

1991

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Repository Citation

Moliterno, James E., "An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere" (1991). *Faculty Publications*. 1011.
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AN ANALYSIS OF ETHICS TEACHING IN LAW SCHOOLS: REPLACING LOST BENEFITS OF THE APPRENTICE SYSTEM IN THE ACADEMIC ATMOSPHERE

James E. Moliterno*

INTRODUCTION

In the too recent past, ethics-legal profession¹ teaching was not merely a weakness in legal education but a farce. As recently as 1966, one prominent law school's offering (or non-offering as it turned out) consisted of three, one-hour lecture meetings for which neither credit nor grade were given; as it turned out, even the lectures were never actually given.² At about the same time, a student of another prominent law school reports that "chanting the canons" was a regular feature of her one credit hour ethics class. Things are much better now: no shortage of material on the subject exists, whether viewed from the perspective of volume or variety;³ every accredited school must require some course of study in the field;⁴ and teachers of the subject are more experienced.⁵ Even with these improved conditions, however, student and media reports continue

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1. I will use this term throughout because my list of topics that ought to be covered in the field includes not only those with an exclusive relationship to the legal profession, but also broader ethical principles that relate to the profession. Courses taught in the popular, single-semester, freestanding format have primarily been three: "legal ethics" (thought to exclude treatment of some non ethics legal topics such as malpractice and thought by some to connote an sense of moralizing, also referred to regularly as an oxymoron); "legal profession" (thought to be a dodge of broader ethics issues, limiting talk of ethics to the grand traditions of the profession and its history); and "professional responsibility" (connoting to some an excessive reliance on study of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) or the MODEL RULES OF PROFESSIONAL CONDUCT (1989)).

2. Lawrence A. Dubin, *Professionalism Among Lawyers: The Law School's Role*, 68 MICH. B.J. 850, 851 (1989).

3. The books are many. A few of the more prominent and varied are GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY* (1981); ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981); GEOFFREY C. HAZARD & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* (1985); ANDREW KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (3rd ed. 1989); THOMAS L. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* (1977); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986).

4. A.B.A., *STANDARDS FOR THE APPROVAL OF LAW SCHOOLS* § 302(a)(iv) (1987).

5. Stewart Goldberg, *1977 National Survey of Current Methods of Teaching Professional Responsibility in American Law Schools*, in NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY xxxviii - xli (Stewart Goldberg ed. 1977).

to be more than highly unfavorable of legal education's treatment of ethics-legal profession matters.⁶ By and large, the attacks in these reports are well-founded, and although it may be that the profession is itself a moral teacher,⁷ whatever hope that the profession's morals and moral standing will improve seems to be placed at the door of legal education.⁸ Remarkably, over one hundred years after university legal education displaced the apprentice system, legal education continues to struggle with the definition of its role in socializing students into the profession.⁹

This article is meant to accomplish the following goals with as little hand-wringing¹⁰ as possible: first, to briefly examine from where we come in terms of educating new lawyers about the ethical principles that are brought to bear on their work; second, to describe and categorize the goals to be served by ethics-legal profession teaching and the subtopics within the general topic of ethics-legal profession; third, to analyze which goals might be met and which subtopics might most profitably be taught by which teaching methodologies; and fourth, to analyze the formats for programmatic legal education for their accommodation of the combination of those methodolo-

6. A few such comments follow: "[I]t is a standard bit of student conventional wisdom that professional ethics classes are a joke. For many people, at best it's a blowoff course, one that can be skipped often and without guilt." Rosemary C. Harold, *Dilemmas: Ethics are Lawyers' Biggest Concern — So Why Isn't There Any Rational Way to Teach Them in Law School?*, STUDENT LAWYER, Dec. 1989, at 9; "[E]ach fall [the Harvard Law School] takes five hundred of our brightest, most idealistic young people and in three years transforms them into Wall Street moneygrubbers." Calvin Trillin, *A Reporter at Large: Harvard Law School*, THE NEW YORKER, March 26, 1984, at 53, 67; but see David F. Cavers, *Signs of Progress: Legal Education*, 1982, 33 J. LEGAL EDUC. 33, 39 (1983) (describing an informal survey in 1980 showing that ratings by students of ethics-legal profession courses were on par with ratings of other courses).

7. Though perhaps not a very good one. Thomas L. Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 219 (1986) (arguing that young lawyers are "exploited by amoral if not corrupt institution") (citing JAMES B. STEWART, *THE PARTNERS* (1983)). Perhaps the biggest problem plaguing lawyer ethics, says one commentator, is the bar's failure to self-police. Hon. Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 251 (1975).

8. "The statement is frequently made that legal education as administered in the law schools is deficient in the teaching of ethics." ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 155 (1953). Even though academicians say moral reasoning and ethics of students' cannot be enhanced, law schools must do it because no other institution is available to do this job. Clark, *supra* note 7, at 253.

9. "If the law is to remain . . . a profession, some means must be provided for instilling into [the students] that sense of obligation and responsibility which is the essence of a profession." Sidney P. Simpson, *The Function of the University Law School*, 49 HARV. L. REV. 1068, 1070 (1936).

10. There is far more hand-wringing than constructive solution offering in the literature. That seems natural and perhaps even justifiable to a point. The hand-wringing is often what gets the problem solvers solving.

gies most likely to be efficacious for the teaching of the full field.¹¹ Ultimately, the article's goal is (1) to provide an analytical framework within which teachers of ethics-legal profession can be true to the fundamental charge to all teachers — "one's methods shall be true to one's purposes"¹² — and, (2) to suggest a programmatic model for teaching the field. Little else that law faculty do could be more important, for "[a]rguments about legal ethics courses are really a battle for the soul of the legal profession of the future."¹³

I. A VERY BRIEF HISTORY OF ETHICS TEACHING IN LEGAL EDUCATION

Before the Langdellian revolution that ultimately ensured the supremacy of the law school as the generator of the bar population, new lawyers were socialized into the mores of the profession by the apprentice system.¹⁴

In the late nineteenth and early twentieth centuries, contemporary forms of legal education, including the dominant Harvard method, began competing with the traditional law-office apprenticeship.¹⁵ The Harvard method carried three ethical implications:¹⁶

- 1) Law was considered a science which was learned so that lawyers could maintain the concept of order. Law was both the instrument and the expression of that order. The fundamental concepts of right and wrong were not taught; law schools focused upon the more complex rules of moral order protected by the law.
- 2) Teaching methods focused upon the cognitive and analytical study of the law and concentrated on the larger moral universe rather than the individual. They considered the morality of practice learned in the law office to be unworthy subject matter for university law study.

11. In the interests of bias disclosure, I should mention that I currently direct a program of comprehensive skills development that is responsible for the teaching of the ethics-legal profession field, although I have also taught the "freestanding" course called variously "legal profession" or "professional responsibility" at three schools and have taught as both a live-client and simulation oriented clinician.

12. Donald T. Weckstein, *Boulder II: Why and How?*, 41 U. COLO. L. REV. 304, reprinted in *EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER* 12, 20 (Donald T. Weckstein ed. 1970) (quoting Alexander Meikeljohn, *They Were Teachers*).

13. Erwin Chemerinsky, *Training the Ethical Lawyer: A Rejoinder to Schneyer*, 1985 AM. B. FOUND. RES. J. 959, 969.

14. Clark, *supra* note 7; See also WILLIAM JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 42-57 (1978).

15. For a more complete, but still brief, history (upon which some of this very brief history is based), see MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 5-21 (1980).

16. *Id.* at 5-6.

3) The cognitive dimension of law study had its own moral implications. Holmes described education as a form of initiation that disciplines the imagination, the sensibilities and the mind.¹⁷ Legal education's function was to teach a morality of rigor based on its intellectual and cognitive demands.¹⁸

These implications represented a dramatic change in the moral focus of the dominant form of lawyer preparation from the ethics of the lawyer's day-to-day work conveyed by the apprentice system to the tough-minded ethic of rigor upon which the Harvard method was based. The Harvard method of teaching gained widespread acceptance in the early twentieth century.

Educational changes roughly coincided in time with early moves by lawyers to form professional organizations and those organizations' efforts to control a profession coping with dramatic economic and social change.¹⁹ Indeed, some have said that the expansion of law schools as a replacement of the apprentice system was "directly related" to the economic changes in the country.²⁰ At that time, there were many complaints against the bar. Many bar associations reacted to the complaints by adopting codes and canons of ethics.²¹ The early canons of ethics covered maxims of prudence or convention, manners, tactical advice, fraternalism, idealism, as well as norms of behavior.

Law schools responded by offering lectures on the subjects covered by the new codes. By 1915, fifty-seven of the eighty-one law schools offered a course on legal ethics. These lectures were given by judges or prominent attorneys and used the codes, Judge Sharswood's book²² or the reports of the Committee on Professional

17. OLIVER W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 35, 36 (1920); OLIVER W. HOLMES, *The Profession of Law*, in COLLECTED LEGAL PAPERS, *supra*, 29, 32.

18. See WILLIAM FRANKENA, *ETHICS* 62-70 (1973).

19. JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 56-59 (1978).

20. ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850's TO THE 1980's* 23 (1983).

21. In 1887, the Alabama Bar Association adopted a Code of Ethics largely drawn from George Sharswood's lectures and David Hoffman's "Fifty Resolutions in Regard to Professional Deportment." HENRY S. DRINKER, *LEGAL ETHICS* 23 (1953); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (1869); DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 752-75 (1836).

22. SHARSWOOD, *supra* note 21.

Ethics.²³ These lectures were often optional²⁴ and their importance was often down-played by the law schools.²⁵

Harvard's reaction was to post the ABA canons in the school's main hallway and to distribute copies to the students. Harvard required no special legal ethics course on the theory that ethics were learned as an incidental matter in all courses.²⁶

In 1917, George P. Costigan, Jr. published the first modern casebook on ethics. It addressed protocol, standards of conduct, discipline, and ethical guidelines. A substantial part of the book was devoted to moral problems presented by concepts such as client confidentiality and the limits of advocacy.²⁷

By the late 1920s, the assumption that commonly-held moral values existed in society had broken down and Legal Realism began to emerge.²⁸ To the realists, law served to implement public policy and protect the democratic process. The function of law schools, in their view, was to teach the consequences of legal actions and to impart high ethical standards by which to assess the effect of law in all areas.²⁹ The realists believed that true ethical inquiry should focus on the defects and impact of the law, and that social policy should pervade all law school courses, not be contained within or limited to a separate lecture on ethics. They were more concerned

23. Jesse H. Bond, *Present Instruction in Professional Ethics in Law Schools*, 4 AM. L. SCH. REV. 40, 44 (1915).

24. The American Bar Association did not make such instruction mandatory until 1974. To be accredited, law schools must

require for all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure, and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and the bar in such instruction.

A.B.A., *supra* note 4, at 302(a)(iv) (1987).

25. In 1927, the ABA Committee on Professional Ethics and Grievances noted that, while most schools had a course on ethics, attendance was low and "the subject of professional ethics [did] not receive a sufficient place in the lawyer's scholastic education." Henry W. Edgerton et al., *Report of the Special Committee on the Teaching of Professional Ethics in Law Schools*, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING 158 (1928).

26. Bond, *supra* note 23, at 43. This may have been the beginning of the "pervasive method." See *infra* notes 189-99 and accompanying text.

27. GEORGE P. COSTIGAN, JR., CASES ON LEGAL ETHICS 82-101, 368-473 (1917).

28. See G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972), and Rand E. Rosenblatt, Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 (1970).

29. That is, the political, economic and social consequences of legal rules and procedures. Karl Llewellyn, *On What is Wrong With So-Called Legal Education*, 35 COLO. L. REV. 651 (1935).

with the attorney as a policy maker than the attorney as client-server.

Jerome Frank was more interested in the lawyer's role as a guardian of justice than as a policy maker.³⁰ His concern with the relationship between client, attorney, and court system led him to suggest the practice of law by students in university-related clinics.³¹ Although early clinics existed,³² the idea made little headway until the 1960's. Thirty-four years before Frank's classic article, *Why Not a Clinical Lawyer School?*,³³ Dean Ames began an argument for the Harvard system as follows:

One of my colleagues has said that if a lawyer's office were conducted purely in the interest of the student, and if, by some magician's power, the lawyer could command an unfailing supply of clients with all sorts of cases, and could so order the coming of these clients as one would arrange the topics of a scientific law-book, we should have the law-student's paradise.³⁴

Although Dean Ames undoubtedly had the apprentice system and not a clinical law school in mind, his words clarify the contrast between the Harvard method and the actual law office-based clinical approach to legal education, and implicitly mark the difficulties in teaching the experiential and substantive law based ethics-legal profession field by the exclusive use of either method.

In 1932, Elliot Cheatham described an approach to teaching ethics in which the bar and the bench were studied as institutions responsible for the administration of justice. Students were to be introduced to the bar and its capacity to obstruct or facilitate desirable social change.³⁵

The realists sought to replace ethics with professional ethics designed to inculcate values and a conception of "the law as a public profession charged with inescapable social responsibilities."³⁶ Sidney Simpson argued that teaching the traditions of the bar was inad-

30. KELLY, *supra* note 15, at 11.

31. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933). See also George K. Gardner, *Why Not a Clinical Lawyer-School? — Some Reflections*, 82 U. PA. L. REV. 785 (1934); Ralph F. Fuchs, *The Educational Value of a Legal Clinic — Some Doubts and Queries*, 8 AM. L. SCH. REV. 857 (1937); and Nellie MacNamara, *Teaching Legal Ethics by the Clinical Method*, 8 AM. L. SCH. REV. 241 (1935).

32. McNamara, *supra* note 31.

33. Frank, *supra* note 31.

34. Dean Ames, *The Vocation of the Law Professor*, 48 U. PA. L. REV. 129, 140 (1900).

35. Elliott Cheatham, *What the Law Schools Can Do to Raise the Standards of the Legal Profession*, in HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTIETH ANNUAL MEETING 32, 37 (1932).

36. Simpson, *supra* note 9, at 1072.

equate, perhaps even harmful, because these traditions were generally unethical.³⁷ Implicitly, he argued that a modern apprentice system would be a poor moral teacher. Describing post-Harvard method bar practice, he was correct; perhaps not so with reference to earlier, apprentice system dominated times. For example, among David Hoffman's *Fifty Resolutions* (published in 1834) are these three:

"I will never plead the Statute of Limitations, when based on the mere efflux of time; for if my client is conscious he owes the debt; and has no other defence than the legal bar, he shall never make me a partner in his knavery";³⁸

"I will never plead, or otherwise avail of the bar of *Infancy*, against an honest demand";³⁹ and

"no . . . ignorance or folly [of my professional brethren] shall induce me to take any advantage"⁴⁰

To the extent that Hoffman's resolutions represent a statement of the ethics of his time,⁴¹ bar traditions had greatly changed by the time of Simpson's writing to reflect a more adversarial, client (mostly business client) controlled ethic.

