Legal Education, Experiential Education, and Professional Responsibility

James E. Moliterno
LEGAL EDUCATION, EXPERIENTIAL EDUCATION, AND PROFESSIONAL RESPONSIBILITY

JAMES E. MOLITERNO*

I. INTRODUCTION

Picture five lawyers as each enters the legal profession in subsequent generations, each having received the best legal education of the time.

1. In 1875, Alan Anderson became a lawyer after four years of apprenticeship with a mentor.1 Alan had received a formal education through the tenth grade. During the four years with his mentor, he read from Blackstone2 and Coke;3 he observed his mentor consulting with clients and performing in court; under supervision, he drafted wills, real estate documents, and pleadings; he dined or lunched with nearly every member of the local bar. He possessed a deep understanding of the small sliver of the legal profession that was relevant to his life. He had considerable experience with the interpersonal skills that are valuable to a lawyer, although his exposure to the theory behind those interactions was limited to whatever he could draw from the example set by his mentor and other local lawyers whom he observed. In contrast, he had no academic education, either legal or general. Without such education, Alan had almost no understanding of the larger aspects of the legal profession, of the effects of modern developments in tort and products liability law,

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* Professor of Law and Director of the Legal Skills Program at the College of William & Mary. I am grateful to the W.M. Keck Foundation for its support of the conference for which this paper was written. I thank Kenney Hegland and Lance Liebman for their comments on the version of this article that was presented at the conference. I also thank Catherine Trinkle and Tammy Hopkins for their invaluable research and editorial assistance.

2. See 1 WILLIAM BLACKSTONE, COMMENTARIES (1765).
nor of the impact on the law made by the industrial revolution that took place around him.

Alan benefitted from extensive experiential learning, but received very little experiential education:4 he learned much about little from the haphazard series of experiences that came his way during the four years with his mentor. Beyond a reading of Sharswood,5 his exposure to the law and ethics governing lawyers was limited to whatever he gleaned from watching the ways in which lawyers behaved.

2. In 1910, Bernard Baker became a lawyer after having graduated from a modern, Harvard-model law school.6 Like many, but not all, of his classmates, he began law school after receiving a four-year college degree.7 He learned according to the Langdellian style of scientific legal method.8 The library was his laboratory, the cases were his data. His mental processes followed the scientific method from hypothesis through data gathering to result. He read little of Blackstone9 or Coke.10 Instead he read appellate decisions and engaged in searching classroom dissection of them with his professors and classmates. Throughout his three-year law school experience, he was placed in the mental role of a scientific lawyer applying legal doctrine on a daily basis. An educator designed and planned that experience, along with the materials used. Bernard’s exposure to other activities of lawyers was minimal, largely limited to moot courts. The only clients in his legal education were names in cases, all of them considered utterly irrelevant in the educational process. His comprehension of a lawyer’s work was limited to a deep understanding of utilizing the scientific method to analyze common law materials. He also knew much about the common law materials.

4. The differences between experiential learning and education are discussed infra notes 22-43 and accompanying text.
6. For a discussion of the Harvard model instituted by Dean Christopher Columbus Langdell, see ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 162-205 (1967).
7. See STEVENS, supra note 1, at 15 n.146.
8. Id.
9. See BLACKSTONE, supra note 2, at 1-4.
10. See COKE, supra note 3, at 1.
rules of property, contracts, and torts; he knew the rules of civil pleading.

Bernard benefitted from a great deal of experiential education, but it was limited to a single topic: the scientific method of thinking as engaged in by lawyers. His experiential learning was similarly limited to observations on this same topic. 11

Like Alan's, Bernard's exposure to the law and ethics governing lawyers was limited to a reading of Sharswood. 12 Bernard's social background, his early practice experience under the tutelage of a senior lawyer, and the academic rigor of his legal education all shaped his character as a lawyer.

Between 1875 and 1910, legal education underwent a nearly 180 degree turn: cases replaced treatises, classrooms replaced law offices and courtrooms; ordered, planned materials replaced a haphazard course of instruction; academic-led education replaced practitioner-led education; academic analytical skills replaced practical client and interpersonal skills. 13 I said "nearly 180 degree turn" for a reason: Bernard, like Alan, still had a considerable experiential component to his legal education. Those experiential components, while undoubtedly effective, were fully and squarely aimed at different purposes.

3. In 1948, Carl Connor became a lawyer after having graduated from a modern, Columbia-Yale-model law school, dominated by Legal Realist thought. 14 Like all of his classmates, he began law school after receiving a four-year college degree. He was taught largely in a classroom style that on its surface could have been mistaken for the Langdellian style. The Columbia-Yale classroom style was certainly as rigorous as the Harvard model. It mainly used appellate decisions as classroom materials; it primarily was conducted in a form that came to be described as a "Socratic" dialogue between professor and students, and it was conducted almost entirely in a classroom as opposed to a lawyer's office or a courtroom. The Legal Realists, however, re-

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11. See infra notes 22-43 and accompanying text.
12. For an example of an ethics text that was influential at the turn of the century, see generally SHARSWOOD, supra note 5.
13. See SUTHERLAND, supra note 6, at 175.
14. For a discussion of Legal Realism at Columbia and Yale, see LAURA KALMAN, LEGAL REALISM AT YALE 67-97 (1986).
jected the Harvard model's purely "hard" science approach to legal analysis and, instead, introduced the perspective and methods of "soft" science. Nevertheless, much of Carl's legal education was conducted in a way not markedly different from Bernard's. Like Bernard's, Carl's education was also about the thought processes of lawyers engaged in the analysis of law. The thought processes changed, but the mode of education did not. The thought processes Carl learned included the social scientific methods along with the hard scientific method imperfectly applied to learning law during Bernard's time.

Carl benefitted from a great deal of experiential education regarding a single topic: the thinking process engaged in by lawyers. His experiential learning likewise was limited to observations on this same topic.

Carl was exposed to the law and ethics governing lawyers by means of a successor to Elliott Cheatham's Legal Profession course, which was first introduced at Columbia in 1933. In this class, Carl studied the ABA Canons in the context of the history and structure of the legal profession. A great deal of his character as a lawyer was formed by his early exposure to senior lawyers in practice and to the academic rigor of his legal education.

Carl's legal education was as different from Alan's as Alan's was from Bernard's. Although both Carl and Bernard were educated in the thought processes of lawyers, Carl's model of lawyerly thought included social science-oriented thinking and skepticism; Bernard's model did not.

4. In 1980, Dana Dickenson became a lawyer by following an educational path strikingly similar to Carl's path. Many of the attributes of his education were mirrored by hers. For example, Legal Realist thought and its progeny dominated her law school's jurisprudence as it did Carl's. Like all of her classmates, Dana began law school after receiving a four-year college degree. Also like Carl, Dana was taught largely in a classroom style.

15. Id.
17. See id. at 323-24.
that, on its surface, might have been mistaken for the Langdellian style. It, too, was rigorous, using appellate cases as the basis for a Socratic dialogue conducted almost entirely in a classroom as opposed to a lawyer's office or a courtroom.

In four ways, however, Dana's education was markedly different from her predecessors'. First, Dana and about thirty percent of her classmates were women; their presence brought new perspectives to the law that affected jurisprudence. Women's perspectives were not significant in Alan's, Bernard's, or Carl's legal education. Second, the curriculum of Dana's law school included a few prototypical skills courses, most of which were elective. When well-conceived, these courses addressed a particular segment of the thought processes of lawyers associated with activities such as counselling clients, negotiating, advocating, and writing, rather than the application of legal doctrine and theory. Third, Dana was among a fortunate group of about twenty-five percent of her classmates who experienced a clinical course during law school. Most law schools offered elective, limited enrollment clinical studies. In these courses, students experienced the broader aspects of the lawyer's role in client representation, while under faculty supervision. Dana met and counselled clients, drafted documents, and advocated in court. Although the clinic deliberately accepted only certain categories of cases, Dana's experience was largely haphazard, not unlike Alan's entire apprenticeship. This haphazardness, although realistic, was not conducive to an organized educational experience. Finally, Dana was required to take a semester-long course called "Professional Responsibility." Taught largely through the same classroom methodology as were her courses in contracts and torts, this course taught the law governing lawyers through the examination of legal doctrine as revealed in cases, but with an additional emphasis on the ABA Model Code of Professional Responsibility.

In terms of experiential education, Dana benefitted from exposure to similar thought processes of lawyers, as did Carl and

18. STEVENS, supra note 1, at 246 (1983).
19. Id. at 240.
20. See id. at 240-41.
Bernard. She gained some limited additional experience with other lawyerly activities through her clinic, although the clinic, like Alan's apprenticeship, presented more experiential learning opportunities than experiential education opportunities. Her professional responsibility course, although a vast improvement over simply reading Sharswood,21 was taught by applying law to problems, the same method used in her torts and contracts courses.

5. In 2010, Emily Ethridge will become a lawyer after graduating from a law school that is a model of early twenty-first century innovations in American legal education. The structure of the curriculum will not be 180 degrees from anything described above; it will be thirty or sixty or ninety degrees from everything. Legal education will retain the primary emphasis on the experience of the lawyer's application-of-law thought process, but this emphasis will not be nearly as exclusive as it might have been in Bernard's or Carl's education. Courses will continue to be taught using cases and supplementary materials as they have been taught since Carl's time. Classroom education in contracts and torts will be similar to that of Carl's day, despite having been changed by shifts in jurisprudential thought.

