizes lack of faculty competency, as well as students' needs for curricula definition and structure which is difficult to achieve in educational programs.

I. Challenge to the ethical assumptions underlying legal education

This innovation would require that courses in legal ethics expose hidden moral assumptions that underlie law, the legal system, and the structure of legal education. The hierarchy of law school and its reward systems push students toward institutions serving upper and middle socio-economic classes. These and other inadequacies of the current legal system must be exposed. Suggested as a strong factor favoring this change is the present intense dissatisfaction and disillusionment on the part of many law teachers with traditional legal education, the legal system, and the legal profession.

J. Increased practical experience for faculty

Advocates of this reform claim practical experience is a preparation for teaching legal ethics. It provides faculty with first-hand experience with ethical problems students will face in actual practice. This proposal likely would be inhibited by faculty resistance to non-traditional forms of legal education and to colleagues whose credentials are practice-based.

III. Barriers to Change

Most forces identified by interview participants as unsupportive of the proposed reforms were common to most or all of the suggested changes. Less frequently mentioned were influences that uniquely impact one or a small number of changes. The following discussion focuses on generic resisting forces while, at the same time, acknowledging the individuality of pressures that may be called into play were law schools to attempt implementation. Barriers discussed by Goodwin Watson in his model of resistance to change are used to analyze influences that inhibit the suggested reforms.[12] For illustrative purposes, excerpts from the interviews are frequently incorporated into the discussion.

A. Conformity to Norms

Existing norms of legal education and of the legal profession create the strongest resistance to change. Customary attitudes and behavior of students, faculty, and professionals are significant inhibitors of legal ethics instruction. Students assign low status to legal ethics courses because instruction does not conform to other "legitimate" modes of legal education: Low status courses lack doctrinal coherence, are taught by the lecture method, are required late in the curriculum and are designated by fewer credit hours.[13] Student dissatisfaction with legal ethics courses is openly acknowledged by teachers.

> My own view is that the teaching of professional responsibility, just to be frank, in the law school is scandalous. It is terrible. It is a very boring class. The students hate it. They are compulsory upper-level courses which have very little intellectual content. They have a very bad rep, which I think is understandable.
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> I think the course is generally not well liked by students. For one, it is a compulsory course after the first year. They resent that. Two, it is not generally taught by people who are interested in the subject matter. The students quickly pick that up. Three, the content still suffers from the lack of theory, lack of rigor, and lack of empirical data.

Some students question a legal ethics course based upon the Code or Model Rules. They challenge the moral content of codified ethical standards, their validity as an embodiment of the legal profession's moral

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12. *See generally,* Watson, *Resistance to Change* (1969).
13. Pipkin, *supra* note 1, at 257-58.

vision, and the usefulness of legal pedagogical methods applied to ethical standards.

> In most ethics courses, students don't expect to spend time studying a set of rules. You would expect to study much more complex concepts and discourses. The problem may lie in the whole idea that there can be a code or set of determinant rules. Certainly the Code is awful. My students are uniformly contemptuous of it.
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> The Code . . . is a particular disaster, because our students know it. They know how stupid the codes are, how controversial, how class-biased they are. Students know this. Nothing is concealed from anyone. It is tremendously self-serving of the profession to maintain its monopoly. You don't have to be a Marxist to know this. So they don't think of it as ethical at all. What does that have to do with ethics? They know that. They are very highly educated students.

Other students are characterized by their teachers as having little interest in ethics instruction not closely related to practical situations or avoiding trouble with the bar. Strong student norms favoring practice-based educational experiences are reinforced by the law school social culture. Peer pressure to identify jobs appears early in law school. Students are quick to perceive that professional success is defined in terms of a large-firm practice, power, and an income earning ability rather than in serving humanitarian purposes. According to one teacher, "They choose the law not as a human service but an entry into organizations in the wealthiest sectors of society." Student and faculty norms are, in important respects, in conflict: faculty value teaching and research in preference to practice; students revere practice and are interested in instruction tied to employment. An ethics instructor observed, "Students are motivated to get through. They are not there because they want to become professors . . . . The professors want the students to be like them, and the students don't want to be like them." The conflict is most pronounced when the teacher is driven to a teaching career by an aversion to law practice. One commentator remarked:

> Most law professors are refugees from law practice. They are people who have either never wanted to go into law practice, or went into practice and for one reason or other didn't like it. It is an oddity that they would be the ones who would teach people how to practice law, or to draw upon their own experiences as reflective of the practice.