Realist views had their first important impact on legal ethics teaching in the 1950s. The Association of American Law Schools (AALS) and the Council of the Section of Legal Education of the ABA began to explore solutions to the problem of ethics-legal profession teaching's low status. They asked a question with realist themes: "how important [are] lawyers and how much more [could] they contribute to the national life if they possessed a greater awareness of the public responsibilities that attach to their positions as lawyers?"⁴² An AALS committee sponsored a conference at Boulder, Colorado in 1956 (Boulder I) to discuss the education of law students in their public responsibilities as lawyers.

Although the attendees did not agree on a list of values central to the concept of public responsibility, they did share common views of legal education's problems in teaching those central values: chiefly the "ethically sterilizing" effect of appellate case-method study (implicitly a recognition that the Harvard method was at best neutral in

37. *Id.* at 1070-71.

38. DAVID HOFFMAN, *Fifty Resolutions in Regard to Professional Deportment, Resolution XII*, in A COURSE OF LEGAL STUDY 754 (1836).

39. *Id.*

40. *Id.* at 752.

41. Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822-33*, 32 J. LEGAL EDUC. 127 (1982).

42. Robert E. Mathews, *Forward to JULIUS STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY* 3 (1959).

its effect on students' moral development) and the separation of law and technical competence from ethics and morals.⁴³

Conference participants suggested everything from altering admissions criteria, (a theme that had an impact in the first stages of change from the apprentice system to university legal education),⁴⁴ to enhancing practitioner involvement to ameliorate problems. Many conferees strongly supported the pervasive method, but others supported concentrated ethics courses.⁴⁵ Ultimately, the conference encouraged experimentation in developing more effective means to improve awareness of lawyers' public responsibilities.⁴⁶

After the Boulder conference, the AALS committee took another survey of ethics teaching. Sixty-four percent of the schools replying indicated that they offered a specific course on ethics, usually a one credit, ungraded or pass-fail course required of seniors. Only thirty-six courses were identified as being pervasive in that the instructors introduced ethical issues into their various classes. The subject matter taught in the ethics courses included: the Canons of Professional Ethics; the nature of the profession; law practice matters; the lawyer's duties of competence, good faith, honesty, and integrity; client relationships; court conduct; and unauthorized practice.⁴⁷

In 1958, The Joint Conference on Professional Responsibility of the ABA and AALS issued a report that articulated the philosophical premises and reasoning behind the Canons of Professional Ethics. It stressed the public role of the lawyer as advocate and counselor, justification of the adversarial system, and the lawyer's ultimate role as a protector of the fundamental processes of government and self-government upon which our society depends.⁴⁸ This report may have provided the consensus about the values central to professional responsibility that was lacking among Boulder I participants. After this report, the emphasis shifted to the problem of how to teach professional responsibility, and away from a theoretical concern with the nature of professional responsibility. At a second

43. STONE, *supra* note 42, at 12-13, 25, 77-84.

44. JOHNSON, *supra* note 14.

45. STONE, *supra* note 42, at 245-62. Later in this article, I refer to these concentrated courses as "freestanding" ethics-legal profession courses.

46. STONE, *supra* note 42, at 275-80.

47. Caleb Foote et al., *Report of the Committee on Education for Professional Responsibility*, in 1958 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING 169, 172.

48. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). For a critique of this document, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 61-91.

Boulder conference held in 1968 (Boulder II), participants premised discussions about pedagogy on the proposition that a lawyer's professional responsibility embraces each of the duties proposed by various Boulder I conferees as *the* dominant duty: a duty to client, to society, to the improvement of the substantive law, and to procedural reform.⁴⁹

Contemporaneously with Boulder II, the role of clinical experience in the teaching of ethics emerged. At Boulder II, participants agreed that legal clinics were useful for teaching all aspects of professional responsibility. The near-exclusive focus of legal clinics at this time was on serving the legal needs of the poor and on providing the student with a perspective from which to view the lawyer's duties to the courts, and the public. Clinical programs were also meant to expose students to the adversary system with the expectation that it would be seen as a flawed system for achieving justice.⁵⁰

The clinical movement could not have progressed without the Council for Legal Education in Professional Responsibility (CLEPR), a foundation committed to funding clinical programs and making legal education more socially responsive.⁵¹ Clinicians and others criticized the law school classroom as a dehumanizing, value-destructive means of creating a competitive, hostile environment likely to produce amoral or immoral graduates to take their places at the adversary system's controls.⁵² Various suggestions were made including the use of cooperative learning, more positive role modeling,⁵³ and more extensive clinical training.⁵⁴ The clinical movement

49. Weckstein, *supra* note 12, at 15-16.

50. See William V. Rowe, *Legal Clinics and Better Trained Lawyers — A Necessity*, 11 ILL. L. REV. 591 (1917); John S. Bradway, *The Legal Aid Clinic as an Educational Device*, 7 AM. L. SCH. REV. 1153 (1934); John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1934); Frank, *supra* note 31; Silas A. Harris, *The Educational Value of a Legal Aid Clinic — A Reply*, 8 AM. L. SCH. REV. 860 (1937); and William Piel, Jr., *The Student Viewpoint Towards Clinic Work*, 8 AM. L. SCH. REV. 228 (1935). See also Robert E. Stone, *Law Students and Legislation*, 7 AM. L. SCH. REV. 1138 (1934); but see the skepticism expressed in MacNamara, *supra* note 31.

51. See William Pincus, *Council on Legal Education for Professional Responsibility, Past, Present and Potential Contributions*, in EDUCATION IN THE PROFESSIONAL RESPONSIBILITY OF THE LAWYER, *supra* note 12, at 327-32; Lester Brickman, *CLEPR and Clinical Education; a Review and Analysis*, CLINICAL EDUCATION FOR THE LAW STUDENT 56 (Council on Legal Education for Professional Responsibility (CLEPR) ed., 1973); William Pincus, *Legal Education in a Service Setting*, in CLINICAL EDUCATION FOR THE LAW STUDENT, *supra*, at 27. CLEPR, in turn, made the clinic an economically feasible addition to the law curriculum. Pincus, *Legal Education in a Service Setting*, *supra*, at 30-31, 35-39.

52. See Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 392-98 (1971).

53. See *id.* at 417.

54. See Andrew S. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248, 271, 284-85 (1975) [hereinafter Watson,

provided opportunities for students to experience the ethics of lawyering from within the role of lawyer. The clinical education movement has flourished, but costs associated with live client, in-house clinics have limited their availability to students.⁵⁵

At Boulder II, participants discussed the various kinds of legal profession courses being taught in American law schools. Many members of the Conference believed that such courses were best taught by the problem method. Although they noted some disadvantages, the benefits they perceived included: "coverage of subject matter which has not been adjudicated; easier identification with the lawyer; relief from case analysis in the third year; inductive research; the stimulation of imagination and comparison; and ease of combining this method with outside reading."⁵⁶

The problem method of teaching professional ethics involves the presentation of a series of factual situations in which a lawyer faces a decision concerning his or her own behavior as a lawyer or as a citizen. The values between which the hypothetical lawyer must choose require a choice that is based upon an ethical consideration.⁵⁷ The idea behind the problem method is that students face situations, look to the guidelines for action the profession offers or fails to offer, and then decide for themselves what the appropriate solution should be without the inhibiting effect that examination of a case decision can have.⁵⁸ Evidently, legal educators agreed with the participants of Boulder II because, "There is now a general consensus that legal ethics is best taught by using problems and dilemmas that arise in legal practice."⁵⁹

II. GUIDING PRINCIPLES AND GOALS OF ETHICS-LEGAL PROFESSION TEACHING⁶⁰

Armed with some background on the history of ethics teaching in law schools, it may be possible to identify elements of the field being

Lawyers]; Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968) [hereinafter Watson, *Quest*].

55. See generally, ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION ON CLINICAL LEGAL EDUCATION, FINAL REPORT OF THE COMMITTEE ON THE FUTURE OF THE IN-HOUSE CLINIC, (1990) [hereinafter FINAL REPORT].

56. Samuel D. Thurman, *The Legal Profession Course: An Evaluation*, 41 U. COLO. L. REV. 385, 389 (1969).

57. Robert E. Mathews, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION (1968).

58. ANDREW KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY at xxxi (1984).

59. James R. Elkins, *The Pedagogy of Ethics*, 10 J. LEGAL PROF. 37, 46 (1985).

60. For two contrasting lists of the purposes served, see Erwin Chemerinsky, *Pedagogy Without Purpose: An Essay on Professional Responsibility Courses and Casebooks*, 1985 AM. B. FOUND. RES. J. 189 (advocating such purposes as encouraging students to think

taught with the goal of matching those elements with efficacious teaching methodologies and ultimately determining programmatic formats that will best accommodate the mix of methodologies necessary to teach the entire ethics-legal profession field.

To adequately verify and examine the goals that the teaching of ethics-legal profession should serve, or the elements of the field itself, it is necessary to think of such teaching as the teaching of a field rather than as the teaching of a course; the latter sort of thinking is too confining to allow for full exploration of the range of goals to be served. Adopting such a broad approach should not be particularly difficult in this field because the organized thought about what is taught in the field and how it should be taught is not particularly well-developed. Teachers of the field who teach almost exclusively from the codes and cases and those who teach almost none of them can easily be found.⁶¹ The methods routinely used to teach the field, from pervasion to lecture to story-telling to problem method to use of role sensitive activities, vary more widely than those routinely employed to teach other substantive law fields. Further, a fairly large part of what is developed relates to the use of the pervasive method, which is approached not as a single course but as the sum of the efforts of a large number of faculty teaching separate, otherwise unrelated courses.⁶² Nevertheless, the dominant organizational pattern for the teaching of ethics-legal profession today is the single-semester, free-standing classroom course on the subject.⁶³ A myopic view of the organizational pattern for teaching the field will lead to a similarly limited view of its goals and the extent to which they can be achieved.

As a starting point, teaching of ethics-legal profession shares a number of goals with the teaching of any other law field; teaching analytical thinking skills, constructing an analytical framework for the examination of problems that arise in the field, conveying a block of substantive law, and providing an academic atmosphere for critique of the current state of knowledge in the field are all goals of the ethics-legal profession field. In these respects, ethics-legal profession teaching is no different from torts or contracts teaching; the

critically about the profession and the role of the lawyer, preparing students for the ethical issues they are likely to confront in practice (codes plus), encouraging students to think about methods of regulating the delivery of legal services and the practice); Elkins, *supra* note 59, at 37.

61. Elkins, *supra* note 59, at 39-40. See also *infra* note 82.

62. For more on the pervasive method, see *infra* notes 189-99 and accompanying text.

63. Goldberg, *supra* note 5, at xviii-xxxiii. For more on its strengths and failings, see *infra* notes 185-92 and accompanying text.

balance among the four common goals would shift toward the first two goals if the teaching is offered in the first year and toward the second two goals if the teaching is in the second or third year. Clearly, though, there are goals beyond these common ones that are unique to the ethics-legal profession field. Further, what seems clear about the four seemingly common goals is in fact complicated by the implications of the examination of the role of lawyer that is unique to the ethics-legal profession field. This examination of the lawyer's role has a telling effect on the nature of the substance of the ethics-legal profession field, and in turn, on the goals of its teaching and the optimum methods for achieving those goals. The role examination adds a lawyer-experiential element to much of the field's substance, and this element is better taught outside the classroom.⁶⁴

In whatever instructional format, ethics-legal profession teaching serves an arguably higher and unquestionably more elusive goal; this goal has been characterized as the teaching of "character," "integrity," "virtue," and "values."⁶⁵ This goal, however characterized, is not uniformly regarded as being achievable. Indeed, whether the law school experience generally, and course work in ethics specifically, can positively affect students' moral development *at all* has been the subject of considerable debate.⁶⁶ To the extent that anything summarized this briefly can be fair, the positions seem to be these: those arguing that values cannot be taught by the law school posit that one's value system is established beyond effective influence by the time one arrives at the age of law school attendance

64. See *infra* sections III and IV.

65. Terrance Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 169 (1984) (characterizing goal as teaching of "character"); John V. Tunney, *Is the Bar Meeting Its Ethical Responsibilities?*, 12 SAN DIEGO L. REV. 245, 247 (1975) (characterizing goal as teaching of "integrity"); Elkins, *supra* note 59, at 37-38 (characterizing goal as teaching of "virtue"); Donald C. Mulcahey, *A Plea for Moral Education in Law Schools*, 2 J. L. RELIGION 101, 102 (1984) (characterizing goal as teaching of "values"). There are obvious differences among the various characterizations, but all have in common that they name a teaching goal of a higher order than the mere conveyance of knowledge about a set of rules, the violation of which may produce penalty. They identify a human character trait of higher order than mere obedience to authority.

66. I leave aside the related question of whether the law school *should* attempt to teach values, see, e.g., Weckstein, *supra* note 12, at 312 (quoting Bob Matthews, *The Lawyer as Community Leader*, in CONFERENCE ON THE PROFESSION OF LAW AND LEGAL EDUCATION 29, 37 (1952)), and the argument that the overall law school experience is a negative teacher of ethics. See, e.g., Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444 (1970); Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970). "Only through training do most lawyers develop an 'indifference to the wide variety of ends and consequences that in other contexts would be of undeniable moral significance.'" RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS 44 (1989) (quoting Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RTS. 1, 5 (1975)).

and rely on empirical evidence that indicates that neither the standard first year law experience nor the single semester, free-standing legal profession course has a measurable effect on students' values.⁶⁷ Those who argue that ethics and virtue can be taught to law students argue from an Aristotelian view, influenced by Kohlberg,⁶⁸ that virtue can be learned by adults primarily by the doing of virtuous, role-sensitive acts. They argue that a student begins to develop a role-sensitive morality on the first day of the law school experience and not before.⁶⁹ Certainly to the extent that the would-be lawyer begins to develop "attitudes and insights" into the role of lawyer on the first day of law school,⁷⁰ the law school experience will affect, for good or ill, the students' level of virtue.⁷¹

67. This measurement is accomplished by various paper and pencil tests. See e.g., LEIBERMAN, *supra* note 19, at 226; Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partnership*, 23 VILL. L. REV. 957, 959 (1978); Robert M. Ackerman, *Law Schools and Professional Responsibility: A Task for All Seasons*, 88 DICK. L. REV. 202, 205 (1983); Jerome E. Carlin, *What Law Schools Can Do About Professional Responsibility*, 4 CONN. L. REV. 459 (1971).

Law schools are not, to be sure, well positioned to play a decisive role in forming their students' characters. Students come to law school as adults. The deplorable faculty-student ratio at all law schools largely precludes a level of personal contact which might permit faculty members to become an important personal influence in the lives of their students.

Sandalow, *supra* note 65, at 169. See also Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility — Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 379-81 (1988); Wagner P. Thielens, Jr., *The Influence of the Law School Experience on the Professional Ethics of Law Students*, 21 J. LEGAL EDUC. 587, 591-98 (1969); Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 326-45 (1981); Shaffer and Redmount seem to say that legal education neither nurtures nor impedes students' moral development. SHAFFER & REDMOUNT, *supra* note 3.

68. LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981). Kohlberg argues that people develop sequentially through a series of stages of moral reasoning; that the development continues into adulthood; and that only a small percentage of people ever reach the final stage.

69. Implicit in every article arguing for a better way of teaching ethics-legal profession is the position that it can be taught. See, e.g., Elkins, *supra* note 59, at 38; KELLY, *supra* note 15, at 5-21; Watson, *Lawyers*, *supra* note 54; Watson, *Quest*, *supra* note 54; Sandalow, *supra* note 65; Thomas L. Shaffer, *Moral Implications and Effects of Legal Education*, 34 J. LEGAL EDUC. 190 (1984); David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451 (1981) [hereinafter Luban, *Calming*]; David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636 (1983) [hereinafter Luban, *Epistemology*]; Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility* 16 J. LEGAL EDUC. 1 (1963); Mulcahey, *supra* note 65. For a full explication of this position, see Willging & Dunn, *supra* note 67.

70. James P. White, *Professionalism and the Law School*, 19 CUMB. L. REV. 309, 314 (1989).

71. Indeed, Watson suggests that the role sensitive formation is suspended until entry to law school. See Watson, *Quest*, *supra* note 54, at 105-06; Watson, *Lawyers*, *supra* note 54.

With one important controversial point excepted, (whether an individual retains room for growth in moral reasoning at age twenty-one or so), the positions and evidence generated by the two sides are not incompatible with each other. Both positions are consistent with the evidence showing that current methods of teaching the ethics-legal profession field do not have a measurably positive effect on students' moral development. Obviously, those who argue that virtue cannot be taught are not surprised by such evidence, but even those who argue otherwise could hardly be surprised. Nearly everyone who argues that virtue can be taught bases the argument on the Aristotelian view that virtue is learned by the doing of virtuous role-sensitive acts; someone making the Aristotelian based argument would surely expect that both the standard first year of law school and the standard free-standing ethics-legal profession course, neither of which allow the students to *do* much of anything save read and think about legal issues and doctrine,⁷² would be utter failures if their goal were to teach virtue. Even the apparent failure of short term clinical work to positively affect moral development⁷³ is explainable to the advocate of the Aristotelian view because usually such students lack the opportunity to see the long term results of their conduct on relationships, the quality of which form the basis for a system of ethics.⁷⁴ It may well be that virtue can be taught to law students, but not by the methods that have been extensively used thus far. The moral development value of role sensitive activities in clinics has been postulated and described in anecdotal ways, but live client clinics remain an expensive way to teach, to which the vast majority of students are not exposed,⁷⁵ and questions of the format's efficacy for teaching ethics remain.⁷⁶ As such, it would sur-

72. Neither of these activities bear a close role-sensitive relationship to the *ethics* of lawyering except that the lawyer, to be ethical, must provide competent service, often requiring both reading and thinking about legal issues and principles.

73. Eugene L. Smith, *Some Sociological and Psychological Problems in Education for Professional Responsibility*, in *EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER*, *supra* note 12, at 295, 297-300.

74. Current statistics indicate that about 62% of in-house, live client clinics are partial year clinics (one quarter or one semester). *FINAL REPORT*, *supra* note 55, at 6.

75. Marjorie A. McDiarmid, *A Look at Professional Skills: Study Completed on In-House Clinics*, 21 *SYLLABUS* (ABA Section on Legal Educ. and Admissions to the Bar), Summer 1990, at 2. Professor McDiarmid reports that even among schools with clinical programs, approximately 70% of students cannot be accommodated. The student/teacher ratio is approximately 8.41 to 1.

76. Professor Robert Condlin has argued persuasively that a combination of in-house clinic attributes make it a less than ideal place for students to learn ethics-legal profession, among them the tension of the co-counsel relationship between faculty and student that drives the faculty supervisor toward dominating behavior and diminishes the opportunity for critique of practice. Robert Condlin, *Socrates' New Clothes: Substituting*

prise neither side of the argument that current methodologies are not likely to produce gains in moral reasoning for many students.⁷⁷

Even if one accepted the argument that virtue cannot be taught, the goal of teaching virtuous conduct would remain, though the focus of the virtue teaching goal would be changed from the teaching of virtue for virtue's sake to teaching of rules the violation of which is agreed to be nonvirtuous. At the very least, exposure to the rules the violation of which could produce punishment would serve to reduce the level of behavior that violates the organized bar's rules. To the limited extent that behavior that complies with these rules is virtuous behavior, some positive value would accrue.⁷⁸ The fact that only a small portion of the field would be covered by such an approach⁷⁹ would have its long-term detrimental implications, but some marginal reduction in unethical behavior could accrue from the general deterrence implicated by knowledge of the "rules," and a corresponding enhancement of virtuous behavior would be realized.

Additionally, even absent acceptance of the Aristotelian view, students can profitably be exposed to different modes of moral reasoning, providing an opportunity to examine different systems of thought regarding the process of distinguishing good from bad.⁸⁰ Few would question the proposition that one purpose of ethics-legal profession teaching should be the teaching of virtue to the extent possible or at least that one purpose of such teaching ought to be to reduce the frequency of unethical behavior.⁸¹ If virtue cannot be

Persuasion for Learning in Clinical Practice Instruction, 40 MD. L. REV. 223 (1981); Robert Condlin, 'Taste's Great, Less Filling': *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986); Robert Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604 (1983).

77. For more on the ethics teaching efficacy of role sensitive activities, see *infra* notes 154-79 and accompanying text.

78. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897); This approach to producing enhanced moral behavior comports with behaviorist theories. See e.g., B. F. SKINNER, ABOUT BEHAVIORISM 268-69 (1974); and ALBERT BANDURA & RICHARD H. WALTERS, SOCIAL LEARNING AND PERSONALITY DEVELOPMENT 168-200 (1963).

79. Professors Chemerinsky and Schneyer argued the question whether code based learning can make an effective ethics-legal profession course. See Chemerinsky, *supra* note 60; Chemerinsky, *supra* note 13; Ted Schneyer, *Professional Responsibility Casebooks and the New Positivism: A Reply to Professor Chemerinsky*, 1985 AM. B. FOUND. RES. J. 943; Ilmar Tammelo, *On the Lawyer's Search for Contact with the Philosopher*, 13 J. LEGAL EDUC. 441, 441-42 (1961).

80. See, e.g., Thomas H. Morawetz, *Lawyers and Conscience*, 21 CONN. L. REV. 383 (1989).

81. But see *supra* note 65 for references to those who say that legal education should remain "value neutral." In an interesting display of both candor and contemporaneous feelings of helplessness and hopefulness, Former Associate Justice Tom C. Clark of the

taught, the latter, limited goal may only be achievable to the extent that the published codes conform with general ethical principles.⁸²

Beyond the proposition that, if possible, virtue should be taught, and beyond a recognition that some goals of ethics-legal profession teaching are similar to those of any law field are the complications of those seemingly similar goals that arise because an examination of the lawyer's role is implicit in so much of the field's study. A significant portion of the substantive law of the ethics-legal profession field to be conveyed and of the analytical framework to be constructed differ from that of other law fields because they are experiential to the lawyer; that is, they are based on data generated from relationships to which lawyers are parties. The effect and operation of the substantive tort or contract law, for example, is experienced generally by members of the society governed by the legal rules under study; the lawyer experiences the effect and operation of law generally in a vicarious way through the direct encounters of the lawyer's clients with the law. Much of the substance of ethics-legal profession law, on the contrary, is tied inextricably to the relationships between lawyer and client, lawyer and lawyer, lawyer and law makers, lawyer and society. In other words, much of the ethics-legal profession law is formed by a relationship that the lawyer experiences, unlike other fields in which the lawyer experiences the law only vicariously. Although the law student can learn the substantive law of contracts quite well without entering into a contract, the student cannot appreciate the experiential aspects of the law that is formed by data from the lawyer's various relationships without experience in those relationships. Although a student would likely learn a great deal about the law of contracts by entering into one in a serious way or about the law of negligence by enduring the results of an automobile accident, it is merely the personalized motivation to learn contracts or torts or the perspective of an affected party that would provide the enhancement. In the case of ethics-legal profession learning, however, the relationship between lawyer and client, for example, actually forms the substance of the field.

Of course, there is an important relationship between learning any substantive law and using that law. Students often approach

United States Supreme Court has said that even though many academics say that they cannot teach virtue, they must, because no one else can either. Clark, *supra* note 7, at 252-53.

82. Some teachers appear content to teach the field from this perspective. They would assign readings almost exclusively from rule-oriented materials such as GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* (1989).

"skills" teachers to say things like, "I learned more about evidence (contracts) in the simulated exercise (by producing that writing assignment) than I did in the whole semester of the evidence (contracts) course." Such students are wrong partly because their comments take account only of the substantive law learning goal of the substantive law course, failing to consider the analytical skills probably acquired there; rather, because of the simulation or the writing assignment's perspective, they have realized the gain in knowledge that had largely occurred, though not necessarily that which has been credited, in the substantive law course. More importantly, however, such statements evidence the relative paucity of value toward the learning of the substantive law in either a wholly ungrounded skills exercise or a substantive course not closely followed by some application of the learning accomplished there. The connection between substantive law learning generally and skills learning is different in kind from that between ethics-legal profession issues and skills learning. The connection between substantive law and the practical exercise is the connection between knowledge and its use. That connection is an important one. The connection between ethics-legal profession knowledge and the role-sensitive activity is not only a connection between knowledge and its use, but also a connection between current knowledge and the generation of new knowledge.⁸³

Consider the respect in which the rules of ethics themselves (or more generally, the law of lawyering) are analogous to the rules governing a game. The game cannot be played without reference to the rules, but the performance by the players, while referenced to those rules, really "responds to a sense of quality that seems far removed from any set of rules."⁸⁴ In this respect, learning to play the game well (learning to lawyer ethically) is accomplished not so much by learning the game's rules, though learn them the players must, as by the activity of playing (experience with lawyering behavior). Learning the rules of the game can be separated from learning to play well in terms of teaching methodology. A player might well learn the text and basic meaning of the rules by reading and discussing them; but to learn the subtleties that define what it means to play well, the player must experience the play itself.

Not all of the substance of the ethics-legal profession field is lawyer-experiential; much of it differs little if at all from the substance

83. See *infra* notes 154-79 and accompanying text for more on the learning efficacy of role sensitive activities.

84. Elkins, *supra* note 59, at 41.

of other fields.⁸⁵ Discerning the difference between the two categories is not always simple, and in many cases what sounds like a single topic has experiential and non-experiential elements. A number of attributes converge to help identify the experiential elements of the field and, indeed, these attributes identify several subtypes of experiential elements.

1. All lawyer-experiential elements are based in one of the relationships in which lawyers are parties, such as lawyer-client, lawyer-justice system, lawyer-adverse lawyer, lawyer-witness, lawyer-juror, subordinate lawyer-supervisory lawyer, lawyer-society. Each of these relationships produces a set of norms for behavior that form lawyer-experiential substance in the field.

2. There is not much to say in a traditional "legal" way about some lawyer-experiential elements. For example, the general topic of fees has both experiential and non-experiential elements; the history and rules governing the propriety of contingent fee arrangements is largely non-experiential, while the limiting effect on lawyering activities that results from appropriate client decision-making based on cost for services rendered is experiential. Professor Wolfram, in his excellent treatise, devotes some sixty-eight pages to the subject of fees, none of which refer to the phenomenon of fees as service limiter.⁸⁶ There is a passing reference elsewhere to the question whether a lawyer may charge a fee for nonlegal advice⁸⁷ and some general treatment of the decision-making division of authority between lawyer and client,⁸⁸ but a treatise (or for that matter the caselaw and code on which it is based), it turns out, is not a likely source of information on many of the lawyer-experiential elements of the ethics-legal profession field.

3. In a related way, lawyer-experiential elements are treated in only the broadest generalities in the Code or Model Rules. Compare the specificity of the trial publicity rule⁸⁹ with the vague standards of the rule regarding client communication.⁹⁰ The client communication rule uses the word "reasonably" three times in two sentences. This is meant as no particular criticism of the rules; some things are simply harder (and perhaps inappropriate) to articulate in

85. I will distinguish between the two in this article by use of the terms "lawyer-experiential substance" and "non-lawyer-experiential substance."

86. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 495-563 (1986).

87. *Id.* at 158.

88. *Id.* at 154-58.

89. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.7 (1989).

90. *Id.*, Rule 1.4 (1989).

the form of specific, normative rules. Elements of lawyer-experiential substance in the ethics-legal profession field are such things.

4. All of the elements of lawyer-experiential substance have in common a relationship to a larger question that students and lawyers ask themselves: who am I as a lawyer and as a person? Professor Elkins' students have provided many well-put examples of their articulation of this question.⁹¹ Such elements are those more likely to be complied with because of the sanctions of conscience than of law.⁹²

These four attributes are helpful. Beneath them is a common element with teaching method implications: each attribute points to the reasons that the lawyer-experiential elements of the ethics-legal profession field are not profitably taught (at least beyond their preliminaries) in a classroom.⁹³ In this regard, the lawyer experiential elements may be seen as being of two types.

The first of these types is populated by ideas that are akin to the skills of lawyering that are usually taught in a separate course on interviewing, negotiating and counselling, or writing, or trial advocacy and so on. These skills themselves play into the ethics of lawyering in two ways: in some respects, they provide opportunities to see in operation specific, fairly well defined issues in the law of lawyering;⁹⁴ in other respects, the skills and their use are an integral part of less well defined but more fundamental aspects of ethics.⁹⁵ For example, lawyers who have "good bedside manner" (the ability to recognize that a client is in distress and make that person more comfortable without making unreasonable assurances) may have "the rarest and very likely the most valuable of all skills for lawyers"⁹⁶ This "skill" is itself an attribute that flows from a lawyer's ethical sensitivities.

91. Elkins, *supra* note 59, at 44-45; James R. Elkins, *Rites de Passage: Law Students "Telling Their Lives,"* 35 J. LEGAL EDUC. 27, 27-29 (1985); James R. Elkins, *The Quest for Meaning: Narrative Accounts of Legal Education,* 38 J. LEGAL EDUC. 577, 577 (1988).

92. "True civilization is measured by the extent of Obedience to the Unenforcable." DRINKER, *supra* note 21, at 2 (quoting Lord Moulton).

93. For more on the methodologies that are useful for teaching particular subtopics or for serving particular goals, see *infra* section III.

94. Students in an advocacy setting can apply the rules' standards to their activities, determining in context, for example, what authority must be disclosed to a tribunal in the course of advocacy activities.

95. For example, how do my skills of interviewing affect the relationship with my client? To what system of power division will my technique of interviewing lend itself? How does my use of cross-examination technique affect me as a person or the witness as a future participant in the social contract?

96. Shaffer, *supra* note 7, at 217. This skill is not easy to teach; indeed, Professor Shaffer "wish[es he] knew how to teach it." *Id.* at 218.