In terms of experiential education, Emily will benefit from the same sort of experiences with the thought process of lawyers as did Dana, Carl, and Bernard. Emily's legal education, however, will include a three-year long simulated law practice. The simulations will provide experiential education involving a wide variety of thought processes associated with activities other than the application of law to facts. This simulation will cover the ethics and law of lawyering using a combination of methodologies that address the same thought processes addressed in the "cases and materials" courses and the clinical courses. The program's creators will have attempted to provide a designed, ordered apprenticeship for all students. The combination of classroom work, experiential in the same sense as was Bernard's education, and the three-year ethics and skills simulation program, experiential in that it will introduce a wide variety of other lawyerly thought processes and activities, will provide Emily with a well-balanced

21. See SHARSWOOD, supra note 5.
preparation for entry into the legal profession.

Other consequential changes will have altered legal education by Emily's time. Fewer in-house, live-client clinics will exist in 2010 than existed in the 1980s and 1990s. Both the practicing and academic branches of the profession will view legal education, and, particularly education in the ethical norms of the profession, as a partnership to a far greater extent than was previously the case.

For legal education to advance to what Emily Ethridge will experience, professional responsibility teaching must change to a more experiential style. This change, which has already begun, will not be completed easily. It will be expensive and wrenching. It will disrupt patterns in legal education that have existed for over a century. It will require new resource allocations and perhaps new resource generation at a time when limited current resources are being diminished or eliminated. This change in legal education generally will begin with professional responsibility teaching and will spread, ultimately in more limited but nonetheless real ways, to the entire law school curriculum.

New resources will be found in the near-total elimination of live-client, in-house clinics, in foundation grants, and in a consortium of public and private legal sector employers that will pool their training resources to fund comprehensive skills and ethics development programs that will be demonstrably better at preparing law students for the rigors of legal practice, including the confrontation of ethical issues. This resource pooling will diminish the effects of the serious free-rider problem that has deterred employers from expending more resources on training programs. Currently, employers have no useful way to protect their investment in training law students. The changes will, in some ways, make legal education more like medical and other professional education, but will not abandon what has been good about legal education, such as training in the case method and rigorous statutory analysis in conjunction with the teaching of substantive law.
II. EXPERIENTIAL EDUCATION AND EXPERIENTIAL LEARNING

Although they are receiving renewed interest, experimental education and experiential learning are not new to legal education or professional education in general. Learning is not education, and experiential learning differs from experiential education. Learning happens with or without teachers and institutions. For example, eavesdroppers learn about the things they hear, yet they are not educated simply by the act of eavesdropping because the activity is not accompanied by a teacher's or institution's participation in the learning process. Education, in contrast to a learning opportunity, consists of a designed, managed, and guided experience.

The apprentice form of legal education outlined in the Alan Anderson hypothetical was primarily an experiential learning opportunity. The learning was guided in only a very limited sense by the mentor. The arrangement chiefly suited the needs of the mentor and was arranged according to the mentor's business needs, not the educational needs of the apprentice. In


23. European medical education, for example, has its roots in the field experiences of French Napoleonic era battlefield doctors. See Dora B. Weiner, French Doctors Face War 1792-1815, in FROM THE ANCIEN RÉGIME TO THE POPULAR FRONT 51 (Charles K. Warner ed., 1969); see generally JOHN DEWEY, EXPERIENCE AND EDUCATION (1938) (interpreting education as the scientific method by which individuals study the world to acquire knowledge); KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE (Dorwin Cartwright ed., 1951) (characterizing the social scientist's essential task as the translation of phenomena into concepts); Carl Rogers, Toward a Theory of Creativity, in CREATIVITY AND ITS CULTIVATION (1959) (arguing that experiential education is transferable from experience to experience).


26. Id.

27. STEVENS, supra note 1, at 24.

28. In describing the advantages of a casebook over the haphazard order of an apprentice's experiences, Ames said:

[II]f 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 unfail-
modern legal education, summer job experiences, unsupervised externships, moot court competitions, and law review memberships are all largely experiential learning opportunities. Although students learn a great deal through participation in these activities, they are only one part of an educational experience. In the law school environment, these activities are surrounded by other opportunities designed to enable students to take something useful from these unguided learning opportunities. The organized, designed, and guided educational activity has been either loosely or closely linked to the experiential learning activity.

When the organized activity is closely linked to the experiential learning, experiential education occurs. For example, suppose that a student takes a contracts course and learns the doctrine relating to unconscionability. At some later point in his law school years, he does an externship at the local Legal Aid office. At Legal Aid, he meets and works for a client who has entered into a one-sided, adhesive, consumer contract. The student might later say that he never really understood the unconscionability doctrine until he worked on the case at Legal Aid. The student's reaction would be genuine, even if slightly off the mark. In fact, the understanding or learning has come from the combination of his classroom activity and the Legal Aid experience; his current level of understanding unconscionability would probably not exist in the absence of either of the two learning experiences. A loose link existed between the educational activity in his contracts class and his experiential learning activity at Legal Aid. That this specific client matter was assigned to this student at Legal Aid, of course, was fortuitous. The contracts teacher and the Legal Aid lawyer-supervisor are separate people with separate goals.

The relationship between the traditional professional responsibility course and the student's Legal Aid experience may be analogous. The student learned the confidentiality doctrine in

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class by reading and discussing Model Rule 1.6,\textsuperscript{29} \textit{Upjohn Co. v. United States},\textsuperscript{30} \textit{In re Ryder},\textsuperscript{31} \textit{People v. Meredith},\textsuperscript{32} \textit{United States v. Zolin},\textsuperscript{33} and \textit{Meyerhofer v. Empire Fire & Marine Insurance Co.}\textsuperscript{34} The same student, after representing a client, might remark that he never really understood the duty of confidentiality until a client confided in him at Legal Aid. Again, the link is loose. Because of the subject matter of the professional responsibility course, however, a strong possibility exists that a very large percentage of the students in the class will someday receive the confidences of a client, creating the expectation of an eventual link between classroom and real-world experiences.

In contrast to the foregoing, loose-link hypotheticals, a close link between two experiences occurs when the same teacher is responsible for guiding both experiences, or when two or more teachers are responsible and are members of a commonly motivated team.\textsuperscript{35} When this close link exists, the two experiences will be parts of an explicitly coordinated experiential education activity. The discussion of confidentiality doctrine and the confidentiality experience with the client will be organized to coincide or follow one shortly after the other so that the student can readily place the experience in a theoretical and legal framework, and can reflect on the experience and refine the effectiveness of the theory.

Since the time of Christopher Columbus Langdell's revolution, legal education has anticipated and proceeded on the basis of Carl Rogers's theory that "the only learning that really sticks is that which is self discovered."\textsuperscript{36} Experiential education proceeds

\textsuperscript{29} \textit{Model Rules of Professional Conduct} Rule 1.6 (1992) (generally prohibiting a lawyer from revealing confidential information unless the client consents after consultation).
\textsuperscript{31} 263 F. Supp. 360 (E.D. Va.), aff'd, 381 F.2d 713 (4th Cir. 1967).
\textsuperscript{32} 631 P.2d 46 (Cal. 1981).
\textsuperscript{33} 491 U.S. 554 (1989).
\textsuperscript{34} 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974).
\textsuperscript{35} Examples of efforts to use these approaches are found at the University of Maryland, see David Luban & Michael Millemann, \textit{Good Judgment: Ethics Teaching in Dark Times}, 9 GEO. J. LEGAL ETHICS 31, 64 n.134 (1995), and at William & Mary in the Legal Skills Program, see infra nn. 192-95 and accompanying text.
\textsuperscript{36} Rogers, \textit{supra} note 23, at 243.
through the process of synthesis that Dewey, and later Lewin, outlined: students are exposed to the theory of an activity; they experience the activity; they reflect on the relationship between the theory and the experience and synthesize the two; they form a new or modified theory; they test it by experience, and so on.37

The experiential education approach provides the student with something that other educational models do not: "an internal locus of evaluation."38 This internal locus of evaluation allows students to self-learn.39 It provides students with a pattern for continued learning from experience that is largely transferable.40 When, however, the thinking or analysis skills differ markedly from one learned activity to another, the learning pattern must be created through experience with the different activities.41

From Langdell's revolution until fairly recently, legal education has provided students with only one experiential education activity: lawyer as a reader and retrospective applier of the law.42 It is true that the repeated activity of legal education—that is, reading appellate cases and discussing them in order to extract doctrine and theory, followed by student reflection on the law-reading activity, also followed by more law reading to extract doctrine and theory—has been extremely successful at teaching a single, unquestionably critical, lawyerly skill and activity through the model of the lawyer's retrospective thinking experience. As useful, and indeed central, as that activity is for lawyers, its learning pattern differs from that of other lawyerly activities in critical ways. The traditional model of legal education has been focused so narrowly on this single activity as to be extremely unsuccessful at educating students for

38. Rogers, supra note 23, at 247.
39. Id.
40. Id.
41. Id.
42. A contrary view of the value of this teaching is well-expressed by Paul N. Savoy, Toward a New Politics of Legal Education, 79 YALE L.J. 444, 460 (1970) (offering the view that the case method effects thought reform rather than teaches legal analysis).
any other lawyerly activity. This failure has its greatest deleterious effect on the teaching of professional responsibility law and theory, where the widest possible range of lawyerly activities are in fact the substance that shapes the legal rules and informs the theory. In truth, the rest of the substantive law may be more effectively and efficiently taught through current methods, but professional responsibility is about the role of lawyer, and its teaching is not so easily separable from the experience in that role.