Faculty attitudes about acceptable peer performance play a signifi-

cant role in curtailing reform. Reform in ethics instruction would require competencies that are at variance with traditional faculty tenure or promotion requirements and general professional norms. Some ethics instructors do not enjoy the credibility of faculty who teach traditional courses. As one commentator remarked, "People who like to teach and enjoy the subject matter [ethics] are known as 'softies.' They get marginalized by this." An added barrier is the stature of clinical faculty, many of whom include ethics in their programs. Clinical faculty are viewed as lacking theoretical and analytical orientation, writing ability, and general scholarly competence—attributes stressed by existing faculty norms. Some clinical faculty are regarded as non-conformists who represent leftist political ideologies.

Faculty attitudes about course subject matter represent divergent assumptions about the dynamics of professional and ethical responsibility, past and existing standards of the legal profession's moral conduct, the legitimacy and moral content of the profession's ethical standards, and the process or method best suited for moral inquiry in professional life. Several points are disputed, including whether or not instruction should: increase students' critical awareness and ability to articulate the profession's formal standards, sensitize students to the various dimensions of ethical dilemmas, encourage self-understanding and the conscious ability to develop personal norms, make students more moral, or develop particular character traits in students such as courtesy, courage or a sense of justice. An important point of pedagogical controversy concerns the effect ethics instruction has on moral disposition, as the following contradicting statements illustrate:

> You can't train them to be ethical. It is impossible, either by precept or example.
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> There is a whole attitude that they necessarily develop when they are with us about what they do, how they behave as lawyers. That is all obtained in law school. It is not only possible [to influence behavior], it is impossible not to. What we do is send them out with shoddy values they learn in law school, or we don't send them out with any. It's just silly to think that.

Faculty strongly disagree about the means by which ethics penetrates the law school curriculum, the relevance of ethics instruction to legal practice, the impact of law school socialization on students' ethical behavior, and the influence of the work environment on moral conduct. The appropriate subject matter and instructional methodology for legal ethics courses also is disputed. At present there is a lack of consensus among faculty over whether a strong implicit ethic underlies law

school instruction. One argument suggests a hidden ethic in the hierarchy of courses, particularly the higher status assigned courses representing right of center, conservative, and middle-class ideology. Basic classroom doctrinal analysis and presentation of legal procedure also are said to carry moral significance which neither students nor teachers critically decipher.

> The case method is very "a-ethical" and amoral. It is an attempt to scientifically analyze what the various factors are without evaluation. Of course it is not value-free. You don't have to be a brilliant legal scholar to understand that the American legal system never has been value-free.

Diverse factors influence the profession's attitude toward change. Strong support for legal ethics instruction is reflected in the ABA accreditation mandate and increased professional attention for the equitable delivery of legal services. Concern about increased lawyer competition and malpractice litigation also have focused attention on ethics. Yet teaching reforms, irrespective of their intrinsic merits, may be met by the legal profession's alleged conservativism. One legal educator portrayed the bar's moderate outlook by recalling its reluctance to revise the Code:

> Now when the ABA Code was revised, the profession as a whole showed itself to be very conservative in the sense of resisting change. The Commission wanted to go further in reform in terms of toning down the shield to confidentiality, but didn't get far.

The norms of law practice model the values emphasized within legal education. The practitioner defines success by monetary gain; law school success, in turn, is determined by the extent to which the institution produces prospective lawyers who satisfy the standards of professional status. Students recognize the configuration of professional success; hence, they define their personal striving in light of such criteria, as the following comment illustrates:

> I think we are under enormous pressure from the Bar all the time, because our income is heavily dependent on the fact that we can turn out students who these firms need and who make quite remarkable salaries. That is, in large part, why we are the strongest part of the universities, why law schools are even stronger now than medical schools. So you are continually under the pressure to produce products precisely attuned to their needs, which is very understandable. But of course, it absolutely is contrary to what a university is supposed to be doing in training an independent-

minded people who are supposed to both be capable of working in their society, but also having critical input.