The second of these types is created by the relative absence of specific standards in the law of lawyering.⁹⁷ A number of issues in the field are governed by fairly specific standards, or at least standards that are relatively easy to develop in the classroom setting, but many of the general standards that make up the law of lawyering present a special opportunity for learning by doing. The data that provides meaning to these general standards is generated by lawyer conduct. Unlike the conduct of tort participants that gives meaning to the "reasonable person" standard, lawyer conduct (generated by lawyering mental processes and activities) is that which gives meaning to standards such as "the exercise of [the lawyer's] professional judgment . . . reasonably may be affected by [the lawyer's] own . . . interests"⁹⁸ or "knowingly use perjured testimony. . . ."⁹⁹ Although these elements can be classroom taught by using examination of case materials for the data, the issues that fit this subtopic should be characterized as lawyer-experiential. It is the lawyer's experience of what it means "to know" that a witness will lie or to feel the effect that personal interests may have on judgment that defines the legal standard and brings insight into the ethics of lawyering.¹⁰⁰

97. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 480 (1990); Robert H. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 274 (1976).

98. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1989).

99. *Id.*, DR 7-102(A)(4).

100. The following is a good, if not quite exhaustive, list of the topics typically included within the ethics-legal profession field. They could easily be articulated in other ways or some combined with others to make broader categories, (*see, e.g.*, Thurman, *supra* note 58, at 388) but for present purposes they will help illustrate the distinction between lawyer-experiential and non-lawyer-experiential substance in the field:

- Adversarial System (theory of the system is largely non-lawyer-experiential, emotions generated by the system in participants is experiential);
- Advertising and Solicitation (non-lawyer-experiential except for issues of coercion arising in the in-person solicitation context);
- Appearance of Impropriety (mostly experiential);
- Candor with the Court (mostly experiential);
- Candor with Opponents (mostly experiential);
- Client-Lawyer Relationship/Competence (experiential except for some contract and agency principles that transfer to the field without change);
- Confidentiality (trust aspects largely experiential, legal rules relating the evidentiary privilege to the duty of confidentiality largely non-lawyer-experiential);
- Conflicts of Interest (specific Code rules and disqualification law non-lawyer-experiential, otherwise experiential);
- Entry to the Bar/Unauthorized Practice (non-lawyer experiential);
- Fees (history and propriety of contingent fees, reasonableness of fee largely non-lawyer-experiential, lawyer activity affected by fee arrangement largely experiential);

Perhaps the distinction between lawyer-experiential and nonlawyer-experiential substance is no more than a distinction between material that would be more profitably learned through experiencing the application of very general standards of the law regulating the profession and material that can be classroom learned.¹⁰¹ Another aspect of the distinction, however, relates to something more obscure but no less a part of the substance of the ethics-legal profession field — the emotions and feelings generated in both the lawyer and those to whom the lawyer relates that produce the answer to the question, “who am I as a lawyer?” Further, the distinction implicates the differences between the skills of analysis and those of interpersonal relationships.¹⁰²

For example, clearly experiential are important elements of the ethics of group work. Certainly a part of what most would include in a description of the ethics of lawyering is the concept of individual and group responsibility for a client's affairs (sometimes involving supervisors and subordinates).¹⁰³ Yet little more than the legal questions implicated in a study of the *Pavelic* case and the general standards of model rules 5.1, 5.2, for example, are nonlawyer expe-

Fiduciary Duties (technical accounting rules non-lawyer-experiential, loyalty issues experiential);

Frivolous Claims (mostly experiential);

Judicial Conduct;

Lawyer as Mediator (mostly experiential);

Prosecutorial Responsibility (mostly experiential);

Nature of Discipline and Malpractice (mostly non-lawyer-experiential);

Pro Bono and Public Service (mostly experiential);

Supervisory Subordinate Relationships (mostly experiential);

Systems of Moral Thought (mostly experiential)

Treatment of Third Parties Witnesses, Jurors (mostly experiential);

Treatment of Adversaries (mostly experiential);

Trial Publicity (mostly non-lawyer-experiential);

Unpopular Clients (mostly experiential);

Withdrawal (includes many issues of each);

Zealous Representation and its Limits (largely experiential).

101. Whether these general standards, or even the positive standards governing some areas, are “law” is a question beyond the scope of this article. For a glimpse of this debate, see RONALD M. DWORKIN, *A MATTER OF PRINCIPLE* (1985), and H.L.A. HART, *THE CONCEPT OF LAW* (1972).

102. An interesting perspective on these distinctions may be found in Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 246-52 (1988).

103. Professor Shaffer, in particular, bemoans the failure of most law schools to provide the opportunities for students to engage in group work projects. Lawyers work with others, and a moral law school would train its students in this art. Shaffer, *supra* note 69.

riential.¹⁰⁴ Beyond lie remaining topics of consequence that are lawyer-experiential: the interpersonal-relational skills and ethics of the group work dynamic, and development of the very general standards of model rules 5.1 and 5.2 through the data generated by lawyers' working in subordinate and supervisory capacities. The very important ethics implications in the ways lawyers treat each other and share responsibilities to client, court, and society are not subject to significant classroom learning, but rather are learned by experiencing those relationships.

With ethics, unlike other substantive fields, much of the "substance" is the relationships of lawyers to clients, to adversaries, to courts, to the public. The rules of law themselves implicate lawyer conduct in these relationships. As such, an experiential approach is necessary to allow students to "learn," that is, to acquire mental pathways¹⁰⁵ for solving problems of everyday practice.

Ultimately, teaching in the ethics-legal profession field is directed at the furtherance of several goals: to facilitate the learning of both lawyer and non-lawyer-experiential substance, to teach analytical skills, to construct an analytical framework for the examination of problems that arise in the field, to provide an academic atmosphere for critique of the current state of knowledge in the field, to teach virtue, and to expose students to systems of moral thought. To some, these goals may all dissolve into an overriding goal of positively affecting the ethics of the law and its practice,¹⁰⁶ but to design effectively a program of instruction, the goals must be separated and analyzed to determine what methodologies will be most effective in achieving each goal.

III. EFFICACY AND ROLE OF VARIOUS TEACHING METHODS EMPLOYED TO ACHIEVE ETHICS-LEGAL PROFESSION TEACHING GOALS

Knowing what is being taught in the ethics-legal profession field is a good first step toward determining the best programmatic structure for teaching the field. The second step toward that end is an examination of available methodologies for their fit with the various topics and goals of teaching in the field.

104. *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S. Ct. 456 (1989) (holding that only persons who sign pleadings, and not law firms, may be liable for Rule 11 sanctions); MODEL RULES OF PROFESSIONAL CONDUCT, Rules 5.1, 5.2 (1989).

105. Anthony D'Amato, *The Decline and Fall of Law Teaching in an Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 466-67 (1987); MARVIN L. MINSKY, *THE SOCIETY OF MIND* 120-31 (1986).

106. Willging & Dunn, *supra* note 67, at 309.

Teaching in the field has not met with great success. In 1979, Pipkin reported that ethics-legal profession courses were perceived by students as "requiring less time, as substantially easier, as less well taught, and as a less valuable use of class time than their other coursework."¹⁰⁷ Willging and Dunn reported that both the standard first year of law school and the third year ethics course made little difference in moral development of students.¹⁰⁸ The dissatisfaction may be the result of nothing more complicated than a failure to match goals with methods in a systematic way. As demonstrated in section II above, a wide variety of goals is to be served by teaching in the field, probably a wider variety than in any other area of legal study. As such, a more concerted, or at least conscious, effort needs to be exerted toward matching particular goals with particular methodologies for teaching in the ethics-legal profession field to be as successful as teaching in other law fields.¹⁰⁹ In this section, I will examine the following methodologies¹¹⁰ for their fit with the goals of ethics-legal profession teaching identified in section II:

- A. lecture;
- B. problem-based discussion;
- C. case-opinion based discussion;
- D. example (including lawyer case studies¹¹¹ and faculty or supervisor role modeling); and
- E. role-sensitive representation activity (including both client and simulated client representation).

After examining each methodology, I will (in section IV) examine various programmatic structures for their accommodation of the useful methodologies in an attempt to identify a programmatic

107. Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 258.

108. Willging & Dunn, *supra* note 67.

109. For criticism of the effort being exerted, see Chemerinsky, *supra* note 60, at 191.

110. My list of methodologies are only different by categorization from Professor Keeton's general categorization of teaching methods, "exposition, demonstration, discussion, supervised simulation, and supervised practice." Robert Keeton, *Teaching and Testing For Competence in Law Schools*, 40 MD. L. REV. 203, 218 (1981); I have not included as a separate methodology a currently popular teaching tool, the videotape. Depending on the nature of the video, its use is really an attempt to enhance one or more of the lecture, problem discussion, or example methodologies. There are videotapes that are the expression of opinion on various issues by various experts (e.g., *Dilemmas in Legal Ethics*, ABA round table discussions that follow vignettes); there are others that are dramatizations of lawyer activities that pose certain problems. These are quite an effective enhancement of the problem based discussion method, but their use is not a separate method.

111. See, e.g., PHILIP HEYMANN & LANCE LEIBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* (1988); DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973); Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703, 712-23 (1988); Symposium, *Pedagogy of Narrative*, 40 J. LEGAL EDUC. 1, 1-171 (1990).

structure that will best serve the varied goals of teaching in the field identified in section II.

*A. Lecture*¹¹²

The lecture method of teaching in law schools generally may be making inroads into the previously case discussion dominated classroom, especially when the classroom is populated by other than first year students.¹¹³ This is understandable, though regrettable to some.¹¹⁴

There may have been a time when the lecture was an effective device for training students in analytical thinking.¹¹⁵ Today, unfortunately, the typical lecture is more aptly described as the "transfer of material from the teacher's notes to the students' notes without passing through the mind of either." Even so, the lecture method can be an efficient method for the delivery of large blocks of relatively uninspiring material to uninspirable listeners, particularly when synthesis of an unproductively long set of readings can be accomplished in the lecture. To the extent that it is used for this purpose (to convey, for example, a history of lawyering, or material regarding entry-to-the-bar rules), the method has a place in the field. Certainly to the extent that the "bad man" will comply with rules the violation of which risk punishment,¹¹⁶ a lecture that efficiently conveys such information has some value at least for its effect on the most cynical students. The lecture may also be an efficient way to acquaint students with a background understanding of the "philosophical arguments geared specifically to lawyers' ethical dilemmas."¹¹⁷

Despite its usefulness for some limited purposes, most would agree that "exhortation from the front of the classroom is not the way to foster" an understanding of the lawyer's personal responsibility for his or her actions.¹¹⁸ As such, there is limited use to lec-

112. It might be appropriate to equate the usual lecture with the giving of a reading assignment that will not be discussed in class; both accomplish nearly the same goals with about equal effectiveness.

113. Symposium, *supra* note 111.

114. D'Amato, *supra* note 105, at 464-65.

115. Shaffer, *supra* note 41, at 132-34. Interestingly, Hoffman, the father of American legal ethics according to Shaffer, may also have early on recognized the need for an experiential component to university legal education; he established what was apparently the first moot court and ran it in conjunction with his lecture series.

116. Holmes, *supra* note 78.

117. Luban, *Calming*, *supra* note 69, at 452; Morawetz, *supra* note 80.

118. Kleinberger, *supra* note 67, at 380.

tures that are mere sermons,¹¹⁹ except to the extent that teachers who effectively convey their own deep-felt concerns for ethics issues may further the value to be found in their service as positive role models.¹²⁰ Further, lectures are of little value when the teaching goal is to enhance analytical ability generally or to give insight into the modes of analysis that are particularly useful in the field under consideration.

B. Problem-based discussion

No doubt partly in response to the "enervating blend of cynicism and derision"¹²¹ with which many students approach the case or lecture-based classroom experience of ethics-legal profession study, "There is now a general consensus that legal ethics is best taught by using problems and dilemmas that arise in legal practice."¹²² Certainly that consensus is reflected in the domination in the market of problem-based texts in the field.¹²³

Problem-based teaching is an effective way of highlighting the types of dilemmas that face lawyers in practice; by orienting the instruction toward the practice, student interest can be heightened. Given the disdain with which teaching in the field has been met, anything that heightens interest must be regarded as a positive. However, it may be that the near exclusive use of problems (such as in a freestanding, problem-based course) presents a misleading picture of the nature of lawyer ethics; if so, then some of the heightened interest produced is misdirected interest.¹²⁴

The lawyer's life is not a series of dilemmas that present themselves by way of short vignettes. Presenting the ethics course as such a series of problems misleads the student into thinking that ethics are a set of rules for resolving a finite list of the problems that

119. "Emotional acceptance may well follow intellectual understanding but cannot be coerced." Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 274-277 (1975); but see Jack L. Sammons, *Professing: Some Thoughts on Professionalism and Classroom Teaching*, 3 GEO. J. LEGAL ETHICS 609, 618 (1990) (urging value of some preaching).

120. See *infra* notes 135-53 and accompanying text.

121. Wayne D. Brazil, *Reflections on Community, Responsibility, and Legal Education*, 9 J. LEGAL PROF. 93, 96 (1984).

122. Elkins, *supra* note 59, at 46 (1985).

123. For example, KAUFMAN, *supra* note 3; STEPHEN GILLERS & NORMAN DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* (2nd ed. 1989); MORTIMER D. SCHWARTZ & RICHARD C. WYDICK, *PROBLEMS IN LEGAL ETHICS* (2nd ed. 1988); THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (5th ed. 1991).

124. There are ways of heightening interest that are both less misleading and more effective. See *infra* notes 154-79 and accompanying text.

lawyers face. Although there is, of course, a set of rules, and although it is useful to confront students with the kinds of dilemmas that occasionally confront lawyers for the purpose of provoking thought on the various and sometimes conflicting roles and duties of lawyers, such teaching must be balanced by at least equal treatment of a truer picture of what ethics mean to lawyers day in and day out.¹²⁵ Failure to balance will lead students to the conclusion that the ethics of a lawyer's life involve either a technical skill of identifying the problem and locating its proper resolution in the rules or a hopeless daily diet of unresolvable dilemmas to which every possible answer is as harmful as every other. Some small part of the lawyer's life involves exercising that technical skill or facing those occasional times of crisis. However, most of the relevance of ethics to lawyers lies in the answers to day-to-day questions of how to live life — apparently small things that are really the biggest things, like, "how will I treat my clients?", or "where do 'honesty' and 'care' fit in my daily dealings with others?" The answers to these questions can only be developed by students when they deal with the lawyer-experiential aspects of the ethics-legal profession field, little of which can be treated effectively by the abstract problem method.¹²⁶ As such, if the problem method as used in the classroom is more effective than case or lecture based teaching, as it probably is, it is likely to be more effective only in dealing with non-lawyer-experiential aspects of the field.¹²⁷

The problem method in the large class has produced greater student-interest levels.¹²⁸ Provided that the problems are not focused on aspects of the field that are lawyer-experiential (and are therefore not misleading), the heightened interest is a positive contribution of the method. In this respect, it serves the same purpose as and will be no more or less effective than a good hypothetical in a torts class of similar size. In the classroom, whether the subject be torts or legal profession, a relatively small number of students are directly involved in any given exchange with the teacher. Guided, intellectual grappling with a good hypothetical or problem produces learning at the classroom stage for participating students; the remaining

125. Elkins, *supra* note 59, at 47; see also, L.H. LaRue, *Teaching Legal Ethics by Negative Example: John Dean's Blind Ambition*, 10 LEGAL STUD. F. 315, 316 (1986).