III. FROM ALAN TO DANA

In this section, I will trace a brief history of experiential learning and education in legal education, contrasting at points with the medical education model and its history of experiential education. I will suggest four reasons why medical education developed into a far more experiential education-oriented model and why legal education has thus far not done so. Of these reasons, only one, relating to resources, continues to be a restraint on expansion of experiential education in legal education. As such, I will suggest that legal education, especially professional responsibility education, should become more experiential if an efficient model for it can be constructed.

How did legal education wind its way from Alan Anderson’s experience to Dana Dickenson’s? Why did its association with experiential education differ so markedly from medical education’s association with experiential education?

Langdell’s revolution generated an incredible change in legal education and in legal theory. Although the Realists largely discredited Langdell’s innovations in legal theory, his innovative teaching methods remain the most influential and pervasive of models. With respect to experiential learning, the change from the apprentice system to classroom-focused appellate case

43. See STEVENS, supra note 1, at 74.
44. See SUTHERLAND, supra note 6, at 162-205.
46. STEVENS, supra note 1, at xv.
reading signified a near total reversal. Experiential learning dominated the apprentice system. The apprentice's activities in the mentor's law practice, combined only with the reading of available treatises, prepared the student for entry into the profession. By contrast, the Harvard model eliminated all experiences save one, that of reading appellate cases to learn doctrine, theory, and skills relative to legal analysis. Because the Harvard method was planned and controlled, however, it did provide experiential education in a way that the experiential learning-based apprentice system could not. The Harvard model provided experiential education of the lawyer's role as law reader and analyzer.

As dramatically as legal education changed in the late-nineteenth- and early-twentieth-centuries, it was not the only model of professional education that was undergoing dramatic change at that time. Indeed, the timing of legal education's revolution, and the role of at least one of the key players in it, coincided with the "scientification" of higher education in general and of medical education in particular. Further, these changes in professional education coincided with a more general move toward professionalization and institutionalization in America.

Harvard President Charles W. Eliot, who encouraged Langdell's experiment in the face of significant opposition,
was doing so as a part of a broader university reform effort. The effort encompassed changes in the sciences, the medical school, and the law school. These changes focused on the adoption of teaching methodologies that would enable students to develop the modes of analysis and the practices of professionals in their fields of study. The changes moved the schools away from reading and lecture and toward experiential education.

Eliot's medical school recommendations had a sound historical basis. During the nineteenth century, medical education in Europe became both scientific and experiential. Medical education as we know it today had its origins in the training and experiences of French doctors during the Napoleonic wars. Eliot was greatly influenced by these developments in profes-

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52. Id. at 157.
54. See SUTHERLAND, supra note 6, at 178.
55. STEVENS, supra note 1, at 63.
56. Eliot said, "[I]n all departments of the University . . . a careful observation of actual facts, an accurate recording of the facts determined, and a just and limited inference from the recorded facts have come to be the primary methods of study and research." Chase, supra note 53, at 336 (quoting CHARLES W. ELIOT, HARVARD MEMORIES 65-66 (1923)).
57. See Weiner, supra note 23, at 72-73.
58. Id. at 51.
sional, and especially medical, education.\textsuperscript{59} He was also influenced by the more general movement toward scientific methods.\textsuperscript{60}

The early American reforms in medical education merged the various experiences that physicians need for effective practice, including a wide variety of methods of thinking and analyzing.\textsuperscript{61} The resultant modern medical education combines a period of academic work to acquire a theoretical basis for practice, followed by internship and residency periods in which new doctors experience the physician's activities and roles, reflect on the theory and the experience, synthesize them, form new or modified theories, test them by experience, and so on.\textsuperscript{62} Since the nineteenth century, medical students have been expected to work in teaching hospitals as part of their academic experience.\textsuperscript{63} A close, planned connection has been fostered between the classroom and practical experiences of students and recent medical school graduates.\textsuperscript{64} What happens in the medical teaching clinic has been "regarded as either a science [in itself] or as a way of teaching medicine."\textsuperscript{65} Similarly, the case method of law study has been regarded as either a scientific inquiry into the common law or as a way of teaching law.\textsuperscript{66}

Although Eliot might have preferred to establish a "teaching hospital" for legal education, he became convinced that no such thing was possible.\textsuperscript{67} In contrasting medical and legal education, Eliot reported in his 1873-1874 Annual Report on the state of the university that:

\begin{quote}
[t]he medical student must spend a large part of his time in hospitals; but a law student who should habitually attend courts, except during the short period when he is acquainting
\end{quote}

\begin{itemize}
\item \textsuperscript{59} See Chase, supra note 53, at 340-42.
\item \textsuperscript{60} See id. at 334-35.
\item \textsuperscript{61} The Evolution of Graduate Medical Education in the United States, 56 J. Med. Educ. 7, 7-9 (1981) [hereinafter Evolution].
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Bouillard, Philosophic M\'edicale 244 (1831), translated in Michel Foucault, The Birth of the Clinic 115 (1973).
\item \textsuperscript{66} See Larson, supra note 49, at 171-72.
\item \textsuperscript{67} Chase, supra note 53, at 341-42.
\end{itemize}
himself with office work and practice, would waste his time. The law library, and not the court or the law office, is the real analogue of the hospital.\textsuperscript{68}

His words echo Langdell's own: "[The library] is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists."\textsuperscript{69} Langdell was Eliot's choice for the job of reforming legal education. Eliot knew of Langdell from their days as Harvard students.\textsuperscript{70} When Eliot became President of Harvard, he found Langdell in New York and brought him to Cambridge to further Eliot's reform agenda.\textsuperscript{71}

Langdell was not the only person interested in reforming legal education and upgrading the legal profession at that time, but other calls for reform were not as narrow as Langdell's in experiential terms.\textsuperscript{72} They more closely mirrored the medical education reforms that Eliot supported.\textsuperscript{73} These plans called for a requirement of apprenticeship, some portion of which could be satisfied by law school attendance.\textsuperscript{74} Such plans implicitly recognized the need for both an academic and a practical experience to fully educate professionals.\textsuperscript{75} Even the most ambitious plans fell short of the medical education reforms in one crucial respect that continues to flaw today's system of legal education. Unlike medical education's teaching hospital, legal education's apprenticeship, its broadly experiential portion, was disconnected from structured education. It was so under Langdell's reform

\textsuperscript{68} WARREN, supra note 50, at 392.

\textsuperscript{69} SUTHERLAND, supra note 6, at 175 (quoting Christopher Columbus Langdell, Remarks to the Harvard Law School Association (Nov. 5, 1886)).

\textsuperscript{70} Id. at 159 (quoting Charles W. Eliot, Address at the Record of Commemoration, 250th Anniversary of Harvard College (1886)).

\textsuperscript{71} Id.

\textsuperscript{72} See, e.g., STEVENS, supra note 1, at 25 (describing bar leaders' efforts to require strict training and examinations before admittance to the bar); Concerning Examinations for Admission to the Bar, 1 ALB. L.J. 350, 350-51 (1870) (arguing for stringent entrance requirements for the bar).

\textsuperscript{73} Stevens, supra note 1, at 25.

\textsuperscript{74} Id.

\textsuperscript{75} See id.
proposal; it was so under the alternative reform proposals; it remains so today, with the post-law school experience of lawyers awkwardly and by default serving as the broadly experiential component of the learning process.

Although Eliot actually may have supported a more experiential education oriented reform of legal education than Langdell—one that more closely resembled the medical education reform that he spearheaded—several factors led to the differences between medical and legal education reform efforts and results. For instance, medical education had a history of experiential education from which reform could proceed, but legal education did not.\(^7\) The European medical education model from which the American medical education reforms proceeded had already connected the experiential aspects of the learning process within educational institutions.\(^7\) In contrast, the law apprenticeship system existed as a separate and independent alternative means of obtaining legal knowledge which coexisted with the university system in place before Langdell.

In further contrast with law, medicine had a preexisting relationship with hard sciences. Medicine’s connection with the more respectable hard sciences made its place in the university more secure and stable\(^7\) because part of the motivation for reforming professional education was the concurrent crises of professionalism.\(^9\) Professions and professional education were in the process of institutionalizing and of separating their occupations from an earlier identification with the trades.\(^8\) Medicine’s connection to the highly respected hard science disciplines helped it to clearly separate itself from the trades. Law could claim no such preexisting relationship with hard science to insulate it

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76. See generally Weiner, supra note 23, at 51 (describing the battlefield training of 19th-century physicians in Europe).
77. Id.
78. PROFESSIONAL EDUCATION, supra note 22, at 4-5 (noting the existence of “an academic hierarchy, with the natural, hard, pure [sciences] having greater prestige . . . than those of the soft, man-made, and applied.”).
80. See STEVENS, supra note 1, at 20.
from the crises: the choices were to present law as its own science (one that had elements in common with the hard sciences) or to play on the law's more readily apparent relationship with the less respectable social sciences. Langdell, illustrated by this classic quotation, chose to present law as a hard science: "If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices." Thus, medical education could "afford" a greater emphasis on practical skills than could law. It did not have to swim upstream against currents of thought represented by Thorstein Veblen's remark that "a school of law no more belongs in a university than a school of . . . dancing."