Also frequently characterized were professional norms that discourage active ethical self-policing. For example,

> Professional etiquette is more powerful than professional responsibility.
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> I talk to former students who are in various kinds of law firms where a wide range of ethical misconduct is prevalent. The incentive not to blow the whistle is just extraordinary. There are all problems of confidentiality and hierarchy and so forth, so I don't think that the legal profession has even begun to do anything which is going to have a serious impact on improving the ethical behavior of lawyers.

A frequent comment is that law school and law practice norms are antithetical to ethical sensitivity. The high value assigned to moral relativism, instrumentalism, positivism, rationalism, competitiveness, and advocacy is contradictory to empathic and conciliatory truth-seeking competencies:

> The arts of advocacy work against ethical impulses. Feelings of compassion and sympathy are suppressed in the interest of one's client so to get as much as possible from the other fellow.
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> I think there is probably a subtle difference, particularly in the law, between seeing an ethical issue as a genuine moral problem and something that you should try to wiggle your way around—a road block, something in the way. Where the moral issue is seen as just a problem, it really doesn't get moral weight. It is a professional complication to be dealt with in some way that for the practitioner may not raise any very fundamental questions . . . . This is the sense that I sometimes get: People supposedly do not think philosophically or ethically, particularly; ethics is just problems, a bother, a difficulty; it is not something that provokes one to think deep thoughts. It provokes you to be more clever in order to get around it. And, I suspect that is because the profession has certain standards, and they are there, and you accept them. You have to learn to live with them, and you have to be clever not to violate the rules. It is one more set of rules. Moral rules come to be treated like the law in general. Mainly it is something to be sort of respected. But, more often than not, it is a question of "How do you work yourself around the law? How do you find the loophole, the way of dealing with the law that will get by the courts?"

Legal ethics problems have become increasingly complex for the

practitioner because of the size of law firms and range of the lawyer's involvement in the client's legal affairs. Moral questions can become muffled by complicated issues of detail.

> Perhaps the larger issues of lawyer responsibility . . . , of confidentiality versus duty to the court or to the public, get neglected in terms of the conventional rules about confidentiality and where does this detail fit in. The subject has become so complex that some of the great simplicities have been lost . . . . And so it becomes rigorous in the sense that it is a very minute inquiry.

Legal educators are becoming aware that rational and instrumental strategies for resolving ethical dilemmas, as opposed to conciliatory methods, represent male and female norms. Indeed, new norms may be created with the infusion of women into the professional and law school environment. Women are characterized by legal educators as more concerned than men about ethical dilemmas and as giving greater weight to the dynamics of interpersonal relationships, to preservation of community, and conciliatory strategies. For example:

> You could see [women law students] really struggling with their feelings . . . : "I feel badly about this; I don't know how to resolve this; I am worried about dumping on client *X* because I have to withdraw from his case, according to the Code." Whereas, the men [say]: "Well, it says in the Code that . . ." It really is a perfect manifestation of the . . . dichotomy. I think women are much, much more sympathetic to all of the empathic issues of being a good lawyer. A good lawyer has to be empathic.

Some observers see signs that mitigate the resisting power of established norms. For example, one observer noted that although legal ethics instruction still is viewed by faculty as less prestigious than other courses, it is gaining in status:

> It is still not considered a popular course. It used to be considered a real dog. The best people were not used. It was not thought of as very challenging. Now it is a tough and challenging intellectual subject. There is a full panoply of ethical rulings and judicial decisions, a substantive body of case law in addition to the Code and Model Rules. Yet in general it is viewed as not as vital. The increasing number of lawyers, the proliferation of specialization, and the widening geographical heterogeneity of the profession may weaken long held values that support the current orientation to legal ethics instruction.

Disparity in norms of different quarters of educational and profes-

sional culture – students, faculty, administrators, and practitioners – also possibly check restraining powers. Each group may develop loyalties to their own values that compete with other groups; for example, faculty may define professional status as scholarly achievement, whereas students may see professional success in terms of large salaries.

B. Cultural Coherence

The interviews portrayed the systemic or interdependent nature of restraining influences as having significant bearing on change efforts. Forces characterized as systemic represent connections between groups both internal and external to the law school. For reformers this may mean several tiers of values. According to one interview participant, the "traditional perspective" of ethics instruction, or typical presentation and analysis of formalistic standards, is a value sustained by numerous forces:

> Both students and faculty are tied into the traditional perspective . . . . Tradition is reinforced from all different kinds of directions. It is reinforced by the university at large; it is reinforced in society; it is reinforced because people think they have to go out and get jobs and then need certain kinds of things.