126. Luban, *Epistemology*, *supra* note 69.

127. It may be that the role sensitive activity method described *infra*, at section III E is really an expanded problem method that is not classroom oriented and that allows the students to experience more of the daily work of the lawyer rather than focus exclusively on the "crisis" moments in law practice.

128. Cavers, *supra* note 6, at 38-39; Michael J. Kelly, *Notes on the Teaching of Ethics in Law School*, 5 J. LEGAL PROF. 21 (1980) (predicting positive changes).

students experience the intellectual grappling once-removed by their vicarious involvement. For conscientious students, much learning remains to be accomplished by the good hypothetical or problem after class.¹²⁹ To the extent that a problem endeavors to teach *what is experiential with the lawyer*, the teaching derived from another student's grappling with a hypothetical problem is probably of less impact than the torts student's indirect intellectual involvement with the other student's grappling with the hypothetical. Intellectual involvement is accomplished without the relational-experiential aspect that is a necessary component of learning the lawyer-experiential components of the ethics-legal profession field.

C. *Case opinion-based discussion*¹³⁰

Arguing in favor of a clinical approach to teaching ethics and reporting on empirical research into student reaction to ethics teaching, Pincus has asserted that "the academic method followed for teaching ethics is the root cause of the ineffectiveness in teaching and the low status of the subject matter area."¹³¹ Whether the low status of the field in the eyes of students is caused by the academic approach or not, the case-based teaching method, (quite naturally that method initially turned to by law professors faced with teaching in the ethics-legal profession field for the first time), has serious limitations for teaching the ethics-legal profession field.

The use of case-based teaching will achieve the same goals with regard to non-lawyer-experiential substance as will lecture and problem-based instruction¹³² with relative degrees of efficiency, and it will be at least as ineffective as problem-based teaching in treating lawyer-experiential substance. However, case-based teaching does its work at an additional cost: because of the focus on the most egregious sorts of misconduct, this method risks teaching that the minimum level of ethical sensitivity is the desired level, or at least the accepted level.¹³³

In spite of the risks, three distinct purposes support the inclusion of a modest measure of case-based instruction. First, skills of case

129. D'Amato, *supra* note 105 at 472-73.

130. I include in this definition bar association ethics opinions because they are functionally similar to judicial opinions on ethics-legal profession issues.

131. William Pincus, *One Man's Perspective on Ethics and the Legal Profession*, 12 SAN DIEGO L. REV. 279, 285 (1975).

132. See *supra* notes 112-30 and accompanying text.

133. "[S]ome of the students may use what they learn from [studying cases and bar opinions] to go just short of the line of impropriety and say, 'Well, now I have learned how to outmaneuver my Bar Association disciplinary committee.'" Robert E. Mathews, *The Legal Profession Course*, 41 U. COLO. L. REV. 379, 381 (1969).

analysis executed on one topic differ in small ways from the same order of skills executed on another topic. Varying purposes are served by different areas of the law, and the case reading and analysis skills reflect the shadings of the topic under consideration. As such, case-based instruction in ethics-legal profession can uniquely provide that flavor for the student. Second, a part of the low status of the field in student eyes is the result of their perception that the topic is less rigorous than others. The value system of the law school may itself require some adjustment if the students cannot see that rigor is not the exclusive value in legal education and that rigor can exist without case-based study; but that adjustment unmade, rigorous case-based teaching of those topics that lend themselves to it within the ethics-legal profession field would reduce the extent to which students downgrade the field.¹³⁴ Third, the traditional, case-based method is a valuable means of providing the academic critique of the existing state of knowledge that is essential for the survival and growth of any field worthy of university study.

D. Example (including lawyer case studies and faculty or supervisor role modeling)

The question of who in the law school is responsible for teaching ethics has occupied considerable time of legal educators over the years.¹³⁵ Although some of this attention has been focused on the "pervasive method" of teaching ethics,¹³⁶ most of the positive contributions have focused on the faculty and administration of the law school as role models.¹³⁷

134. Examples of such topics include the relationship between the evidentiary lawyer-client privilege and the ethical duty of confidentiality, the first amendment implications of associational restrictions on entry to the bar, and distinctions between discipline for incompetence and liability for malpractice.

135. Vernon, *Ethics in Academe — Afton Dekanal*, 34 J. LEGAL EDUC. 205 (1984); see also, James E. Moliterno, *Goodness and Humanness: Distinguishing Traits?*, 19 N.M. L. REV. 203 (1989) (arguing that claim of moral superiority often raised by clinicians may reduce pressure on other faculty to be positive role models).

136. See, e.g., E. Wayne Thode & T.A. Smedley, *An Evaluation of the Pervasive Approach to Education for Professional Responsibility of Lawyers*, 41 U. COLO. L. REV. 365 (1969); although the pervasive method might have been thought to be dead, it continues to have adherents. David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485 (1989); see *infra* notes 189-99 and accompanying text.

137. Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986); *Recommendations of the ABA Special Coordinating Committee on Professionalism*, ABA SUMMARY OF ACTION OF THE HOUSE OF DELEGATES AT THE 1989 ANNUAL MEETING, (approved by ABA House of Delegates, August 1989), at 21-22; Richard Wasserstrom, *Ethics in Academia: Power and Responsibility in Legal Education*, 34 J. LEGAL EDUC. 155-228 (1984); White, *supra* note 70, at 313-15.

The notion of role modeling takes on several forms, chiefly, from both positive and negative perspectives, live role models and storytelling. Generally, because student integration into the role of lawyer is not begun until the beginning of law school,¹³⁸ and because the development of an identity or sense of self "largely results from the emulation of those who are respected . . .," an opportunity exists to affect the development of students by the positive or negative¹³⁹ examples that faculty set. This notion is hardly new,¹⁴⁰ and in some respects is no more than an acknowledgement that legal educators are endeavoring to replace the best aspects of the apprentice system of law teaching that university legal education displaced in the late nineteenth century.¹⁴¹

Although many faculty members may hesitate to serve as role models because of a legitimate fear of exploiting a captive audience,¹⁴² because, "The universal human need to have objects for modeling and identity formation may be the single most important psychological factor in the educational process,"¹⁴³ the effect of both the presence and absence of positive models is too great to ignore. Still, an examination of the limitations and most beneficial use of such modeling may help to keep in focus what can and cannot be accomplished by example teaching.

Obviously, teaching of the standard law of lawyering is not furthered appreciably by example teaching. More likely, the more elusive qualities of the ideal lawyer are those the role model hopes will be instilled by such teaching. However, because the law teacher is not typically modeling lawyering behaviors,¹⁴⁴ only the generic form of the desired character traits is likely to be transferred from faculty to students. Considerable learning can occur when students ob-

138. See Watson, *Lawyers*, *supra* note 54, at 249-50.

139. LaRue, *supra* note 125, at 316.

140. "Teaching ethics is good; living ethics before one's class is incomparably better." John C. Townes, *Organization and Operation of a Law School*, 2 AM. L. SCH. REV. 436, 439 (1910).

141. For a history of the process of apprentice system replacement with university legal education, see JOHNSON, *supra* note 14; see also Letter from Harvard Dean Ephraim Gurney to his President, Charles Eliot in ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967* 187-90 (1967) (lamenting earliest moments of Langdellian revolution).

142. Indeed, one reason said to support the pervasive method is that a single ethics-legal profession teacher might subvert the students. Theodore A. Smedley, *The Pervasive Approach on a Large Scale — "The Vanderbilt Experiment,"* 15 J. LEGAL EDUC. 435, 437 (1963).

143. Watson, *Lawyer*, *supra* note 54, at 250.

144. To the extent they *are* modeling such behaviors, they usually do so only in the context of the lawyer's rigorous doctrinal analysis.

serve model behavior that expresses integrity, commitment to quality, concern for the human condition, and a sense of community.¹⁴⁵

While there is value in the modeling of all of these traits, perhaps the last, the sense of community, is the one that is most uniquely within the power of a law faculty to accomplish. The others might more profitably come from exposure to models of lawyering behavior. Lawyering models produce more readily transferable learning for the students from the law school to law practice,¹⁴⁶ and have less of a discount applied because of the perceived ease of being virtuous in the ivory tower.¹⁴⁷ But the sense of community is a sense that is had or not by the full faculty and is conveyed or not by its collective presence, its attitude about the common enterprise, and its actions toward one another and toward students.

Modeling is more effective the closer the model is to the role to be learned.¹⁴⁸ As such, the most effective modeling of lawyer behaviors will be done by those modeling the role of lawyer. Students may be exposed to those acting the role of lawyer in two ways: indirectly through storytelling about and case studies of lawyers, and directly by working with a lawyer in either actual or simulated client service.¹⁴⁹

Storytelling is and has always been an effective educational tool,¹⁵⁰ and in the context of legal education it has been a way of replacing aspects of the apprentice system of lawyer socialization. Books primarily consisting of lawyer behavior stories and intended for legal education audiences continue to appear.¹⁵¹ The effect that

145. Professor Shaffer is perhaps the foremost advocate for a better developed sense of community among lawyers and law schools. *See, e.g.*, Shaffer, *supra* note 111, at 705-12.

146. In keeping with my terminology, these general traits are non-lawyer-experiential while the application of those traits to lawyering activities is lawyer-experiential.

147. In particular, when a teacher's attempt at modeling goes awry and enters the realm of preaching, serious student negative reaction is risked. "Preaching annoys me . . ." Harold, *supra* note 6, at 10.

148. The implication of this phenomenon is that "ideas about professional behavior gathered from practicing lawyers will be eagerly grasped and emulated by the student. . . ." Watson, *Lawyers*, *supra* note 54, at 251 (emphasis added).

149. The typical trial advocacy course's teacher, for example, would not fit this description because he or she is not acting in the role of lawyer; by contrast, a faculty supervisor in a program of comprehensive skills development organized around the activities of law practice entities as described, *infra*, at section IV C would fit this description.

150. *See, e.g.*, The Bible; Symposium, *supra* note 111, at 1-173.

151. *See, e.g.*, sources cited *supra* note 111.

storytelling can have on students' motivation toward self-reflection can be considerable.¹⁵²

Working directly with a lawyer will have even more effect than will storytelling or general faculty modeling because it is direct with respect to both student involvement and emotional proximity and because it is more closely connected to the behaviors to be modeled. While actual client service contacts may be closer to reality, such contacts involve dangers of inappropriate behavior that becomes the modeled behavior.¹⁵³ Therefore, the simulated client representation model may be the more likely to be efficacious for modeling of desired traits, balancing as it does the realism of practice situations with greater assurances of student autonomy of decision-making. The students may, understandably, apply some ivory tower discount to the impact generated by faculty-supervised simulations. To the extent that the involved faculty have reasonably close ties to the practice, this effect can be diminished.

E. Role-sensitive representation activity (including both client and simulated client representation).

Role-sensitive activities, activities in which students engage themselves in the role of lawyer, come in many forms. Everything from trying a case as a live-client clinic student to writing a legal memorandum as a first year student engage students in role-sensitive lawyering activities. Some of these (such as clinic work) traditionally have been thought of as activities for teaching ethics while others have been considered almost exclusively as skills activities. If designed for their efficacy as teachers of role-sensitive behavior, any such activity can provide students with valuable learning of lawyer experiential aspects of the ethics-legal profession field.

Engaging in such activities will only incidentally convey non-lawyer-experiential substance,¹⁵⁴ and to the extent they do provide such learning, they will be quite inefficient in conveying a large block of substantive legal material. As a method for teaching law-

152. I was moved to self-reflection and consideration of my own values and way of looking at the world recently by reading Professor Shaffer's description of a Louis Auchincloss story about an Italian-American lawyer. Louis Auchincloss, *The Fabri Tape*, in NARCISSA AND OTHER FABLES 149 (1983) as described in Shaffer, *supra* note 111, at 712-23. I have every expectation that the same happens for students. Even if a somewhat cruder form of storytelling, the attention that storytelling about lawyers receives may be measured by the fact that I have not made it through a week during an academic session for the past three years without having at least one student start a conversation by asking, "Did you see L.A. Law this week?"

153. See sources cited *supra* note 76.

154. See *supra* text immediately preceding note 83.

yer-experiential substance, however, role-sensitive activities are highly effective. Indeed, among the methods examined here, using such activities is the only effective method for teaching lawyer-experiential substance. Such activities facilitate the teaching of each of the elements of lawyer-experiential substance.¹⁵⁵

For example, when a student is negotiating in the role of lawyer, the student generates the data that gives meaning to the rules prohibiting making false statements of fact to others.¹⁵⁶ By doing so, the student is able to see and sense the conflicts between the literal meaning of the prohibition and the nature of negotiation as a process that implicates at least subtle techniques designed to mislead.¹⁵⁷ What makes the activity invaluable to learning is the unique role that lawyer conduct plays in the development of the relevant legal standards. Unlike other areas of the law that rely on client conduct to define the parameters of legal concepts, such as the tortfeasor's conduct that gives meaning to the reasonable person standard, here it is lawyer conduct that produces the law itself. Further, the lawyer conduct that creates the law is bound in several relationships: that with the other party to the negotiation and the client, in this example. Providing the student an opportunity to experience what the law is in addition to intellectual involvement with the law gives the student more insightful and lasting learning.

Role-sensitive activities not only provide significant learning about the data that gives meaning to many standards governing lawyer behavior, but they also hold out the greatest hope for replicating the best aspects of the apprenticeship system — those that produced the socialization of the moral lawyer by the influence of a supervisor-mentor who was better than the organized bar's rules assumed.¹⁵⁸

The conditions and timing of professional socialization have shifted in the last hundred years in American legal education. Office apprenticeship — the law school of an earlier era — introduced the neophyte to the principles of law and the principals-at-law simultaneously. In reading law, the apprentice combined theory and implementation in a gradually expanding responsibility. He became a lawyer as he saw and assisted in real cases, in concrete situations, and with specific personalities. Exposed to live models of practicing attorneys and clients, he possessed realistic bases for learning the lawyer

155. See *supra* section II.

156. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, Rules 3.3, 3.4, 4.1 (1989).

157. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

158. Shaffer, *supra* note 7, at 217-18.

role. He coupled this increasing awareness with the gradual assumption of the rights and obligations of a member of the bar. Technical knowledge, prevailing practices, and professional values were articulated one step at a time.¹⁵⁹

In order to teach the lawyer-experiential substance of the ethics-legal profession field, it is necessary to replicate the positive aspects of the apprentice system with due deference to the academic setting in which this replication will, and properly should, occur.¹⁶⁰ The key to this replication is teaching the lawyer-experiential substance of the ethics-legal profession field through its relationship to role-sensitive activities. Student role socialization is largely undeveloped at the time of entry to law school.¹⁶¹ Taking advantage of this opportunity requires that students engage in role-sensitive activities in a psychologically meaningful context,¹⁶² preferably early in their law school careers.¹⁶³

Lawyers and the profession have lost something of value, over time, that the apprentice system once provided — the sense of the lawyer as a moral force in society. It has taken several generations, the firm establishment of the organized bar's standards of ethics as *the* ethics of the profession, and the loss of value placed in community reputation that attends the increased size and business-oriented nature of the modern law firm for this loss to accrue. Professor Shaffer describes this loss by contrasting stories of his own development into the lawyer's role, influenced as it was by his close relationship with partners, (who were better than the organized bar's code assumed them to be), with more recent, perceptive accounts of the socializing influence of the law firm.¹⁶⁴

Hopes for regaining this moral sense rest primarily with the law school.¹⁶⁵ For law schools to fulfill these hopes, they must take advantage of the opportunity to socialize students into the profession by presenting the student, acting in the role of lawyer, with the moral questions that face lawyers. Law schools can best facilitate this socialization by allowing students to face and reflect on these

159. D. Lortie, *Laymen and Lawmen: Law School, Careers, and Professional Socialization*, 29 HARV. ED. REV. 352 (1959).

160. See Keeton, *supra* note 110, quoted at length *infra* text accompanying note 178.

161. See Watson, *Lawyers*, *supra* note 54, at 249-250; Lortie, *supra* note 159.

162. "[S]elf-concept crystallizes only where role performance is undertaken in a psychologically meaningful context. . . ." Lortie, *supra* note 159, at 366.

163. White, *supra* note 70, at 316-17; Clark, *supra* note 7, at 259-60; Kelly, *supra* note 128, at 27 (suggesting small section "attorney-client relationship" class in first year).

164. Shaffer, *supra* note 7, at 218-19 (contrasting his 1961 stories with those of Stewart, *supra* note 7).

165. See Clark, *supra* note 7, at 253; Chemerinsky, *supra* note 13.

questions in the academic environment, "without the heavy weight that self-interest [and modern law firm socialization] exerts on the practitioner"¹⁶⁶ Use of role-sensitive activities allows this development to occur in the law school environment by facilitating the students' learning of the lawyer-experiential elements of the ethics-legal profession field. Development of role and identity is the niche in which professional school training fits in the overall process of socialization of new members into the ethics of the profession. Because the resolution of role is delayed until at least the beginning of professional (especially legal) education,¹⁶⁷ legal education can be influential in that development.¹⁶⁸ It may do so by drawing the best from the apprentice system that survived, at least until Professor Shaffer experienced it — the influence of a supervising elder that is better than the code assumes him or her to be.

It is not incongruous to combine the moral supervisor with the academic atmosphere; doing so merely acknowledges as a goal the combination of the best of both pre and post Langdellian revolution law teachers. Indeed that combination is most likely to allow quality teaching of the lawyer-experiential elements of the ethics-legal profession field. In order to develop virtue, one must do virtuous things,¹⁶⁹ preferably under the guidance of a moral teacher.¹⁷⁰ One cannot develop morally by study alone.¹⁷¹ This practicing of virtuous lawyering can occur, and probably better occurs, in an academic setting than in the office.

Such an argument might be seen as an argument favoring in-house clinics, although serious moral, methodological, and practical problems exist in any attempt to teach the entire ethics-legal profession field in such a setting.¹⁷² Although some of these problems may be ameliorated by using extern placements rather than in-house supervision,¹⁷³ many of the problems are better resolved by

166. KAUFMAN, *supra* note 3, at xxix.

167. See Watson, *Lawyers*, *supra* note 54 (explaining that law students have less well defined notions about career as entering students than do entering medical students); Lortie, *supra* note 159.

168. Lawrence Kohlberg, *Relativity and Indoctrination in Value Education*, 6 ZYGON 285, 303 (1972); see David A.J. Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359 (1981).

169. See G.M. Dickinson, *Moral Development Theory and Clinical Legal Education: The Development of Professional Identity*, 22 U. W. ONT. L. REV. 183, 186-97 (1984).

170. Luban, *supra*, note 69, at 650-51; MARK TWAIN, *LIFE ON THE MISSISSIPPI* (1899); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

171. Aristotelian theory underlies these assertions. Luban, *Epistemology*, *supra* note 69, at 653.

172. See *infra* notes 200-47 and accompanying text.

173. Norman Redlich, *The Moral Value of Clinical Legal Education*, 33 J. LEGAL EDUC. 613, 614 (1983).

using comprehensive simulations rather than actual client service as the methodological base.¹⁷⁴ Simulations, if well constructed, afford opportunities similar to those provided by in-house clinic situations to "learn by doing" and "learn by imitating,"¹⁷⁵ which, activists correctly argue, teach moral judgment.¹⁷⁶ Once students are put into a setting conducive to learning by doing and learning by imitating, teachers must concern themselves with what students do and whom they imitate.¹⁷⁷

Centering pre-admission legal education in university-related law schools has detached it from its earlier mooring in law office reading and apprenticeship. Association with a university underscores the objective that the basic educational preparation for careers in the legal profession be, first, more systematic than the vagaries that any set of clients' interests and concerns are likely to present to an apprentice; second, more reflective than instruction is likely to be in competition with the demands of a busy law office; and, third, richer in variety of both content and perspective than a single mentor or law firm would be likely to offer. Detachment from the immediate contacts of law offices with the worlds of business and government provides some insulation for uninhibited, reflective inquiry out of which may emerge deeper understandings of law and all the institutions and relations it affects.

These positive gains from treating the study of law as an academic discipline reinforce rather than conflict with a law school's professional mission. Educational experience in a protected academic setting — far from being tangential to or in conflict with preparation for a career in practice — is indeed the ideal basic educational preparation for a professional career in law.¹⁷⁸

Although any role based activity, whether conducted in a clinic, a simulation, or as a roleplay in a classroom, may provide some learning of lawyer-experiential substance, some forms of activity will be much more beneficial than others. Of these three, the classroom roleplay (the "only game in town" for a teacher of the standard,

174. See *infra* notes 200-47.

175. Robert Condlin, *The Moral Failure of Clinical Education*, in *THE GOOD LAWYER: LAWYER'S ROLES AND LAWYER'S ETHICS* 317, 325 (David Luban ed. 1984).

176. Luban, *Epistemology*, *supra* note 69; KELLY, *supra* note 15, at 40. These arguments are not much different than the argument that students ought to be taught to learn how to learn from experience. Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

177. Shaffer, *supra* note 7, at 195.

178. Keeton, *supra* note 110, at 203-04.

freestanding legal profession course) is least likely to engage the students, even those few who are directly involved in the roleplay, in reflection about anything beyond the particular dilemma the roleplay scenario presents. The lack of any continuing obligation to act and any prospect of realization of results from the roleplay's activity keep the effective teaching of lawyer-experiential substance to a minimum level, exceeding only the near or total absence of effect on lawyer-experiential learning found in the case, lecture or problem methods. In effect, the classroom roleplay is one small step in the right direction from the problem method, but because it requires no continuing relationship to be developed and fostered, it shares the problem method's shortcoming of presenting ethics as the resolution of a series of short-term problems to the exclusion of consideration of the true, ubiquitous question with which lawyers live — "who am I and who do I want to be as a lawyer?"¹⁷⁹ Whether this methodology, crucial to any effective ethics-legal profession teaching program, is better accommodated by a live client clinic or a program of comprehensive skills development will be discussed in section IV C.

IV. EVALUATION OF PROGRAMMATIC DESIGNS FOR ACCOMMODATION OF USEFUL METHODOLOGIES

None of the methodologies examined in section III are effective and efficient teachers of both lawyer experiential and non-lawyer experiential substance of the ethics-legal profession field. This section is meant to examine programmatic formats for the proper combination of methodologies, each in its proper measure to facilitate the learning of the element of the field most effectively taught by the particular methodology. The formats examined here are these:

- A. the freestanding, concentrated, classroom oriented course;
- B. the pervasive "method";¹⁸⁰
- C. comprehensive clinical programs, whether simulation or live-client centered.

A. Although it has been the most popular structure for teaching ethics-legal profession for some time,¹⁸¹ the freestanding concen-

179. A teacher of ethics-legal profession at a school offering only the freestanding course must turn to roleplays as the only available method for treating lawyer-experiential substance, even if that treatment is of limited effect.

180. Although generally referred to as a "method," pervasion is not a single method so much as it is a format within which other methods fit well or poorly.

181. Don W. Sears, *Professional Responsibility and Legal Education: Boulder II*, 41 U. COLO. L. REV. 303 (1969); NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY, *supra* note 5, at Introduction, v.-xlv.

trated course has significant, probably fatal, shortcomings. It is naturally the structure that law professors would turn to when abandoning the pervasive method¹⁸² because it is most like the rest of law school teaching.

Spurred partly by teacher dissatisfaction with the results achieved, methodologies within the freestanding structure have moved from mostly lecture to mostly case-based discussion to a combination of case-based and treatise based discussions and finally to the problem method.¹⁸³ Some have attempted to add limited roleplaying exercises to the problem method, and recently, extensive use of commercially prepared videotapes.¹⁸⁴ Most of the reports of dissatisfaction among students with both the rigor and relevancy of teaching in the field have resulted from studies of students being taught in the freestanding course structure.¹⁸⁵

Slight increases in satisfaction may be seen through the problem method, but both it and the limited involvement of students in classroom roleplays lead to only marginal benefits in teaching the lawyer-experiential aspects of the field. There is no real way to accommodate crucial role-sensitive activities in the freestanding course. Roleplays that do involve the entire class will of necessity be very limited in scope and duration.¹⁸⁶ Although the freestanding structure can quite adequately teach the nonlawyer-experiential substance of the field, its beneficial effect is largely limited to that aspect of ethics-legal profession teaching.

A special form of the freestanding course, at one school called "the blitz,"¹⁸⁷ has an even greater tendency to isolate the ethics-legal profession field from other law fields or the lawyer's work than does the standard, semester-long version of the freestanding course. In "the blitz," students are inundated with ethics-legal profession teaching for one or two weeks while all other law school activities halt.¹⁸⁸ While some positive impression may be created by the exclusive, though short-term, attention the subject receives, the

182. See *infra* notes 191-201 and accompanying text.

183. Sears, *supra* note 181; Robert E. Mathews, *Professional Responsibility: Past Concern But Today's Urgency*, 41 U. COLO. L. REV. 313 (1969); Elkins, *supra* note 59, at 37.

184. The ABA has produced numerous tapes; some schools have also been producing their own. See Professor Douglas N. Frenkel, presentation at The ABA Standing Committee on Lawyer Competence Conference, 3-4 (November 1, 1990); for further discussion, see *supra* note 110.

185. See, e.g., Pipkin, *supra* note 107 at 258-61.

186. Frenkel, *supra* note 184, at 4, 7, 13.

187. *Innovations*, 21 SYLLABUS (ABA Section on Legal Educ. and Admissions to the Bar), Fall 1990, at 4 (describing Boston University's new course); The University of Pennsylvania teaches the field in a two-week course. Frenkel, *supra* note 184, at 7-9.

188. *Innovations*, *supra* note 187, at 4.

format is the ultimate nonintegrative approach, leaving little opportunity for students to connect the two weeks' work with the work of lawyers. Further, the format will result in a reduction of opportunity for reflection, an aspect of teaching perhaps even more important to the ethics-legal profession field than it is to others.

B. The pervasive method of structuring ethics-legal profession instruction, in one form or another, has been with legal education since the displacement of the apprentice system.¹⁸⁹ In its earliest forms, it was little more than the assertion that the rigor of the Socratic dialogue that itself pervaded the student's legal education was the primary builder of character.¹⁹⁰ By the time Dr. Edwin E. Aubrey first called it the "pervasive method,"¹⁹¹ the structure was being used at most law schools in the absence of a freestanding, concentrated course in ethics-legal profession.¹⁹² A number of schools were making serious efforts to structure the exposure to ethics-legal profession issues through the three years of law study; others were merely avoiding the responsibility of providing their students with exposure to ethics-legal profession issues. Some schools feared that if they had a single ethics-legal profession teacher, that teacher would subjugate the students to his or her own moral code.¹⁹³

Later quite soundly regarded as a failure,¹⁹⁴ the pervasive method fell into disuse. Even where the method was combined with a concentrated course on the subject, too often the popular method of integrating ethics was to "invit[e] the poor sap who teaches Professional Responsibility into each course at least once a semester to do something ethical with the students."¹⁹⁵ Interestingly, the method has been recently revived,¹⁹⁶ although, as became true of its advoca-

189. See *supra* section II.

190. See sources cited *supra* note 17.

191. Mathews, *supra* note 42, at 8 (reporting Boulder I conference).

192. *Id.* at 7.

193. Smedley, *supra* note 142, at 437.

194. See, e.g., Kelly, *supra* note 128, at 27 (suggesting better effort on pervasive method); Watson, *supra* note 69, at 10-12 (explaining that faculty are psychologically uncomfortable teaching professional responsibility, a problem exacerbated by reliance on number of faculty members needed to execute pervasive method); Thode & Smedley, *supra* note 136, at 365.

195. Sammons, *supra* note 119, at 610.

196. Link, *supra* note 136, at 485. Its revival at Notre Dame raises interesting issues. First, respect due the work of Professor Shaffer and his obvious connection with the Notre Dame effort leads to more careful reconsideration of the method than would otherwise be warranted. Second, it may be that the Notre Dame ethos makes it a place in which the approach might be possible. Perhaps the lack of commitment to the undertaking that has doomed to failure other schools' pervasion efforts will not attend Notre Dame's program. Still, commitment aside, it is unlikely that the method can

tion toward the end of its reputable period,¹⁹⁷ it is nowhere relied upon as a sole structure. The chief benefit of its use, because under the method those teaching ethics-legal profession have no particular expertise and too often have no particular interest in ethics-legal profession, is the positive effect of students seeing examples of the ethics-legal profession issues that arise in conjunction with various areas of the substantive law.¹⁹⁸ Few ethics-legal profession sub-topics are intimately related to the doctrinal core of particular substantive areas.¹⁹⁹ Even as to these closely related topics, the benefit of their teaching being connected to the related substantive law field is in the illumination of analytical similarity between the examination of the two related issues. Though of some value to the teaching of the non-experiential substance of the field, the closer, even if more elusive, connection to the ethics of lawyering is with the day-to-day work-life of lawyers. Given the choice, it makes far better sense to relate ethics-legal profession issues to the lawyer's work (skills courses) than to substantive law.