Huge disparities between the financial resources available to medical and legal education flowed from medical education's decision to emphasize the teaching hospital. Medical education's incorporation of laboratory research and teaching hospitals made it the target beneficiary of both government grants and private philanthropy. To achieve advances in medicine, the government and society turned to medical education. In later years, with the onset of Medicaid and Medicare, government support for medical services for some of the patients of medical education's teaching clinics and hospitals has also contributed to the financing of medical education. In contrast, legal education's disdain for the experiential component denied it an analogous path as the recognized source of advances in substantive legal reform and justice system reform that may have produced similar, though certainly more modest, contributions to its financing from government grants and private philanthropy. Thus, legal education's development was influ-

81. The latter path would have been incompatible with Langdell's views of law as a hard science. This path was, of course, later taken up by the Realists. See, e.g., id. at 155-60.
82. Id. at 52 (quoting CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (1871)).
83. THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA 23 (1965).
84. See LARSON, supra note 49, at 160-64.
85. Id.
87. The modern exceptions mostly relate to the practical dimension: Ford
enced by financial considerations to a far greater extent than was medical school development. For example, high student-faculty ratios and low-impact teaching methodologies became the norm in law schools because these choices allowed law schools to function in a fiscally responsible manner despite their lack of medical education's advantages in outside funding. 88

Because of medicine's relationship to the hard sciences, medical educators naturally turned toward laboratory and clinical applications of scientific theory. 89 Law had no ready analog to the teaching hospital and legal educators did not need to look for one. Law is different from medicine, after all. The roughly coincidental Flexner Report 90 on medical education and the Reed Report 91 on legal education indicate as much. 92 The Flexner Report blamed both people and institutions for medical education's failures. 93 Further, the report promoted a unitary system of medical education modeled primarily on the Johns Hopkins and Harvard medical schools. 94 The Reed Report criticized law as being flexible, diverse, and locally driven. 95 Although the doctor would find the human body to be the same in all locales at all times, Reed regarded the lawyer's subject of

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Foundation's creation of CLEPR, William Pincus, The President's Report, CLEPR'S FIRST BIENNIAL REPORT (1970), reprinted in CLINICAL EDUCATION FOR LAW STUDENTS 21, 27-28 (1980), and government infusions of money to support clinics through Legal Services Corporation grants and Department of Education grants, see infra notes 218-21 and accompanying text. The current efforts of the W.M. Keck Foundation to support advances in legal ethics teaching seem undoubtedly connected to that subject's close relationship to the practicing branch of the legal profession.

88. STEVENS, supra note 1, at 63 (stating that student-faculty ratios of 75-1 made the Harvard Law School self-supporting).
89. See Ebert, supra note 48, at 41, 43-44.
90. Abraham Flexner, Medical Education in the United States and Canada, in Bulletin No. 4, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1910).
91. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).
92. The reports are related by more than timing. Reed prepared his report after the ABA Committee on Legal Education and Admissions to the Bar asked the Carnegie Foundation to support a Flexner-style report for legal education. See Henry S. Fritchett, Preface to REED, supra note 91, at xvii-xviii. For a comparison of the two reports, see Michael Schudson, The Flexner Report and the Reed Report: Notes on the History of Professional Education in the United States, 55 SOC. SCI. Q. 347 (1974).
93. See Flexner, supra note 90, at 143-55.
94. Id.
95. See REED, supra note 91, at 418-19.
study as disorganized and unsystematic. Unlike Flexner's proposal of a unitary system of medical education, Reed proposed multiple systems of legal education, one for an elite group of lawyers to represent corporate and government interests and another—for which he thought night and part-time legal study was particularly well suited—to train for more common local matters representing, in large part, individuals. Of course, the ABA rejected Reed's recommendations.

Flexner aptly described the progress of medical education as moving from an apprenticeship system, in which the student simply observed disease, to the didactic process, in which the student heard and read about disease, and finally to the modern scientific and experiential model, in which the student returned to the patient after reading and hearing about disease with senses made infinitely more accurate and acute. Although most law teaching does not lend itself to the Flexner model, professional responsibility law teaching does. Reading and hearing about the law governing lawyers and the legal profession while experiencing the effects of that law on the role of the lawyer would be as useful for teaching professional responsibility law as it has been for teaching medical diagnosis and treatment.

In the years immediately following Langdell's revolution, professional responsibility law teaching in law schools was almost nonexistent. Schools regarded such teaching as either implicit in the rigor of a university legal education or a subject better conveyed in practice after law school and licensure. The first Langdell-style casebook for legal ethics was published in 1917, later than texts for many other then-existing fields of law. The courses that did exist were lecture-

96. Id.
97. See generally Flexner, supra note 90, at 143-55 (discussing reconstructing medical education).
98. Schudson, supra note 92, at 352.
99. Id.
100. Flexner, supra note 90, at 20.
101. See Michael J. Kelly, Legal Ethics and Legal Education 6 (1980).
103. See Kelly, supra note 101, at 5-6.
104. George P. Costigan, Jr., Cases and Other Authorities on Legal Ethics (1917).
105. See, e.g., Christopher Columbus Langdell, A Selection of Cases on the
based as opposed to case-method-based courses that had little to do with professional responsibility law. Professional responsibility was taught either "pervasively," in the older sense of that term rather than in the revitalized, "Pervasive Method" sense, or through experiential learning once the lawyer entered practice. Except for the ABA Canons, which were themselves largely aspirational and based on outdated, mid-nineteenth-century moralizing, there was no well-recognized law of lawyering to teach.

In spite of the changes in jurisprudential thought brought about by the Realists and by later jurisprudential thinkers, few changes in legal education's methodology have occurred since Langdell's time. The subject matter that legal education covers has been expanded to include emerging areas of law such as tax, administrative law, and environmental law. Further, legal education has embraced late-arriving social science-oriented inquiries embodied in courses such as Law and Economics or Women and the Law. As occurred in the early Realists' time—the 1930s—this expansion of the curriculum was accompanied by a modest shift of teaching materials and classroom methods away from formal legal interpretation and toward social science discussions.

LAW OF CONTRACTS (1871).

106. See KELLY, supra note 101, at 7-8 (describing the pervasiveness approach as the concept that ethical training would be present in all substantive courses and therefore separate professional responsibility courses were unnecessary).

107. See id. at 8.


110. Critical, feminist, and race-conscious thought are fields that have exploded in recent years. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992); MORTON HORWITZ, TRANSFORMATION OF AMERICAN LAW (1977); CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); CATHERINE A. MACKINNON, TOWARDS FEMINIST THEORY OF THE STATE (1989).

111. Goebel, supra note 16, at 135 (describing Columbia Law School as "recognizably the same School" in 1891 and 1955); see KALMAN, supra note 14, at 96-97 (asserting that, beyond subject matter changes, few alterations in legal education resulted from the Realists' jurisprudential victories).

112. See, e.g., Goebel, supra note 16, at 314-27 (describing the addition of legal history, trusts and estates, and administrative law to Columbia's curriculum).

113. Id. at 338, 354-55 (describing institution of small-section first-year classes to
Realists’ early efforts to shift legal education in the direction of clinical work\(^\text{114}\) effected little change.\(^\text{115}\) During the same time period, dramatic changes in medical education, paralleling some of the Realists’ functional, fact-based organizational subject matter schemes,\(^\text{116}\) occurred at what is now Case Western Reserve University. Innovative medical education reorganized the medical school subject matter according to body systems, deemphasizing the purer scientific disciplines.\(^\text{117}\) Unlike the legal education changes advocated by the Realists, these medical education reforms found favor and took hold.\(^\text{118}\)

Despite the call for a more experiential model that accompanied the Realists’ destruction of Langdellian formalism,\(^\text{119}\) little change in experiential legal education occurred until the Council on Legal Education for Professional Responsibility (CLEPR) renewed the clinical study movement in the 1960s and 1970s.\(^\text{120}\)

The clinical legal education movement represented a positive but largely disorganized move toward experiential learning models in legal education.\(^\text{121}\) It is tempting to assume that CLEPR was promoting the teaching of professional responsibility law, but it was not, except under a very limited understanding of the term. CLEPR was born in part from the idea of the Multiversity\(^\text{122}\) of the 1960s; it was at its core a bottom-up legal service

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115. See Kelly, supra note 101, at 11.
116. Kalman, supra note 14, at 48 (describing how Realists organized their casebooks less according to doctrine and more according to factual situations).
117. See Evolution, supra note 61, at 7.
118. Id.
119. See, e.g., Clinical Lawyer-School, supra note 114, at 907, 910-13 (1933); Karl N. Llewellyn, On What Is Wrong with So-Called Legal Education, 35 COLUM. L. REV. 651, 652 (1935); Nellie MacNamara, Teaching Legal Ethics by the Clinical Method, 8 AM. L. SCH. REV. 241 (1935).
120. See William Pincus, CLEPR Looks Ahead, in 1973 NATIONAL CONFERENCE ON CLINICAL LEGAL EDUCATION 3.
121. See infra text accompanying notes 126-34.
122. “Multiversity” is a term used to describe a desire for education to focus on fundamental issues of knowledge and value and service to society. Peter Brooks, Introduction: Symposium on Interpretation in the University/Interpretation of the
delivery reform. Supported by the Ford Foundation and led by William Pincus, CLEPR and the clinical legal education movement that it spearheaded introduced broader experiential education models into legal education but taught professional responsibility almost exclusively through exposing students to service to the poor. Even the inclusion in CLEPR's name of the words "professional responsibility" was in large measure little more than political accident. When the time came to renew the grant for CLEPR's predecessor, the Council on Legal Clinics, its name was first changed to the Council on Education in Professional Responsibility and then to the Council on Legal Education in Professional Responsibility, mainly to satisfy qualms by the American Association of Law Schools (AALS) about being associated with legal clinics. Even Gary Bellow's broader view of professional responsibility teaching through legal clinics was not directed at professional responsibility law as much as it was aimed at the student's direct involvement with moral choice and exposure to the legal system, warts and all. Although certainly addressing one essential element of professional responsibility, CLEPR's focus on service diminished the importance of the changed teaching methods for the rest of legal education. Indeed, clinical legal education took on, with some encouragement from the rest of the legal academy, a separatist role. Although the incredible success of the

University, 6 Yale J.L. & Human. 75 (1994).