Many of the proposed changes may require reformulating both law school and professional norms, including professional success criteria, law school reward structures, and notions about the usefulness of outside authorities to the teaching of law. For example, the proposal to challenge the ethical assumptions of legal education requires critical examination of many suppositions underlying the curriculum content, instructional methodology, and analytical or procedural strategies. Attitude patterns external to the law school environment, including beliefs of law practitioners and values expressed in the legal system, also require analysis. The possible presence of a hierarchy within legal education, the legal profession, and legal system makes pluralistic change particularly problematic. Indeed, the more pronounced the stratification, the lower the rate of organizational change. Extreme differentiation encourages subgroup solidification; in the face of change, multiple bases of power may compete with each other for rewards. For example, one interview participant suggests that faculty have a strong need for security which is satisfied, in part, by their power over students, "I see the faculty as having a need for control, hierarchy and distance. It is a limiting factor on their ability to relate to students . . . . If you keep on the ground level where you are better, then obviously you win the battle."

Another discussant characterizes law faculty and practitioners as competing with one another for the opportunity to train law students in ethics.

> I predicted that this would happen, that once it got clear that we were going to do this, then narcissism would require that we superb teachers, especially those at Harvard, have to do the teaching ourselves. We couldn't possibly turn that over to the likes of the folks out in practice.

An example of inter-group competition is found at Harvard Law School where Critical Legal Studies advocates, it is alleged, inhibit the school's strong initiatives in ethics instruction. It has been said,

> The Critical Legal Studies group has created alot of tension on the faculty—severe discontentment and unhappiness—so there probably will not be much innovation (in ethics instruction) right now. They have been intellectual leaders, and ordinarily for the good . . . They have not been just resting on their laurels. They really have been in the forefront. They have always had good money and good people.

Student subgroups, such as women, minorities, law review, moot court, or political activists, also represent different hierarchical stances in law school that may pursue conflicting objectives.

Cultural trends are significant to the change process. Because societal institutions—family, church, and schools—historically have been concerned with developing moral values, their evolution influences the law school's role in ethics education. One observer argued that legal education is not adequately adapting to the declining role of cultural establishments in the formation of ethical values for young adults and questions the law school obligation to compensate for societal changes:

> I think one of the things we have to reassess is, when the current model evolved in the elite law schools on the East Coast in the 1870's and the 1880's, what was the nature of the student population we were working with, socially and psychologically. You were dealing with young men in their early twenties who had mostly gone to prep schools or good public schools like Boston Latin and Harvard College. They came from money families. They were the "squire-ocracy" of the country—Victorian orientation. They had character formation since they were two years old. They all had Latin and Greek. They had Rhetoric. They had a sense for history. They all went to church on Sundays, although they probably were a little wild in college. The law schools didn't have to worry about character formation or history of jurisprudence or any of these

> things because it had all been given to these people in their prep schools and in their colleges. What happened by the 1960's and 1970's is that you have a student population who hasn't had any of this. And yet the law schools, in what we do, have failed to recognize the changing environment which is sending us students. It is like you design a machine to make glass milk bottles, and suddenly what you have are very fragile cardboard cartons. If you put those cardboard cartons through the machine, they are all going to get crunched up, because the machine is designed to use glass bottles. Something like that has happened over the last thirty or forty years, which then raises profound curricular issues: do we in law schools have to make up for all of that, or do we raise a red flag and say, "Hey, look, you are sending us this kind of student. Don't blame us. Our job is to train them in these ways, and this is what we are designed to do, and we do a very good job at doing this. We will do this part of the package. But there is this, and this part of the package that someone else is supposed to be doing." And it used to be the families, the churches, the high schools, and the colleges. And they are not doing it anymore. And so when Derek Bok gets up and criticizes law schools and lawyers for this lack of commanding contribution to our society, that is not the fault of law schools, that is the fault of the whole society.