Because the pervasive method connects ethics teaching to the teaching of other courses, it is entirely dependant upon the structure of those other courses for its own structure. As a result, the most common form of the method will be found in classroom teaching of various substantive courses. As such, the coverage of the field will approximate (though likely be less thorough and consistent than) that provided by the freestanding, concentrated course. It will be taught almost exclusively by the case-based, problem-based, and

provide significant opportunities for experiential learning to be effective beyond that provided in the freestanding course. The method's chief advantage would remain in the enhanced opportunities for positive role modeling by greater numbers of faculty and in the opportunity for the faculty to model responsible, community based behavior.

197. See, e.g., C. Paul Rogers III, *An Approach to the Teaching of Professional Responsibility to First Year Law Students*, 4 OHIO N.U. L. REV. 800, 803 (1977).

198. However, this is not so much a teaching methodology as it is an attribute of a moral law school. It is only valuable in the setting in which it compliments another, fully developed program of study. Indeed, it is evidence of a failure of commitment to ethics to have the pervasive method be the exclusive method. No other subject in the curriculum is taught by those not specializing in the field.

199. Examples include malpractice and contingent fees in the torts area and reasonableness of fee contracts in the contracts area. Other topics that may be seen as related to a particular substantive course merely happen to occur with greater frequency in cases involving a particular substantive topic but are not related to the course's substance in a way that would make integration of the two valuable. In the contracts field, for example, it is the difference between fees-reasonableness as a relative of unconscionability and relations with business-people and the extent to which lawyers should be morally independent of the profit motive of a client. The former is doctrinally and analytically akin to the contracts field; the latter merely finds application in the practice of lawyers dealing with contract law issues. In the torts field, the parallel topics might be malpractice and the contingent fee.

lecture methods, and it will thus be almost exclusively aimed at non-lawyer-experiential substance. This method may appear beneficial from a teaching-by-example perspective — those who raise ethics issues are worthy of emulation — because it allows all teachers to convey a concern for ethics issues. However, the method can hardly be relied upon to do more than provide a haphazard, nonexperiential exposure to a portion of the ethics-legal profession field.

C. Structures that best accommodate role-sensitive activities are the in-house clinic and the simulated program of comprehensive skills development (CSD). Between them, the CSD program structure better accommodates the methodologies needed to teach both lawyer-experiential and non-lawyer-experiential substance of the field.

The non-lawyer-experiential substance can be most efficiently taught in the classroom setting, and any program of ethics-legal profession study must include a sufficient number of classroom hours. The freestanding course typically consists of thirty or forty-five classroom hours. This number is more than is necessary to teach the non-lawyer-experiential substance (the law of lawyering). The in-house clinic, almost always accompanied by a seminar component, could allocate those seminar hours to non-lawyer-experiential ethics-legal profession teaching. But only in the relatively unusual yearlong clinic, and then only if every seminar hour were given to the subject, would as many as thirty classroom hours be available. As they presently exist (and appropriately so), in-house clinics do not typically devote large numbers of seminar hours to the teaching of non-lawyer-experiential material, but more often devotes those hours to encouraging student reflection and group discussion of all manner on issues raised by the students' caseload.²⁰⁰ The CSD program, on the other hand, spread over at least a year and preferably two,²⁰¹ can afford sufficient classroom time to adequately cover the non-lawyer-experiential aspects of the field as well as offer opportunities to encourage reflection.

Most of the literature about role based ethics instruction focuses on the live client clinical experience, and well it should: CLEPR, whose purpose it was to enhance ethics teaching, is largely responsi-

200. Michael Meltsner & Philip G. Schrag, *Scenes From a Clinic*, 127 U. PA. L. REV. 1, 10 (1978).

201. For a brief description of the William and Mary CSD program, see James E. Moliterno, *The Legal Skills Program at the College of William and Mary: An Early Report*, 40 J. LEGAL EDUC. 535 (1990); for a more detailed description that focuses on the ethics-legal profession aspects of the program, see James E. Moliterno, *Teaching Ethics in a Program of Comprehensive Skills Development*, 15 J. LEGAL PROF. 145 (1991).

ble for both the role based instruction that now occurs in law schools and the establishment of the in-house live client clinic as a fixture in legal education. For a number of reasons, however, a properly structured simulated client representation program of instruction in ethics-legal profession may produce more efficacious role based activities than those produced by the live client clinic.

A properly structured simulated client representation program is one in which students work with others, both supervisors and co-workers, on legal problems of simulated clients who are role played by human beings (rather than exist on pieces of paper) in a long-term (at least one academic year), comprehensive (from initial interview to problem resolution) way. A NITA style trial or other practice skills course, for example, would not fit this definition, and no comparison between them and in-house live client representation clinics is intended here. Some who favor the in-house clinical approach erroneously distinguish simulation by lumping it with the problem method of classroom instruction, calling it the "simulated 'problem method'" and using Professor Kaufman's problem book as an example of what might be used in a "classroom-centered course in legal ethics."²⁰² This presents an accurate description of classroom or other short term role plays, but not of a CSD. The comprehensive skills development (CSD) simulation structure provides more efficacious learning of most of the lawyer-experiential elements of the ethics-legal profession field than does the in-house client representation clinic for a number of reasons.²⁰³

1. The lack of control over the experience and the limited term of the exposure reduce the effectiveness of the in-house clinic as a teacher of lawyer-experiential substance.

The in-house clinic offers students a relatively short-term, usually one semester,²⁰⁴ exposure to the practice,²⁰⁵ during which the student begins a relationship with supervisor and coworkers and serves

202. Gilda M. Tuoni, *Teaching Ethical Considerations in the Clinical Setting: Professional, Personal and Systemic*, 52 U. COLO. L. REV. 409, 412 (1981).

203. See sources cited *supra*, note 201.

204. McDiarmid, *supra* note 75, at 1.

205. Although some clinics allow students to participate for a year and a handful allow even longer participation, (I was myself a fortunate participant in one of these for three semesters), the cost of such an operation necessarily reduces the number of students that can be accommodated even below the average in-house clinic accommodation of approximately 30% of the student body. Such a factor cannot be ignored, (and virtually never is), in the process of curriculum design, although it is often ignored in writing about curriculum design. See John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317, 328, 334. The CSD program referred to in this article accommodates all students and is required for graduation. Except in the case of an experimental program under limited use for evaluation purposes, cost is a necessary

the needs of a few clients. Unfortunately, little can be accomplished in a semester toward the goal of teaching the full ethics-legal profession field. Often cases undertaken are carried over from previous students' work; new students, unfamiliar with the nature of the relationship begun by the earlier students except for what little can be gleaned from the file notes,²⁰⁶ are unlikely to have a well developed relationship with the client. In any event, the nature of the relationship may be cloudy for the students for reasons that they have no real hope of discovering. Under such circumstances, what little the students learn about client relationships may be misleading, having resulted more from the previous, unknowable actions of prior student-lawyers. A similar absence of learning or mislearning occurs when students begin a relationship with a client and pass the case on to the next group of students. Often, the realization of results from the quality of the early part of the client relationship is delayed until much later activity for the client is undertaken. As such, the lessons to be learned from the quality of early aspects of the client relationships are lost for the students who engaged in those early activities. Although, as Pincus says, "there is no substitute for personally living through the circumstances which create the ethical dilemma and for having personally to face the consequences of the action or inaction which is used as a response to the moral challenge,"²⁰⁷ very little facing of personal consequences occurs in the few months of a semester's work in an in-house clinic. More often the real consequences are passed along to others who have little appreciation for their source. The CSD program, in contrast, allows students to reap what they sow: they work with the same individual charged with the responsibility of roleplaying the client from initial interview to some resolution, whether it be a negotiated or mediated settlement or the conclusion of the trial or appellate process.²⁰⁸ Such an occurrence is uncommon in an in-house live client clinic;²⁰⁹ it is the norm in a CSD program.

element for a law school to offer up as a model its program of teaching ethics-legal profession.

206. The file notes may be well done in terms of their rendition of the factual underpinnings of the case, but are unlikely to reveal the nuances of the relationship.

207. Pincus, *supra* note 131, at 285.

208. The same could be said of relationship development with coworkers, other parties and their counsel, supervisors, and court personnel.

209. Caseload and length of service statistics from the recent in-house clinic report lead to the conclusion that very few cases are followed from start to finish by a single student or student team. See FINAL REPORT, *supra* note 55, at § II.

Because of the ability of the CSD staff to control²¹⁰ the nature of the representation and to generate the characters, the students' exposure to issues can both be even (and thus better as a vehicle for teaching particular topics to the entire class) and developed by increments to allow students to gain confidence in their skills. Such confidence is built on incremental successes.²¹¹ Professor Shaffer describes lawyers who have a "good bedside manner" — the ability to recognize that a client is in distress and make him or her more comfortable without making unreasonable assurances — as having "the rarest and very likely the most valuable of all skills for lawyers"²¹² Although designing the difficulty of the relationships incrementally may not "teach"²¹³ this skill and its obvious moral and ethical implications in the usual way of thinking about the word "teach," it certainly provides a greater opportunity for students to learn the skill and the related ethics than that provided by a live client clinic. In such a clinic, students may be initially faced with a horrifyingly difficult relationship to develop as an initial exposure to client work, and then be excused from developing it by the end-of-semester bell. Even when the clinic experience allows students to see such a difficult first relationship through, supervision by faculty notwithstanding, the student has merely been exposed to the "throw them in the deep water and they will learn to swim" approach to teaching. This approach is not likely to succeed in teaching law, lawyering skills, or ethics. Although a few exceptionally talented students succeed despite this technique's use, it demoralizes or drowns the vast majority of students, reducing them in the case of learning lawyer-client relationships, for example, to the least threatening and most readily accessible method of managing such relationships. From the lawyer's position of power, this method is usually domination; for others it means unquestioning compliance with all lawful requests of clients.

Control over the nature of the student experiences is largely lacking in the client representation clinic, and this unevenness poses

210. It might fairly be argued that it is precisely this lack of control that teaches students important lessons, and with this I would agree. However, I refer in this section to control over the experience by the teacher, not to any lack of unpredictability of the experience by the student. It is easy enough for the staff of a sophisticated simulation program to behave themselves and to create characters who will behave in ways that make the experience quite realistically unpredictable for the student-lawyers.

211. See James E. Moliterno, *The Secret of Success: The Small-Section First-Year Skills Offering and Its Relationship to Independent Thinking*, 55 MO. L. REV. 875, 875-76 (1990).

212. Shaffer, *supra* note 7, at 217.

213. Professor Shaffer "wish[es he] knew how to teach it." *Id.* at 218.

problems to students' moral development.²¹⁴ "[T]he available work to be done . . . may require that the student learn from cases that are not ideal pedagogical vehicles and in a setting that is not ideal for reflection."²¹⁵

2. There are underlying moral questions in the use of actual clients as the means for the laudable end of lawyer training.²¹⁶ Although in the run of cases clinic clients probably receive excellent service, it is disturbing to read almost gleeful descriptions of a "disastrous [client] interview . . . [that] provided that [clinic] student with . . . valuable insight into the 'whys' of his behavior and the avenues for change."²¹⁷ The clinic supervisor of this student undoubtedly intervened to more carefully counsel about alternatives

214. Dickinson, *supra* note 169.

215. Kreiling, *supra* note 176, at 315 n.94. Kreiling recognizes and proposes strategies for ameliorating the shortcomings of live client work — the strategies impose a daunting task. See *id.* at 306-318.

216. See generally, IMMANUEL KANT, *THE METAPHYSICAL FOUNDATIONS OF MORALS* (1785).

217. Tuoni, *supra* note 202, at 416. The full description of the behavior follows:

He presents a videotape of a student-conducted interview with a distraught young woman seeking a divorce. The woman has never seen a lawyer before, does not have much money, and is not completely sure that she wants a divorce. To even the most naive observer, it appears that the student, reputed to be academically capable, is incredibly deficient in the interpersonal skills of interviewing and counseling his young client. During the course of the interview, the law student is unable to depart from strict academic orientation and authoritatively attempts to secure only the hard and cold facts upon which his client could be granted a divorce, while contemporaneously ignoring the very personal nature of his client's problems. While it appears that the client is emotionally unprepared and unwilling to commit herself to an immediate separation from her husband and to registration on welfare rolls, the law student seems to view such legal consequences as inevitable and directs all discourse toward those ends.

One could argue that the student's ineptitude in interviewing skills resulted not only from a lack of training in client counseling, but also from his general aversion, however unconscious, to the emotional matters before him. While the student may have been skilled in discovering and analyzing the legal facts of his client's predicament, he was unable to recognize emotional factors. In this regard, the question arises whether the legal profession, concerned with providing services to clients who are often struggling with difficult circumstances should perpetuate a selection process which produces practitioners who are disinclined, relative to others in the population, to respond with sympathy and understanding to emotional conflicts. In spite of the seemingly disastrous interview conducted by the law student, the videotaped clinical experience provided that student with an opportunity to evaluate his actions and characteristic motivations in interviewing and advising his client. Inasmuch as the deficiencies of the interview were commented on and analyzed by the clinical supervisor, the law student may have acquired valuable insight into the 'whys' of his behavior and the

with the client who was "emotionally unprepared and unwilling to commit herself to an immediate separation from her husband and to registration on the welfare rolls, [although the student view[ed] such legal consequences as inevitable and had] direct[ed] all discourse toward those ends . . ." ²¹⁸ Almost surely, the clinic supervisor would not allow their "young" client who had "never seen a lawyer before" to be pushed into actions by the "incredibly deficient . . . interviewing and counselling" of the student. ²¹⁹ Despite best efforts, however, it is less sure that the supervisor could provide the emotional repair to the client as simply as the repair of the purely legal aspects of the representation. If the same teaching of interpersonal skills can happen ²²⁰ without the infliction of human suffering, then it is fundamentally immoral to use real clients as tools of training, hurting people in the process by precisely the same sharp instrument that the teaching is designed to blunt. ²²¹

Professor Condlin has raised a second category of moral failing in the in-house clinic: that clinic teachers are reinforcing undesirable characteristics with controlling, dominating behavior. ²²² Some critics of Condlin argue that his objections are more with the adversarial system within which clinicians (and all lawyers) operate, ²²³ while others confess guilt to self-reduced "charges" and argue that Condlin's complaint is about poor execution of in-house clinical education. ²²⁴ If Condlin is right that the clinician's ego and the pressures of co-practice with inexperienced students lead to manipulating and dominating behavior, then he is also right to say that a dominating clinician is more dangerous than a dominating classroom teacher because the clinician is much more easily recog-

avenues for change. It is in this respect that clinical education further aids in the personal as well as professional development of law students.

Id. (citations omitted).

218. *Id.*

219. *Id.*

220. Students in a CSD conduct plenty of "disastrous" interviews that harm no one. They review them on videotape and are critiqued by staff. They must also continue to deal with the person interviewed and work to maintain or foster that relationship.

221. It is not clear from the passage whether the videotape was of an actual client interview. Whether it is or not, it serves just as well as an example of what happens too often. Although clinics are good things on the small scale where supervision can be sufficiently intense to limit the occasions when this event can occur, entire law school classes receiving significant amounts of clinical training are likely to produce large numbers of harmed clients. Further, this intensity of supervision and intervention will reduce the learning that the event would have produced for the student.