123. Pincus, supra note 120, at 3, 6.
124. See id.
125. See id. at 3.
126. See id. at 4.
127. William Pincus, The Lawyer's Professional Responsibility, 22 J. Legal Educ. 1, 3 (1969) ("The first item on the agenda of [professional responsibility] reform is the extension of legal services.")
128. See id. at 25-27.
129. Id. at 26-27.
132. A. Kenneth Pye, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLINICAL EDUCATION FOR THE LAW STUDENT
clinical education movement has brought improvements in simulation teaching and externship placements, and has led to the more frequent inclusion of role-sensitive activities in various substantive law courses and in-house live-client clinics,\textsuperscript{133} no widespread, systematic connection between experiential education and professional responsibility law teaching has occurred.\textsuperscript{134} For the move toward experiential education to take firmer hold of its place as an equal partner of the more traditional classroom-oriented model of instruction, professional responsibility instruction must lead. For that to happen, classroom teachers and experientially oriented teachers of professional responsibility law must create a model for teaching this field that takes advantage of both realms.

Thus, the basic model of the legal education enterprise has remained largely unchanged since Langdell's time, except for a modest and separatist move toward the experiential model resulting from the clinical education movement. All of the changes in legal education, aside from the clinical education movement, have been about what is taught, not how it is taught.\textsuperscript{135} The mainstream of legal education remains almost as alien from the apprentice system as at the time of Langdell's revolution,\textsuperscript{136} and the clinical education movement has been separatist in nature, striving to create a new component to legal education that has its own scale, calibrated and set at an educational target that is separate from the rest of legal education.\textsuperscript{137}

The next revolution in legal education should begin with a broadening of the base of the experiential learning of professional responsibility. This revolution should respond to changes in the economics of law practice and training, the funding of clinical education, the connection of law faculty to the profession, the needs of the public, the demands of students, and the accountability of higher education.

The development from the apprentice system to the Harvard

\textsuperscript{21, 23 (1973) (CLEPR Conference Proceedings).}
\textsuperscript{133. STEVENS, supra note 1, at 216.}
\textsuperscript{134. See supra notes 126-33 and accompanying text.}
\textsuperscript{135. See supra notes 110-13 and accompanying text.}
\textsuperscript{136. See Gee, supra note 131, at 24-25.}
\textsuperscript{137. See supra notes 133-34 and accompanying text.}
method of law school education would have been impossible without reliance on post-graduation and post-licensure practice as the primary and nearly exclusive source of enculturation to the profession. The profession would certainly not have been better off today had the apprentice system defeated the law school method in the early twentieth century. The progression from apprentice system to law school education and enculturation by practice was a positive development; the problem is that the resultant separation of responsibilities between the law schools and the profession may now have broken down. It is not broken because professionalism is declining; it is not broken because law is too much like a business; it is not broken because there are too many lawyers being produced by the law schools. It is broken because the economics of law practice and the social attributes of the work force, lawyers included, have created circumstances within which the early twentieth century model may no longer be able to function in the area of professional responsibility teaching. The system—law school followed by enculturation in practice—may never have worked well for lawyers who were without the support of a large firm or a government office system of mentoring. It no longer works, in any event, even for the lawyers for whom it once did. Plenty of evidence demonstrates dissatisfaction with its current product: MacCrate, various bar association complaints, conclaves on legal education, academics' critiques, including

138. See Clinical Lawyer-School, supra note 114, at 907-10.
139. But see George K. Gardner, Why Not a Clinical Lawyer-School?—Some Reflections, 82 U. PA. L. Rev. 785, 800-02 (1984) (responding to Frank's proposals with an explanation of the changed social conditions that would have made the apprentice system a failure had it existed as the dominant method of legal education well into the 20th century).
140. STEVENS, supra note 1, at 96.
141. See, e.g., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR REP. 4-6 (1992) [hereinafter LEGAL EDUCATION] (reporting the findings of a task force chaired by Roger MacCrate).
142. See, e.g., W. Taylor Reveley III, Time for a "Reverse" MacCrate?, EDUC. & PRAC., Spring 1995, at 1 ("The bar relentlessly beats on law schools about their pedagogy.").
143. See, e.g., VIRGINIA STATE BAR, CONCLAVE ON THE EDUCATION OF LAWYERS IN VIRGINIA (Mar. 27-28, 1992).
Kronman's and Glendon's, and the professionalism movement begun by Burger. Much of the blame for the breakdown of this division of responsibility has been visited on the law schools, and progress toward reforming the system will occur through the law schools' adjustments. Actually, the bar has changed more than the law schools have in this time of growing dissatisfaction. Though the changes made in law schools have not always been the most carefully planned and orchestrated, most changes undertaken in law schools have brought about improvements. Section IV of this Article proposes a law school program designed to assist in the repair and reform of the system and to highlight the bar's responsibility to share the financial burden of supporting those reforms.

In fact, late-nineteenth-century calls for alternatives to Langdell's revolution were closer to what actually occurred in practice than one might think. At least in the emerging law firm, lawyers arrived with substantive education and proceeded into an apprenticeship period under the guidance of the firm's partners. Now, however, even this experiential learning, which has never approximated experiential education, is diminished to the point where its continued effectiveness is doubtful. Although law school teaching methods have remained relatively static, the extent to which the practicing branch of the

147. See LEGAL EDUCATION, supra note 141, at 6; STEVENS, supra note 1, at 238.
148. Compare Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227 (1973) (discussing the failure of both the bar and law schools to provide sufficient training on lawyering) with Symposium, Teaching Legal Ethics, LAW & CONTEMP. PROBS., Summer/Autumn 1995 (discussing existing and possible programs for more effective teaching of professional responsibility) and Paul A. Wolkin, Foreword to THEODORE VOORHEES, ON TRAINING ASSOCIATES vii (1989) (describing the recent retreat of law firms from “apprenticing” associates).
149. See VOORHEES, supra note 148, at 3; Wolkin, supra note 148, at vii.
150. Wolkin, supra note 148, at vii.
profession has been delivering the already deficient experiential learning regarding the profession and the law governing it has declined. It may once have been true that a solo lawyer in a small community received sufficient guidance from his or her peers, and, once upon a time, a new lawyer in a law firm probably received the mentoring of a partner. Mentoring is much less common in the 1990s, however, and for valid reasons. The relationship between a new associate and a law firm is a much more tenuous one today. Firms themselves are much less likely to be comprised of a lifetime commitment by commonly interested partners. Associates leave their first employment at a much greater rate than they did even twenty-five years ago. When associates stay beyond the first few years, partnership prospects are less likely than they were even twenty-five years ago. If an associate makes partner it will have taken a much longer time to do so than it did even twenty-five years ago, and the partnership attained may be of the recently developed nonequity variety. Partnership, even equity partnership, has changed so that it is less likely to be a lifetime commitment than it was even twenty-five years ago.

Another trend affecting professional responsibility training is that major clients have altered the ways in which they consume law firm legal services. Some clients now hire law firm partners with the proviso that in-house employee lawyers of the client will do the subordinate work for the law firm partner. When the firm's own associates do the partner's subordinate work, it is more likely to be narrow in scope. For efficiency's sake, today's associates develop narrow areas of expertise, rarely

151. See Stevens, supra note 1, at 216.
153. Id.
154. See id. at 195.
155. See id. at 195-96, 222, 225.
156. Id. at 195.
157. See id. at 235.
158. See Kronman, supra note 144, at 283-91.
159. See id. at 284.
160. Id.
seeing the breadth of the work being done for a client.\textsuperscript{161} Associate salary hikes in the early eighties also raised the stakes on their performance and their billable hours contributions.\textsuperscript{162}

In such an environment, it seems natural that law firm partners mentor less and send associates to CLE and in-house training programs more. The investment of partner and associate time in the sort of time intensive one-on-one development that worked in the past makes little economic sense in today's legal environment. The investment simply cannot be protected and is far less likely to pay dividends compared to the recent past. Developing a new lawyer's judgment is an expensive proposition. It is an expense that is far less likely to be undertaken in an environment where the law firm's interest in developing the judgment of new lawyers has been diminished.

What once was a flawed but workable experiential learning system for supplementing the law school education in professional responsibility has now become fatally flawed. To repair the broken system requires new programs of experiential legal education that are supported, in part, by the practicing branch of the profession. A sharing of responsibility for these programs will diminish the free-rider problem that now discourages law firms from engaging in the most expensive and most constructive forms of teaching.