The interlocking network of conservative and prestigious institutions is a strong cultural and systemic obstacle to law school reform. An elite network controls change variables, including undergraduate instruction, testing standards, pre-law advising, hiring or clerkship patterns, and accreditation criteria. As one legal educator argues:

> Well, you take all the elite law schools. They are an integral part of a really tight network of institutions. They support each other and limit each other's potential for change. They are also part of a larger network that is resistant to change. The larger network includes law firms, judges who have clerkships to allocate, pre-law advisors, and the Educational Testing Service . . . . As alumni fund raising has become more critical, law schools don't want to do anything to offend alumni or do anything that is going to make their students less likely to be affluent givers in the future.

C. Vested Interests

Students, faculty, and practicing lawyers are strongly aware that many of the changes here proposed would potentially increase or decrease their prestige or economic interests. Some observers believe students enroll in law school to acquire skills that open doors to money,

power, and status. Students are infrequently portrayed as motivated by humanitarian rewards. Faculty, on the other hand, are viewed as less preoccupied with financial remuneration than students or practicing lawyers. Supposedly, they are more concerned with prestige. Concrete rewards include association with elite intellectual communities, promotion, tenure, and advancement within the law school hierarchy. One discussant provided a colorful characterization of the reward structure, "We are like princes in law school. Once you get tenure in law school, you really are like a Renaissance prince." Other incentives for faculty include authorship opportunities, service in prestigious organizations or committees, consultantships, and appointments to elite institutions. Instruction and publication in certain specialized areas are viewed as prestigious. Constitutional law, for example, is considered a speciality area of greater stature than family law or poverty law. Senior faculty who have flexibility in choosing the courses they will teach are viewed as having high status. Incentive or disincentive systems in other university academic units also are barriers to potential change. University groups may compete for rewards and financial support. For example, proposals that would enhance law school instruction in moral philosophy through team teaching may be resisted in both philosophy departments and law schools because interdisciplinary activities are infrequently funded. Finally, all members of the legal profession derive status from the restrictive and monopolistic nature of the profession. Distinctive jargon, procedures, ethical standards, self-regulation policies, and training requirements enhance the prestige of the membership. Professional monopolies are likely to resist forces that threaten group exclusivity. Yet the systemic nature of the identified changes require that rewards in both law schools and the legal profession be altered.

D. The Sacrosanct

Idealized traditions and rituals of the law school subculture also may resist change in ethics education. An example of the near-sacred is what one observer calls the "mystique of legal reasoning." Both students and teachers are caught up in the belief that traditional legal analysis, notably the consideration of court decisions through deductive reasoning, is the essential basis for a legal education. It has been said that, "The legal method, well it has this power . . . because you can construct an argument with premises and conclusions, and very focused . . . Here you have a method which seems extremely explicit and discursive, and they [students] say, 'My God, I can now think.' " Student reverence for legal reasoning also may hinder tolerance for

other problem solving approaches. "The mystique of legal reasoning . . . hurts professional responsibility education in the sense that people have been taught to think that the first semester, first year curriculum is what legal education is all about. They don't take seriously any other forms of legal education."

Also discouraging a critical perspective in legal ethics is the law student's romantic image of the adversarial system:

> They call upon . . . images of themselves which are heroic images. Of course, they will never do anything unethical, and if they do something that is unquestionably unethical, they justify it in terms of the needs of the adversary system; and there is alot of professional support for this view.

The Socratic method of classroom discussion also is venerated; indeed, the long-standing use of this teaching technique, especially in the first year, may indicate that instructional routine has itself become "sacrosanct."

E. Rejection of Outsiders

Opposition to impulses external to the law school is a significant and constant theme throughout all discussion. Impetus for change originating from the outside typically is met by strong resistance. Ironically, Watergate and the American Bar Association mandate, clearly two strong peripheral stresses, were the most frequently cited influences accounting for legal education's current emphasis on ethics. Also identified as outside factors are sources within the law school that may influence its subgroups. That is, in certain contexts, law students view faculty as outsiders; faculty view law school administrators as outsiders; and traditional faculty regard innovative faculty as marginal members of the school community. Opposition to outsiders is caused by the teaching profession's fear of encroachment by practitioners. Proposals to increase clinical teaching and to require increased law practice experience for faculty regularly provokes negative attitudes toward practicing lawyers. Also viewed as outsiders are some faculty who advocate challenging the ethical assumptions underlying the curriculum. Faculty seeking reforms that increase student self-identity and who are especially concerned with psychological issues are seen as "soft." Resistance to non-legal subject matter is a major obstacle to implementing change, especially proposals that would increase emphasis on interdisciplinary perspectives, moral philosophy, literature, or that would enhance student self-identity. Each requires the incorporation of another knowl-

edge base, or mode of discourse into an existing curriculum. Some proposed changes would require students and faculty to develop different cognitive orientations and disciplinary competencies. One instructor recalled his attempt at interdisciplinary instruction in his ethics course:

> My experience with law students is that they are much more apt to deal easily with these concepts and talk about them if I don't talk about them as if they were interdisciplinary . . . We teach students implicitly that lawyers are at the top of this pyramid, and we really are omniscient, and we don't really need these other folks who are somewhat down here on the pyramid. We make fun of people who do empirical work and stuff like that. That is, we have taught them interdisciplinary work is useless.

Many faculty, students, and practitioners view outside perspectives as irrelevant to legal ethics education. For example, ethical theory is seen as not essential to understanding fundamental ethical problems because law itself embodies doctrine that recognizes moral concepts, such as justice, fairness, rights, and obligation, as one interview participant recalled:

> I had a general feeling, having worked with most of the people who have worked in legal responsibility, that they feel the law has a sufficient body of theory that it doesn't need other fields . . . There was a kind of scorn for moral philosophy; they kind of felt that they didn't need this stuff. I think that is because law does have a theoretical ingredient . . . . In law you have jurisprudence and you have talks about rights and duties and obligations and you can sort of make due without going anywhere else. So, when they get rhetorical, it sounds like legal language. You've got the language of law, and not the language of philosophy.

Legal ethics courses that emphasize rules discourage the incorporation of moral philosophy. The Model Rules move further toward a legalistic orientation thus reducing incentives for using non-law materials. Finally, ethics instruction, although a regular ingredient in the law school curriculum, still is regarded with xenophobic reaction by faculty and students. While some attitude change is evident, ethics continues to be viewed as "outside" the traditional curriculum. Had ethics instruction been the product of internal initiatives instead of outside impetus, perhaps, the response would have been more amicable.

IV. Conclusion

Fundamental to understanding change in legal ethics instruction is

the question, "What renders change unsuccessful?" Our interviews suggest the presence of strong resistance to curricular change. For law schools attempting to improve ethics instruction, restraining pressures must be recognized and strategies developed that neutralize their negative impact.

The magnitude of resisting forces is sufficiently significant to suggest that reform in ethics instruction will be slow. Some barriers to change are recognized in existing commentaries on ethics instruction (*e.g.*, student dissatisfaction with legal ethics courses), but legal ethics pedagogy as a subject of scholarship still is in its infancy. Our findings identify additional impediments, such as student criteria for success which are based upon the attainment of money and prestige rather than upon humanitarian goals. Also inhibiting are strong contradicting faculty attitudes about subject matter, course objectives, teaching methods, the codified standards, and student characteristics. There is significant faculty disagreement about the relationship of ethics to the legal delivery system and the existence of implicit ethical messages in the law school curriculum, the legal profession, and the legal system. Our research found that non-law approaches to ethics may be resisted on grounds that other disciplines appear superfluous to existing legal doctrines. Moral relativism, rationalism, and adversariness, were frequently mentioned as antithetical to ethical sensitivity and moral discourse. Also depicted as a resistant is the emphasis practitioners place on monetary gain. Law school subgroups were portrayed as power bases that curtail reform that effects hierarchical boundaries, such as faculty authority over students.

Attention to restraining forces does not imply that change is one-dimensional or that strong driving forces supporting innovation are non-existent. Indeed, our research found that faculty and students increasingly recognize the legitimacy of legal ethics instruction. Particularly, the growing concern for the ethics of the legal distribution system was depicted as a positive reform influence. The current social and cultural interest in moral values, the American Bar Association mandate to teach legal ethics, and the growing litigation of lawyers' ethical responsibilities will enhance support within the university community. The widespread teaching of legal ethics, incremental qualitative and quantitative improvement in teaching materials, and increased active involvement by respected scholars also will promote interest in change.

Legal education authorities and experts questioned for this study clearly point to the need for curricular change. Nonetheless, restraining

influences to innovation are widespread, interrelated, powerful, and may impede needed change.