222. See sources cited *supra* note 76.

223. Redlich, *supra* note 173, at 614.

224. Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 620 (1983).

nized by the student as the model of practice than is the classroom teacher.²²⁵ Like it or not, while clinicians²²⁶ claim that their teaching is the place for students to learn the gentler arts,²²⁷ Professor Luban may be correct in observing that clinicians are drawn predominantly from former careers in poverty law where one can be excessively adversarial and "on the side of angels" simultaneously, a combination rich with negative ethics teaching implications.²²⁸

3. The comprehensive skills development program is real enough to take advantage of the best aspects of the apprentice system, but not so real as to lose the best aspects of the academic atmosphere for study and reflection. Teaching through the apprentice system provided a perfectly realistic, even if substantively and academically narrow, approach to the study of law and the learning of the skills and ethics of lawyering.²²⁹ A handful of states still permit one to sit for the bar examination after "reading the law."²³⁰ The closest attempt to replicate a perfectly realistic setting for the acquisition of lawyering skills and ethics for entire law schools full of students have been at the Antioch (now the D.C.) Law School and at City University of New York.²³¹ While both are highly creative efforts and much has been learned from their efforts, neither has been particularly successful in traditional terms,²³² and no rush to emulate them has been observed.²³³ This is perfectly sensible; university law schools do not exist to mirror reality perfectly because there are real advantages to study in a university setting over study under the pressures of perfect reality.²³⁴ Indeed, many of the pressures of personal economics and time are no more

225. Redlich takes a different view, maintaining that the classroom teacher is a more dominant figure than the clinician because of the presence of other players in the student's clinical experience. Redlich, *supra* note 173, at 615-16.

226. I count myself among this number as a former in-house, clinician and legal services grantee lawyer.

227. See, e.g., Tuoni, *supra* note 202, at 417.

228. Luban, *Epistemology*, *supra* note 69, at 660.

229. JOHNSON, *supra* note 14.

230. E.g., VA. CODE ANN. § 54.1-3926 (Michie 1990).

231. CITY UNIVERSITY OF NEW YORK, LAW SCHOOL AT QUEEN'S COLLEGE, CATALOGUE 1990-91; DISTRICT OF COLUMBIA SCHOOL OF LAW, CATALOGUE 1990-91, at 1, 4.

232. Bar resistance may be playing a significant role in CUNY's troubles. The latest word from CUNY indicates a change of emphasis. Nancy Zeldis, *Breaking with Tradition*, 76 A.B.A. J., September 1990, at 60. For the theoretical underpinnings to the CUNY approach, see Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1182-83 (1990).

233. Change, even for the better, is often slow and grudging in legal education. As at least one has observed, changing the law curriculum is harder than moving a graveyard. Clark, *supra* note 7, at 253.

234. Keeton, *supra* note 110, at 221-22.

present in the live client setting²³⁵ than they are in the simulation; but that is a "good" departure from reality, allowing the students to examine important problems with independence and to "develop their own reactions and philosophies before the issues arise" and must be faced with "the heavy weight that self interest exerts on the practitioner."²³⁶ As appealing as the lure of realism for skills and ethics teaching may be, perfect reality is not desirable from a pedagogical perspective.

Some aspects of reality present in the clinic setting and absent in the comprehensive simulation are harmful to teaching ethics-legal profession. Real peoples' lives are at risk in the in-house clinic setting; this simple fact quite rightly forces clinic supervisors to intervene more frequently and with greater force than simulation supervisors.²³⁷ For students to have effective learning of the problem solving skills inherent in identifying and treating ethics issues, they must form the mental pathways that will later be useful in their lifelong adventure in decision-making;²³⁸ they must have a free hand in forming and nurturing a relationship with others. Students are far less likely to get this free hand for mental experimentation in a setting in which the supervisor frequently intervenes or is at least figuratively over the student's shoulder at all times.

A well constructed CSD program is real enough to generate student interest and commitment to quality. Serious treatment of ethics-legal profession is, of course, a primary component of that construction, distinguishing such a program from a NITA style course²³⁹ or any other skills offering whose primary or near exclusive focus is on the technical skills of lawyering.²⁴⁰ The well constructed CSD program has a number of features that enhance the commitment of the students. For example, being a required course of study, the program should be highly visible so that examples of virtuous student-lawyer conduct will positively affect the student's reputation in the law school community; the peer and supervisor pressure to be ethical is effective in much the same way as the community of an earlier time which exerted pressure on lawyers to be a moral force in that community's life. Similarly, a code of ethics and

235. Tuoni, *supra* note 202, at 415.

236. KAUFMAN, *supra* note 3, at xxix.

237. See sources cited *supra* note 76.

238. D'Amato, *supra* note 105, at 466-67; MINSKY, *supra* note 105 at 780; Moliterno, *supra* note 211, at 879.

239. Kenney Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69, 70-72 (1982).

240. Such courses, although important as skills teaching vehicles, are not ethics-legal profession teaching programs as such.

a disciplinary process should be in place to sanction extreme misdeeds.²⁴¹ For the less altruistically motivated, job prospect implications from recommendations by faculty supervisors in a unique position to evaluate students' work habits should be featured.

The intuitive reaction of many to an assertion that well constructed, comprehensive simulations are real enough will be to say, as has the former longtime CLEPR director Pincus, that a simulation program is "an effort by law school faculties to 'fake it' in the clinical area"²⁴² Others will undoubtedly be moved to say worse. It is counterintuitive to say, as this article does, that a comprehensive, long-term simulation is a better teacher of ethics-legal profession than is an in-house clinic. Some will say that students will not take their obligations seriously in the simulated context, and some students will not.²⁴³ Since the days of the first clinics (and these were

241. "Law schools should adopt codes of student conduct, possibly based on the Model Rules of Professional Conduct. . . ." *Recommendations of the ABA Special Coordinating Committee on Professionalism*, *supra* note 137, at 22 (recommendation 4).

242. William Pincus, *Prefatory Remarks*, 29 CLEV. ST. L. REV. 348, 349 (1980).

243. Happily, most do; some take the role very seriously. A rather remarkable example of the realism of our simulations and their effect on our students occurred in the spring of 1990. A working group of students set out to represent their client, a sixteen year old pregnant girl who asked, among other things, whether she could obtain an abortion without telling her parents. The client informed the lawyers that she was without funds to hire a lawyer. The students knew, first, that they must consult the rest of the office before undertaking pro bono representation. (The office had previously adopted a pro bono policy.) Second, they realized that the case would unfold quickly and the opportunities to return to the office group for subsequent authorization to go beyond advice-giving would be quite limited. As a result, the students debated within their working group, with their junior partner, and then with the office regarding the following two questions: 1) should we undertake representation for a teenage girl desiring an abortion without her parents' consent, and 2) should we take this case pro bono?

As it happens, among the students in this particular working group were two devout Catholics. One was affected to a much deeper degree than the other, but both were quite troubled by the representation possibilities. They envisioned not only giving advice about the current state of the law, but possibly seeking injunctive relief to prevent the parents' interference with the abortion. The student more deeply affected was nearly in tears during the discussion of whether to undertake this representation. She asked to be relieved of responsibility for the case.

Some participants at the office meeting argued that an office cannot function if the associates are completely free to pick and choose among assignments. There are times when the associates must simply do what the supervisor asks, they argued. At the same time, however, for all lawyers, the students argued, there is some very small circle of matters that perhaps cannot be handled consistent with the lawyer's deepest moral fabric. At times, this inability to handle a particular case is articulated in terms of an inability to render zealous representation to the client. It is also possible to discuss this inability or unwillingness in the context of the lawyer's need to maintain an inner core of self that persists after entry to the bar in spite of its inconsistency with some views of the lawyer's role. Some argued that their vision of a law office as a small community implied that the office must itself honor the moral judgments of its members. The office meeting

required of students rather than the self-selected group that now most frequently populates clinics), there have also been live-client clinic students who

regularly [fit] certain types There is the man who clearly indicates his conviction that law is a business rather than a profession; the chap who persistently sidesteps responsibility; the youth who refuses to face difficult situations; the boy whose mother made him study law in order to elevate him in the social and intellectual scale.²⁴⁴

There will always be some students (happily it is quite few) who fail to take anything in law school seriously. There is a difference, however, between a clinic student who fails to live up to expectations and a CSD student who does the same: in the clinic, with a real person as client on the line, the supervisor intervenes, the job gets done, the client gets adequately served (save for subtle forms of harm that are "legally" invisible), and the student leaves the experience with no more reproach than that delivered by the supervisor ("after all, everything turned out alright"). In the simulation, however, the supervisor can afford to encourage, cajole, and prod the student without the necessity of taking the issue or case away from

ended with the understanding that the representation would be undertaken but that the two students troubled by it would have a private meeting with the senior supervisor the next day to determine what their status in the representation should be.

The student more deeply affected was moved in the interim to contact her priest to discuss possible implications of such representation both real and simulated. The two students came to the meeting with the senior supervisor prepared to take different positions. The student less deeply troubled expressed a willingness to go forward with the representation provided that she not be put in a position of having to advocate on behalf of the client. In other words, she was willing to do research, to write objective memoranda and to advise the other members of the working group as to the state of the law, but not write a persuasive document, nor appear in court on the client's behalf. The other student, who was considerably more troubled by the representation, was in tears through much of the meeting in the supervisor's office. She related her conversation with her priest and explained that she would find any assistance to this particular client to be sinful for her; her views regarding human life and abortion were such that she simply could not even go the first step with this particular client. The two students presented perfectly apt examples of lawyers troubled by representation. The first student, while troubled, was not unable to go forward, putting her concerns aside to give the client zealous representation and to live with herself. The second, expressing as she did that she has not liked a number of her simulated clients but certainly had been able to represent them zealously was faced with one of those matters that struck to the core of her being and inhibited any representation at all. For her, this simulation was as real as it could get and she derived the great benefit of living the emotions that would accompany actual representation of this type while the comfort and support of the law school community was available to work through those emotions with her. Both of the students, and the students in their working group and office as well, had a remarkably realistic experience in a context that allowed reflection and independence of student thought.

244. MacNamara, *supra* note 31, at 245.

the student, and the student either improves his or her work or the client is disserved. If so, the student will have "blown-off" various functions that are more or less public in the law school community, resulting in the student being subject to a loss of status and good reputation among peers and respected teachers. In the most egregious cases, the student may find himself or herself facing a disciplinary proceeding.

As Professor Elkins has put it, the rules of ethics themselves (the law of lawyering) are analogous to the rules governing a game. The game cannot be played without reference to the rules, but the performance by the players, while referenced to those rules, "responds to a sense of quality that seems far removed from any set of rules."²⁴⁵ No better way to learn what good playing of the game actually responds to exists than by practicing at those activities that make up the playing. But the game need not "count" for learning to occur. Players learn in spring training; when the season begins, the manager, faced with the ethic that requires that games be won, is far less likely to provide opportunities for players likely to make beginners' mistakes to make them and learn from them.²⁴⁶ CSD students make mistakes, see the results, and learn from them. Too often (and rightly given the stakes) live client students simply have decisions taken away from them when they are about to make a mistake. They are left to ponder what would have occurred had they made a different decision, and the resulting learning is incomplete.

4. As tempting as it might be, the public service aspect of clinics provides no reason to favor them over simulations, save in one respect. Students in live client clinics do get a graphic view of the need for public service by lawyers. Unfortunately, except at a school with a pro bono requirement, the students in the clinic are largely self-selected from among the students most likely already to have a good sense of the need for lawyers to do public service work.

Of course clinics do provide service and service is an appropriate activity for a university law school, particularly a state supported one. However, the service provided is supported by a highly inefficient expenditure that benefits the recipients of the service far less than would a similar expenditure that funded additional staff for the local legal aid or defender. Although it is highly unlikely ever to occur, if all the money spent on in-house clinics were given to legal

245. Elkins, *supra* note 59, at 41.

246. Of course, once a mistake is made, the good manager will help the player learn from it, and the player *will* learn from it. But the manager will not be motivated to allow players to learn from mistakes when winning is possible by use of other means.

services grantees, the legal needs of the poor would be much better served.

Further, sophisticated simulation programs that are primary ethics-legal profession teaching programs hold the promise of mobilizing many more toward public service.²⁴⁷ Service is a desirable attribute only to the extent that the clinic's other purposes withstand pedagogical scrutiny; the service motivation is itself irrelevant to the pedagogical question of efficacy to ethics-legal profession teaching goals.

Live client clinics do one thing that a CSD program cannot. Students experience unmistakably important learning the first time they sit across a table from a person with a real problem. Nothing can simulate that special feeling of enlightenment. But it is not a feeling that is necessary for every lesson in ethics, and it can be accomplished by one or two relatively short-term opportunities to serve a real client. The ideal situation would be to follow a CSD program with, or include within it, short-term exposures for all law students to real clients. Such work is available in many settings, such as inmate assistance programs, will drafting sessions, and legal aid and defender intake or clerking work. Freed of any general ethics-legal profession coverage responsibilities and skills teaching responsibilities, the live client exposures would allow the supervisors of students to concentrate on providing opportunities for students to reflect on what the contact with a real client has meant to their own development.

Ultimately, cost factors aside, this is the trade-off between live-client integration with full ethics-legal profession coverage and comprehensive simulation treatment of the ethics-legal profession field: real problems with instructor dominance, unpredictable substance (some issues will never arise), uncontrollable coverage, and relatively short term exposure (resulting in many of the ramifications of ethics choices being passed to the next student instead of being experienced by the acting student), or long-term simulations that will not result in real outcomes for any client but have certainty of issue coverage, the likelihood that students will see the results of their own choices, and students exercising independent judgment and developing long-term relationships with the various participants.

247. Students in the William and Mary CSD program, for example, have undertaken to do voluntary public service work in considerable numbers.

CONCLUSION

The substance of the ethics-legal profession field is composed of a number of elements. Those elements divide into two groups: those many that are lawyer-experiential and the remainder that are not. For a programmatic format to accommodate effectively the teaching of the entire field, it must have both extensive classroom opportunities for teaching the non-lawyer-experiential elements and controllable, long-term opportunities for students to act in the role of lawyer for teaching the lawyer-experiential elements. Neither the standard freestanding legal profession course, nor the pervasive approach, nor a third year, live client clinic is so configured. An ambitious, early curriculum program of comprehensive skills development can be so configured to give short treatment to neither the academic nor experiential side of the field. Until this sort of program for teaching ethics-legal profession is the norm rather than the exception, neither the question of whether the field can be taught nor the question of whether the ethical quality of lawyering has been irretrievably lost or at least diminished will be answerable. Such programs are not unworkable nor unmanageable, and early indications are that they may work well. Given the broad-based dissatisfaction with the current state of teaching in the field, such programs ought to be adopted, executed, and refined until their promise can be fully realized.