IV. FROM DANA TO EMILY

Professional responsibility education should move toward a program of instruction that places students in as many lawyerly roles as is practicable. The key is that these experiences be supervised within an academic setting. Without question, the traditional classroom duties of analyzing and applying law must be included in these new lawyerly roles. Professional responsibility teaching must no longer, however, address this role as exclusively as it has in the past. It is not impractical to propose a three-year program of experience and classroom instruction that incorporates three educational elements: (1) long-term comprehensive

\textsuperscript{161} Id. at 288-90.
\textsuperscript{162} See ABEL, supra note 152, at 190-95.
simulation, (2) case, rule, and material reading with attendant classroom discussion, and (3) live-practice placements. Such a program of instruction is as close as legal education will, or should, ever come to approximating medicine's teaching hospital. Any remaining academic notions of disdain for practice, and the associated feeling that academe must disassociate itself from practice must continue to dissipate. This phenomenon is already occurring, as similar anecdotal evidence from many great law schools and the legal academy generally suggest.\(^{163}\) Dominance in Langdell's era by the great treatise writers and doctrinal scholars gave way to dominance in the Realist era by a faculty group that held the work of the treatise writers in low regard, a group for whom law itself was worthy of study only by virtue of its connection with whatever happened to be their other discipline.\(^{164}\) More recently, a group of faculty that values the contributions of both groups and has an appreciation of the need for a positive connection between law's practicing and academic branches came into the contest for control between purely legal doctrine and diverse doctrines of other disciplines.\(^{165}\)

The long-standing acrimony between academy and practice is particularly inappropriate in the context of professional responsibility teaching. The academy and the profession must jointly accept the intellectual, academic qualities of professional responsibility teaching and the related disciplines of skills theory. Doing so will acknowledge the adulthood of the study of law in the academy and will accomplish two major goals. First, it will foster both a reallocation of major legal employers' training resources into informally pooled funds shared by the law schools, in the same manner that Anthony Amsterdam predicted would occur within the law school;\(^{166}\) second, it will encourage government to reallocate live-client, in-house clinic resources to

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164. See LEGAL EDUCATION, supra note 141, at 4-5.

165. See Michael J. Rost, *Other States Learn from Virginia Conclaves on Education of Lawyers*, 41 VA. LAW. 43, 43 (1996).

more generalized experiential learning programs. These developments will fill MacCrate's gap, \textsuperscript{167} restore balance in the process of students becoming lawyers and make economic sense.

A. Why Professional Responsibility Should Be Taught Through Experiential Education

Anthony Kronman has said, "If Langdell is right, there is nothing left for a practitioner to teach—nothing, in any case, that a full-time academic with the time and inclination to pursue his subject scientifically cannot teach more ably."\textsuperscript{168} This remark is a slight overstatement. Even if Kronman's idea of Langdell's vision is correct, there is one thing better taught by both experience and science than by science alone: the law and ethics of lawyering. Professional responsibility should be taught by the broadest possible experiential education model; it should expose students to as many lawyerly roles as possible, including the traditional classroom legal education role of lawyer as law reader and analyzer.

The law of professional responsibility is the same as the law of other fields in that it is about law, not "mushy pap."\textsuperscript{169} It is different from all other law fields in another crucial way: although the lawyer vicariously interacts with the law of contracts and torts through clients' experiences, the lawyer directly experiences professional responsibility law as the central actor in all of the relationships that professional responsibility law is about. This difference suggests that experiential methods may be more effective in the teaching of professional responsibility law than in other areas of law.

It does not follow from this argument that the use of broad experiential education models and methods are equally effective to teach contracts or torts. The lawyer's need to understand the law of contracts, torts, and all other areas of the law in which the lawyer acts only in the role of expert, is satisfied quite well

\textsuperscript{167} See LEGAL EDUCATION, supra note 141, at 3 (acknowledging the idea of a "gap" between legal education and the realities of the profession).

\textsuperscript{168} KRONMAN, supra note 144, at 184.

by effective use of the case method. The case method, when applied rigorously, effectively simulates what the lawyer's interaction will be with the area of law being taught. Indeed, the case method proves to be an active or experiential learning methodology for learning most legal concepts. Furthermore, the case/problem discussion method works quite well for teaching some aspects of professional responsibility law.

The directness of the lawyer's interaction with professional responsibility law, however, means that broader use of experiential education methods will be especially effective for teaching that subject. Placing the student in the role of lawyer provides the student with a context for learning the law of professional responsibility. This context does at least two things: first, it enhances the understanding and retention of the material by providing for its immediate use, and second it modifies the reading material and the class discussion to reflect the nuances of law that are only apparent in the experience of its application.

Legal education is, at the end of the day, professional education. One of the subject matters inherent in a professional education is education in the particular professional role. Law schools enroll students who either will be lawyers or will use the skills and thought processes common to the lawyer's role. When we put a student in the role of lawyer to facilitate the teaching of professional responsibility law, we do so because that is a role about which well-educated lawyers must have insight and because that role is central to the subject matter being taught. Those basic insights about lawyering will be transferable to a wide variety of circumstances. In contrast, the roles of contracting party or tortfeasor are not central to the law of contracts and torts in the same way that the role of lawyer is central to the study of the law of professional responsibility. To be sure, contracts do not happen without contracting parties, and torts do not happen without tortfeasors. The law of contracts and the law of torts, are, however, not as closely related to the role of the affected parties as the study of professional responsibility is to the role of lawyer. As a result, the rationale for placing the law

170. See Stevens, supra note 1, at 52-55.
171. See Professional Education, supra note 22, at 3-4.
student in the role of lawyer for professional responsibility learning is absent in the contracts and torts analog.

Placing students in the role of contracting party or tortfeasor, nonetheless, would benefit them. They might gain some insight into the businessperson’s mind or an injured person’s feelings that would teach them about the elements of the law of torts or contracts, but this experience is unlikely to be very meaningful. Realistically simulating the lawyer’s role is difficult, but it can be done. Realistically simulating the role of a mass tort victim, for example, would be a virtually hopeless effort that students would not take seriously. Pedagogical interests also militate against using clinical methods to teach roles other than that of lawyer and subject areas other than that of professional responsibility law. Clinics do a reasonably effective job of teaching substantive law topics;\textsuperscript{172} criminal law and procedure can be taught in a prosecutor or defender clinic, for example. Clinics give the student an immediate use of substantive material and place the student in a specialized lawyer role.\textsuperscript{173}

Further, various areas of professional responsibility law rely on what amounts to “trade usage.”\textsuperscript{174} In professional responsibility law, unlike contracts, trade usage is a reference to lawyer conduct: that is, how do lawyers lawyer. To teach this area without putting students in roles and requiring students to work with and watch the functioning of lawyers is to miss the best opportunity available for teaching this aspect of professional responsibility law.

Trade usage differs from practice setting to practice setting. Model Rule 4.1 defines the law governing negotiation conduct by reference to what amounts to trade usage, implicitly creating a rule of law that varies based on the activity undertaken by lawyers and lawyers’ common understanding of the “rules” at play during that activity.\textsuperscript{175} Acceptable rules of the negotiation

\begin{itemize}
    \item \textsuperscript{172} Pye, \textit{supra} note 132, at 21, 23.
    \item \textsuperscript{173} \textit{Id.}
    \item \textsuperscript{174} \textit{See, e.g.,} \textit{MODEL RULES OF PROFESSIONAL CONDUCT} Rule 4.1 cmt. 2 (1995) (referring to the rules of negotiation and the expectations of lawyer-negotiators as determining those tactics that are false or misleading).
    \item \textsuperscript{175} \textit{See id.} (defining acceptable practices by reference to contract and agency law principles).
\end{itemize}
game in labor practice differ from those in family law practice or criminal law practice. Although these differences to some extent reflect differences in the substantive labor, family, and criminal law, to an even greater extent they are the products of the varying practice cultures and norms within these different practice settings. Therefore, although teaching professional responsibility law as a part of a variety of different substantive law courses is helpful, the primary reason for doing so is to teach the norms of the practice setting cultures that are attendant to the substantive law field.

The current "pervasive method" advocates have the subject matter right, but the methodology wrong. They are right that crucial connections exist between the law of lawyering and the law of a variety of other substantive areas; indeed, no one today would argue with the proposition that much of the law of lawyering is the law of a variety of other subject matter areas. The pervasive method falls short of the mark by failing to place the student in any lawyerly role other than that of law analyzer and applier, the same role that is the grist of traditional law teaching.

Although professional ethics law pulls principles from a variety of other substantive law fields, the same can be said of several other law fields typically taught in the second or third year, such as corporate law. Professional responsibility law uses agency principles; so does corporate law. Professional responsibility law uses tort principles; so does corporate

176. See RHODE, supra note 108, at 4-5.
177. See id.
178. See id. at 5.
179. Id.
181. See, e.g., In re Goldstein, 85 A.2d 361, 363 (Del. 1951) ("[A] lawyer is not permitted to traffic in his client's affairs for his own profit . . . ."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(b) (1992) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation . . . .").
183. See, e.g., Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962)
law.\textsuperscript{184} Professional responsibility law uses contract principles;\textsuperscript{185} so does corporate law.\textsuperscript{186} Professional responsibility law, like corporate law, thus has a core of its own that in some respects is dependent on "other law." Yet, no one suggests that corporate law should be taught by sprinkling its instruction throughout the various courses from which its substantive law principles are drawn. Nor is it suggested that significant portions of the corporations course should be put into the hands of other subjects' teachers when it also has its own course.

