

William & Mary Law Review

Volume 38 (1996-1997)
Issue 1 *W.M. Keck Foundation Forum on the
Teaching of Legal Ethics*

Article 8

October 1996

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Lance Liebman, *Comment on Moliterno, Legal Education, Experiential Education, and Professional Responsibility*, 38 Wm. & Mary L. Rev. 137 (1996), <https://scholarship.law.wm.edu/wmlr/vol38/iss1/8>

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COMMENT ON MOLITERNO, *LEGAL EDUCATION, EXPERIENTIAL EDUCATION, AND PROFESSIONAL RESPONSIBILITY*

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In attempting to predict and prescribe the future, my vision of the recent history of legal education differs from Professor Moliterno's in certain relevant ways.

I graduated from Law School in 1967. I learned largely through doctrinal courses that delivered steady training in thinking like a lawyer and information about areas of law. These courses exposed me and my classmates to legal lingo and to the standard types of legal arguments. We learned, largely by hearing the teacher and our fellow students, to make verbal moves and to see the strengths and limitations of others' argumentation skills and techniques. We also learned a great deal about how to argue by dissecting the opinions of appellate judges.

In the three decades since I graduated, legal education has changed—improved, in my opinion—in two different ways. First, law professors have broadened and deepened the theoretical stances from which legal dialogue and legal writing are evaluated and criticized.¹ Many of us do not see an independent science of law.² We instead consider legal questions as economists, philosophers, theologians, political activists, sociologists, and political scientists.³ Such professorial viewpoints expose students to

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1. For a discussion of the importance and influence of an interdisciplinary approach to understanding and teaching the law, see Randy F. Kandel, *Whither the Legal Whale: Interdisciplinarity and the Socialization of Professional Identity*, 27 *LOY. L.A. L. REV.* 9 (1993); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure—Of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 *MICH. L. REV.* 1929 (1993).

2. See, e.g., George L. Priest, *Social Science Theory and Legal Education: The Law School As University*, 33 *J. LEG. EDUC.* 437, 437 (1983) (“[O]ne must reject the notion that the legal system is somehow self-contained or self-sufficient . . .”).

3. See, e.g., Kandel, *supra* note 1, at 10 (listing various professors' symposium

many ways of thinking about questions that arise in class. Although their training is often superficial, they do see, and some even become proficient in, various ways to think and argue about legal questions.

Second, curricula have incorporated practice opportunities for students. Columbia Law School employs ten percent of its faculty as clinical professors whose full-time job is to supervise eight students each per semester.⁴ Various clinical courses guide the students into the profession by taking steps that resemble medical students' first practice experiences. Also at Columbia, recent years have seen a substantial increase in simulation-based instruction. Columbia's curriculum has expanded to include such things as: the week-long intensive ethics experience for third-year students;⁵ many trial practice sections;⁶ and four sections of a simulation-based course in negotiation.⁷ Additional efforts are currently on the drawing board.

Perhaps because I am twelve years older than Jim Moliterno, I see more change and more improvement in legal education than Jim observes. Tension exists precisely because law schools now better serve as centers for the academic study of law and are better at professional training. Of course, funding problems may constrain the growth of clinical teaching or even lead to its retrenchment at some schools. What is important, however, is that law schools will continue to look for teachers who do high-quality economic, political, philosophical, and feminist analysis of law; law schools will also feel obligated to give students their first professional experience in a context that permits reflection and supervision.

I see three directions in which reform of legal education should, and can, progress.

essays addressing such topics as: law and bioethics, law and anthropology, law and philosophy, law and sociology, law and economics, law and religion, law and history, law and feminism, law and language, and law and literature).

4. See COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY SCHOOL OF LAW BULLETIN 1996-97 at 3-4 (indicating that there were seven clinical professors out of 64 full-time, non-emeritus professors).

5. *Id.* at 24.

6. See *id.* at 27.

7. See *id.*

First, new technology has tremendous potential to improve and streamline the process of teaching lawyering.⁸ The goal is to provide the greatest practical amount of experience for a student by requiring the student to take action and make decisions in a context that explores options and criticizes and weighs choices. The computer effectively and efficiently presents situations and supplies individualized responses. Creating good "games" requires superior intellectual skills, and it is not clear how to obtain the intellectual investment. It seems likely, however, that most early-twenty-first-century law students will receive a significant part of their instruction by computer or CD ROM. Such high-tech instruction will play an important role in answering Jim Moliterno's concern that individualized instruction—by way of live-client clinics—is too expensive.⁹

Second, the wall separating law schools from the profession must be removed. The biggest difference between medical training and legal training is that the medical student moves gradually from classroom to laboratory to hospital. The teaching hospital is a place where senior physicians, young physicians, and medical students coexist, allowing the untrained to observe the experienced and, in the process, to learn by "doing" under supervision. Law students, too, are in practice situations. Columbia law students must meet a pro bono requirement.¹⁰ At least half of the students work after the first year of law school in a legal setting, and nearly all do so after the second year. Students begin a bar exam course during their final semester and move to it full-time when they complete their final in-school examination.

Yet the profession and the law faculties do not coordinate their mutual role of training new generations of lawyers. Schools do not prepare students for their summer jobs and do not debrief them afterward. Law firms assume that law schools teach very little of what is useful, and, therefore, they invest substantial

8. For examples of the innovative ways in which computers recently have been used in law school classrooms, see Laura Duncan, *Computing the Future*, CHI. DAILY L. BULL., June 11, 1993, at 3.

9. See James Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 89 (1996).

10. COLUMBIA UNIVERSITY, *supra* note 4, at 24.

revenues in in-house training.¹¹ The MacCrate Report argues that the law schools and the profession must jointly assume educational responsibility.¹² So far, little has happened that represents a coordinated response to these needs.