Even if we were wise to try to teach professional ethics law by a pervasive method, that is, by teaching parts of it in a variety of courses, this goal would be better advanced by focusing on the practice settings typical of lawyers who are working with the course's substantive law topics. This more effective approach to the pervasive method would include focusing on trade usage\textsuperscript{187} in the substantive classes in which ethics instruction is provided. For example, a corporations class should focus on the professional responsibility issues as they would arise in the typical corporate law setting—in-house counsel or firm corporate attorney. A criminal law or criminal procedure course should zero in on ethical issues that arise during criminal practice, such as the prosecutorial responsibility to share potentially exculpatory evidence with the defense,\textsuperscript{188} or the conflict of interest issues that arise when representing multiple criminal defendants.\textsuperscript{189}

\textsuperscript{184} See, e.g., Combined Ins. Co. of America v. Sinclair, 584 P.2d 1034, 1042 (Wyo. 1978) ("[A]s a matter of public policy and economic requirement, a master is liable for damages caused by the negligence of his servant while acting within the scope of the servant's employment.").

\textsuperscript{185} See, e.g., Rosenberg v. Levin, 409 So. 2d 1016, 1019-22 (Fla. 1982) (regarding application of contract rights analysis to lawyer discharge); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1995).

\textsuperscript{186} See, e.g., Bourgeois v. Horizon Healthcare Corp., 872 P.2d 852, 856-87 (N.M. 1994) (discussing the concept of the implied covenant of good faith and fair dealing).

\textsuperscript{187} See infra notes 190-91 and accompanying text.

\textsuperscript{188} See United States v. Williams, 504 U.S. 36 (1992) (holding that a failure to disclose exculpatory evidence will not exclude an otherwise valid indictment).

\textsuperscript{189} See Cuyler v. Sullivan, 446 U.S. 335 (1980) (holding that representation of multiple criminal defendants is not unconstitutional absent a showing of actual conflict).
In torts or products liability classes an emphasis should be placed on the potential pitfalls inherent in personal injury representation or insurance defense. For an administrative law class, professional responsibility should be incorporated in a way that would show students how such issues typically present themselves to government agency attorneys. The potential examples are numerous as this approach could truly pervade all substantive courses. Scholarship on professional ethics law as it relates to specific practice settings is current and rich.190 Some practice cohorts have attempted to draft model ethics rules for their particular practice settings.191 This material is at least as much about the practice settings, and the attendant trade usage, as it is about the imported law of torts, family law, administrative law, corporations, criminal law and so on.

The pervasive method as presently conceived is organized around the wrong theme; rather than being divided up among substantive law courses, the professional responsibility law field should be organized around diversity of practice settings. In other words, instead of asking torts and corporations professors to teach the parts of professional responsibility law that come from tort law or corporate law, for example, we would do better to focus on the nuances in professional responsibility law that are created by differences in practice setting. My way of doing so, perhaps predictably, would be to create practice setting specific simulations that would run alongside the substantive law courses.

Combining varied substantive law subject matter with matching role adjustments would produce the real benefits of pervasive ethics teaching. Creating practice setting specific simulations that run alongside the appropriate substantive law courses


would, however, produce greater pervasive method benefits than merely having the corporations teacher teach the aspects of the law of corporations that are imported into professional ethics law. Through these teaching, learning, and research vehicles focused on the practice setting, we can fully develop a jurisprudence of lawyering.

B. A Proposed Program Description

The full proposed program would include these elements: (1) a long-term comprehensive simulation; (2) case, rule, and material reading with attendant classroom discussion; and (3) live-practice placements. Viewing the proposed program's organization from another perspective, it includes a required program of comprehensive skills and ethics teaching similar to William and Mary's two year course,\(^{192}\) combined with required externship placements, and practice-setting-conscious simulation components in a number of elective courses. In a law school catalogue, the program might look like this:

**REQUIRED**

<table>
<thead>
<tr>
<th>Semester</th>
<th>Course</th>
<th>Credits</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Legal Skills and Ethics I</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>Legal Skills and Ethics II</td>
<td>3</td>
</tr>
<tr>
<td>3</td>
<td>Legal Skills and Ethics III</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Externship</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>Legal Skills and Ethics IV</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Externship</td>
<td>2</td>
</tr>
</tbody>
</table>

**ELECTIVE**

One of the four credits allocated to each of the following listed elective courses is earned in the appropriately designed simulation experience: products liability, corporations, bankruptcy, international business transactions, public international law, administrative law, environmental law, social programs law, criminal procedure, juvenile law, and trusts and estates.

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The full proposed program would be the most ambitious professional responsibility teaching program in American legal education. It would at once overcome the traditional marginalization of professional responsibility teaching in favor of recognizing the centrality of professional responsibility teaching in legal education. It would do as much as reasonably could be done to restore the balance that once existed, albeit only in limited practice circumstances, of classroom and broader experiential education. It could enhance moral development of law students, and therefore lawyers, and it could increase lawyers' perceptions of their preparation to face professional responsibility issues in practice. Finally, it would afford more classroom hours for the teaching of professional responsibility law than does the current two- or three-credit free-standing course.

The basic, required portion of the proposed program follows the pattern of William and Mary's Legal Skills Program. A required externship component would be added to the current William and Mary program, and the electives would be built upon the basic program. At William and Mary, professional responsibility and professional skills-teaching, including research and writing, is accomplished in a required, two-year program of comprehensive skills and ethics development called the Legal Skills Program ("Program"). The Program treats professional responsibility and skills-teaching in the context of long-term, comprehensive, simulated client service.

Program instruction proceeds concurrently on two tracks, classroom instruction and simulated client representation. Because client representation is the methodological core of the Program, the entire Program is organized around the simulated student law office and its need to deliver effective, competent,


194. See generally James E. Moliterno, Professional Preparedness: A Comparative Study of Law Graduates' Perceived Readiness for Professional Responsibility Issues, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 259 (reporting results of recent survey of lawyers with two to five years of practice regarding preparation for professional ethics issues).

195. For a more detailed description of the Legal Skills Program, see Moliterno, supra note 192.
and ethical client service.

The client roles are played by other students as well as members of the community. All of the long-term roles, however, are played by other students in the Program. Enough variations exist on the fabricated legal problem so that no student plays a role in a case in which his or her law office has any representational responsibility. Interestingly, the client role-playing has itself proved to be a valuable learning experience for the students. Students serve four simulated clients over the two-year course of the Program. The client issues vary from office to office, but each student works for clients on both civil and criminal matters and on both litigation and planning or deal-making matters.

The Program also provides students with experiential ethics education. The treatment of ethics within the context of the simulations allows the simulated experiences to be more than mere games. Although it is true that the deeply emotional impact of a live-client experience exceeds that of a simulated client representational experience, the inclusion of ethics makes the simulations much truer, better-textured representations of client service. For example, teaching the professional responsibility issues regarding truth-telling in negotiation in conjunction with teaching negotiation tactics imbues the negotiating experience with consideration of legitimate client and lawyer goals beyond the mere victory over an opponent.

The inclusion of professional responsibility teaching speaks to the sound criticism of the gaming that is involved in many practice skills programs. It matters that the students' clients are not "paper clients," they are individuals with whom the student lawyers interact over the term of the simulation. Because the Program does not separate professional responsibility teaching from skills teaching, students engaged in a practice activity must consider the moral and ethical dilemmas they will face in the activity to at least as great an extent as they consider the tactics and strategies. In fact, the goal is for the students to come to see the ways in which technique and ethics connect with the individual activities in which they have engaged.

The weekly class meetings nearly always include an element of ethics, professional responsibility, and of the law of lawyering.
Many of the classroom discussions are strikingly similar to discussions in a free-standing professional responsibility course, except that they usually include no more than sixteen students. Cases, rules, hypothetical problems, and readings that question the value and wisdom of the rules form the basis of those discussions. Other class sessions are different from and richer than the usual professional responsibility course discussion: rather than focusing on appellate decisions or rules or readings, these discussions focus on the recent simulated case experiences of the students and the issues that have arisen, usually but not always by our own design.

The benefits students glean from playing particular client roles for a long term have been greater than we anticipated. Many students have reported that walking a mile in the client's shoes has given them a valuable perspective on the profession that will make them more sensitive to client needs. A few have reported an enlightening feeling of helplessness in their client roles, particularly when the service being provided by their lawyers was unsatisfactory.

The problem materials and, thus, the simulated client service that the student lawyers provide, are comprehensive. The simulations are comprehensive in the sense that they allow the students to represent the clients from a logical beginning point, such as an initial interview, through a logical end point, such as a successful negotiation or the conclusion of an appellate process. Because student associates can see the results of each activity, they learn more about that particular activity. The skills-teaching benefits of such comprehensiveness are obvious, and the benefits are dramatic from an ethics teaching perspective. Unlike ethics teaching in isolated activities, such as one-time negotiation or interviewing exercises that appear and quickly disappear, students in the Program interact on an ongoing basis with a single individual portraying a client, another acting in the role of the adverse party, others serving as opposing counsel, and still others acting as court personnel. These interconnections often continue for up to two years from case beginning to case closing.

When students try a case in the Program, it is not canned, packaged, or sterile. Rather, it is a case that they have devel-
oped from initial client interview, through fact investigation, research and writing activities, the filing of pleadings, motion practice, discovery practice, to trial. The trials are transcribed by student court reporters. Appellate work is based upon these transcripts; the pleadings, motion and discovery papers, stipulations, proposed findings of fact and conclusions of law that the students have filed during the litigation; and the trial court's judgment. As a result, students get a very direct sense of the consequences of their performance at trial. Because of the comprehensive and ongoing nature of the simulations, any poor relationships must be repaired, unethical behavior of fellow members of the "bar" must be reported under appropriate circumstances, and consequences of lawyering conduct must be faced. Students' interaction with clients from beginning to end of various matters gives them greater opportunities for reflection, experiencing long-term the day-to-day activities and relationships of lawyering.