Third, far more must be done to integrate the new higher learning about law into the law school curriculum. Some have remarked that a separation has developed between the analysis of law done by leading professors and the analysis done by leading practitioners.¹³ Leaders at the antitrust or tax bar formerly had more intellectual contact with professors in their field than they do today. In truth, greater distance also exists between the research done by professors and what is taught to law students. Because the study of law requires no prerequisites, student populations at the most selective law schools inevitably vary widely in their level of prior preparation in, and their willingness to engage, economics, philosophy, statistics, and social theory. I have learned a great deal from Columbia Law School's ambitious recreation of its required ("foundation") curriculum, which involves the addition of courses such as: law and economics (no longer required), foundations of the regulatory state, and perspectives on legal thought.¹⁴ A quarter-century ago, Charles Haar and I struggled to include "perspectives" inserts among the cases in a then-new Property casebook.¹⁵ I remember the difficulty of shortening one of Bruce Ackerman's early articles without creating a caricature of Bruce's position.¹⁶ The best lawyers in the future will likely understand intellectual approaches to law in a manner more similar to that of their professors as compared to what current teaching achieves. To achieve that goal within the constraints of today's law schools, however, will be a challenge.

In his article, Jim Moliterno described and made a good case

11. LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR REP. 299-301, 314-16 (1992) (commonly referred to as the MacCrate Report).

12. *Id.* at 8, 285.

13. *See id.* at 4-6.

14. COLUMBIA UNIVERSITY, *supra* note 4, at 12-13.

15. See CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW (2d ed. 1985).

16. *See id.* at 258-62.

for an expanded version of William and Mary's current sequential program—an imaginative synthesis of simulation and externships.¹⁷ With limited dollars, this seems an efficient undertaking. I have no doubt that it would positively add to conventional—even very *good* conventional—legal education.

I am so far unpersuaded, however, by Jim's diligent effort to declare professional responsibility a better subject for these educational methods than contracts or tax or family law.¹⁸ In any field of legal study, high-quality simulated exercises would be tremendous pedagogical additions to case-based classroom instruction. Students learn more by doing, so long as they are "doing" the right things and getting the right feedback. Imagine simulated tax law exercises, including simulated client interviews. Externships could follow. Just as the teaching hospital is a good venue for learning pediatrics, surgery, *and* doctor-patient relations, so simulation and live-client representation are appropriate for most substantive legal subjects, allowing the student to study herself functioning as an attorney. Certainly live-client and simulated exercises are vital if a school teaches interviewing, counselling, trial techniques, and appellate strategy.

I realize that many of these subjects can easily include professional responsibility ingredients; for example interviewing an income tax client can surely involve the student-lawyer confronting the issue of a client seeking to cross an ethical boundary. My point is that I am not yet persuaded that reality or virtual reality especially suits teaching the important subject of professional norms.

Just as those concerned with tax law will quickly say that supervised practice experience does not make a complete tax curriculum—also needed is rigorous study of the statute, the regulations, and the court cases, as well as high-quality public finance economics—so teaching professional responsibility to students who "do" does not exhaust a school's possible obligations to this subject. The theoretical analysis of lawyer responsibility—the shape, structure, and boundaries of the profession of law—is immensely serious, difficult, interesting, and dynamic.

17. Moliterno, *supra* note 9, at 106-12.

18. *See id.* at 100-06.

First, students should learn the law of lawyering as a doctrinal subject; a subject of importance to a larger percentage of them than any other field. Second, students should study the subject from the methodological perspectives of economists, sociologists, and philosophers. Humanists and social scientists should analyze the legal profession and legal institutions as immensely important parts of American public and private life. Third, students should receive live-client or simulated experiences that permit them to confront the challenges that lawyers face, allowing them to reflect upon their own choices and actions before they enter the real world where unreflective decisions can harm clients, society, and themselves.¹⁹ Columbia does the third of these tolerably well and the first two very poorly.

Because the subject of lawyering has been insufficiently taught and studied, and perhaps for other reasons as well, young persons entering teaching rarely identify professional responsibility as a field in which they wish to work. This \$80 billion industry is insufficiently studied by economists and other social scientists.²⁰ The study of such a huge profession's ethics needs additional intellectual investment, including curricular investment, of the "doctrine" and "theory" sort as well as of the "reality teaching" type.

Jim Moliterno has seized brilliantly a substantial portion of the resources of an excellent law school, is providing a significant portion of his school's curriculum in an innovative and positive way,²¹ and (I very much hope) will generate teaching materials that will be used at and will influence other schools. Even Jim's innovative program is only a part of what advancing the intellectual domain that concerns the American legal profession requires. The approach that Jim suggested has as much

19. Study and teaching in these ways may be particularly suited to joint efforts by law schools and the providers of legal services: law firms, government law offices, corporate counsel offices. But collaborations of this sort are only good when there is imagination, supervision, and coordination. I do not share Jim Moliterno's confidence that externship teaching can be inexpensive yet high quality.

20. In 1991, legal services generated gross domestic product of \$81.9 billion. Robert K. Yuskavage, *Gross Product by Industry, 1988-91*, SURV. OF CURRENT BUS., Nov. 1993, at 33, 38.

21. Moliterno, *supra* note 9, at 107-10.

potential for other legitimate law school subjects as it does for Professional Responsibility. I believe that his methods, done properly, may well be more expensive than he has predicted. I also predict more tension than he acknowledged as the multiple legitimate objects of curricular investment compete for limited resources. The good news is that things are happening in legal education, and that we live in interesting times.