Because the Program replaces other courses in the curriculum, its costs are lessened by savings from not teaching the replaced courses. The Program eliminated from William and Mary's curriculum the research and writing course, an item on which many schools spend considerable resources; an elective negotiation course; an elective interviewing and counselling course; a limited enrollment basic trial practice course; and the required professional responsibility course. Portions of the teaching load of four tenured faculty, twelve adjunct faculty, fourteen teaching assistants, and an administrative assistant are devoted to the Program's operation. The total cost of the program is approximately equal to the cost of offering the replaced courses, including the cost of an average research and writing program staff.

Unlike the current William and Mary Legal Skills Program, the proposed program would make use of externship placements. Advances in sophisticated externship placements and supervision enable the inclusion of the final pieces of the new format. Students in these externships will be simultaneously enrolled in the basic comprehensive simulation/ethics course. The externships will serve an important purpose of clinical legal education: the provision of a realistic forum for critiques of the
profession. Students can produce journals for review by their faculty supervisor and report their externship experiences to their small simulation/ethics course group. Their shared externship experiences will enrich the simulation experiences in the law school while the simulations will give students an analytical framework within which to experience and evaluate their externship activities.

Adding a sophisticated externship component to the new skills and ethics teaching program will improve community service, another important interest of clinical legal education. Inevitably, many of these required externship placements will be public service placements. The brief externships, required of all students, will provide significant help to public service organizations, perhaps more than in-house clinics now provide. At some schools, these externships will probably be tied to public service graduation requirements. At those schools and most others, required externships will expose more students to the public service experience than do limited enrollment in-house live-client clinics. In many cases, more service will be provided than is now provided by the estimated thirty percent of students who are accommodated in in-house clinics at those schools that have them.

Beyond the required program, the proposal would build an ethics simulation into several elective second- and third-year courses. Thus, through experiential education, the required course utilizes the nexus between legal practice and professional responsibility and combines it with simulations of specialized practice settings. These can include: experiential in-house corporate counsel settings in the corporations course; plaintiffs' personal injury and insurance defense offices in torts or products liability courses; government agency settings in administrative law or environmental law; Federal Reserve or the International

197. Association of American Law Schools, Report of the Committee on the Future of the In-House Clinic (1991), reprinted in 42 J. LEGAL EDUC. 508, 522 (1992) [hereinafter AALS]. The percentage of students doing public service through in-house clinics is actually somewhat lower because not every in-house clinic is a public service clinic. See id. at 520.
Monetary Fund in international finance law; United Nations agencies in public international law; legal aid or state human services offices in child welfare or juvenile law courses; and prosecutorial and public defender offices in criminal law and procedure. This approach will produce the benefits of the pervasive method but in a managed way.

The final educational “product” therefore will include a four-semester, broad-based but general practice-oriented simulation skills and ethics course combined with a coordinated variety of simulations that are an integrated part of ten or more substantive law courses in a law school’s curriculum. The three-year program would assume the goals and the course credits formerly assigned to courses in professional responsibility, legal research and writing, interviewing, negotiating and counselling, appellate advocacy, pretrial advocacy, trial advocacy, and alternative dispute resolution as well as externship credits. This will total approximately fourteen semester credits at most schools. It will also account for about twenty-five percent of the credit earned in ten or so other, three- or four-credit, elective, substantive law offerings. If the average student takes six of these electives, he or she will earn fourteen credits in the basic program and six ethics credits from the elective substantive law courses. The total of twenty credits of the typical eighty-six required for graduation equals approximately twenty-five percent of the credits needed to graduate.

Faculty members teaching the elective courses that include a simulated ethics component will, quite naturally, resist intrusions into their turf. Like other modern workers in the twenty-first century’s sophisticated work force, however, law professors may have to acclimate themselves to team-work situations. Some professors may not be able to overcome the difficulties. Most, however, will adjust just as practicing lawyers did in the

198. Other schools have established programs that combine some, but not all, of the elements of William & Mary’s program with explicit teaching of professional responsibility. See infra note 224.
199. See, e.g., Scott J. Burnham, Teaching Legal Ethics in Contracts, 41 J. LEGAL EDUC. 105 (1991) (providing examples of how both substantive and ethical issues can be taught in a contracts course to exemplify how substantive courses can help students answer the question, “What kind of lawyer do I want to be?”).
1980s and 1990s. Law practice's increasing complexity has caused the multiple areas of law affecting the affairs of an individual client to become too much for any single lawyer to grasp and manage.\textsuperscript{200} The phenomenon of lawyer teams working on client matters is now commonplace.\textsuperscript{201} Simply put, every sophisticated worker in society has needed to add interpersonal workplace and teamwork skills to the skills previously required to accomplish his or her respective job.\textsuperscript{202} Workplace adjustment, focusing on lawyer teams, has increased in the 1980s and 1990s.\textsuperscript{203} At least some law faculty members may need to employ a similar focus on teamwork.

The natural reluctance of upper-division elective course teachers to add a simulation component to their courses ultimately will be overcome by experience. They will find that the simulations are not disruptive and that, in important ways, the simulations enhance their students' substantive learning experiences while achieving the primary goal of enhancing students' understanding of professional responsibility.

Several factors will contribute to the successful adjustment to team-teaching among formerly lone-actor faculty members. First, simulation design and management expertise can be provided by the staff of the basic skills and ethics simulation course. The simulations can be created and executed in consultation with teachers of the electives, but the main design and administrative burden need not be on those faculty members. This efficient arrangement would take advantage of the relative expertise of the available personnel.

Second, the simulations can be flexible in duration and intensity. Some faculty members may prefer to have a nearly semester-long simulation running alongside the substantive law course, while others may prefer a shorter simulation. Third, faculty involvement in the simulation can vary from course to course. Some instructors will choose to be central characters in the simulation's execution, while others may prefer that the

\begin{footnotesize}
\begin{enumerate}
\item See Mary Twitchell, \textit{The Ethical Dilemmas of Lawyers on Teams}, 72 \textit{Minn. L. Rev.} 697, 705 (1988).
\item Id. at 701.
\item Id.
\item See id. at 764-66.
\end{enumerate}
\end{footnotesize}
simulation be executed by others and run parallel to their courses. Fourth, substantive law professors will see an enhancement of their own teaching experience resulting from the benefits of teaching students who have a simultaneous practice context for the area of substantive law being taught. Such students should be able to move beyond rudimentary issues more quickly, allowing the teacher to explore the substantive area more deeply and from a wider variety of perspectives than had been possible before.

A typical, elective, substantive law course simulation would have the following characteristics. The skills/ethics program staff would work with the substantive law faculty member to plan the extent of the simulation, which may run anywhere from two weeks to the full length of the semester. The staff and faculty member would discuss the primary issues that should be addressed through the simulation. In products liability, the issues may be contingent fee structures and multiple client conflicts of interest; in juvenile law, issues may include the limits of confidentiality when a lawyer is aware of child abuse, confidentiality in the mediation context, and paternalism in lawyer-client relationships; in corporations, the simulations could address client-as-entity issues, client fraud, and attorney-client privilege in the institutional setting; in criminal procedure, concerns might include the nature of the prosecutor's role, client perjury, and witness preparation. In short, the professional responsibility issues would be culled from those that might be covered if the current description of the pervasive method were being used.204

Several simulations would be designed, mainly by the skills/ethics program staff, for the particular practice settings relevant to the substantive law course. Role players from within and from outside the law school community would be located and given their respective character descriptions and fact pattern instructions. Students in the course would be divided into working groups of between four and six, depending on the complexity of their client's representational needs, and groups would

204. RHODE, supra note 108, at 4-5 (describing the pervasive method as an approach addressing questions of professional responsibility "throughout the curriculum as well as in courses specifically focused on the legal profession").
receive representation settings and client representation responsibilities. Both the skills/ethics staff and the substantive law course teacher would monitor and execute the scenarios in combination.

One scenario in the criminal procedure course, for example, might involve a mid-level drug dealer who is charged with various crimes and who is in hiding. The drug dealer, through his attorneys (a working group of four students) is seeking preferential treatment from the U.S. Attorney's Office (another working group of four students) in a particular location in exchange for revealing information about the organization for which he works. The attorneys' negotiations proceed. The prosecutors must identify the legitimate interests of the government. Later, the defense lawyers learn that their client is attempting to gain his advantage in exchange for false information that they have to that point unwittingly been giving to the U.S. Attorneys. The defense lawyers now must determine their obligations to the prosecutors in this situation. The defendant then calls one of his lawyers, at night, to tell her that while the authorities have not found him, his co-conspirators have and that he is in great danger. Over the telephone, the lawyer hears the sound of gunshots, a door being broken down and glass shattering. The telephone line goes dead. The lawyer wonders whether to call an ambulance or the police. The next morning the defendant calls again to report that he narrowly escaped from his co-conspirators the night before. Losing confidence and patience with his defense lawyers, the defendant calls one of the prosecutors directly. The prosecutor must consider how the contact with opposing, represented parties rules should apply to him as a prosecutor.205 From there, depending on the actions taken by the prosecutors and the defense lawyers the scenario proceeds to a conclusion in one of several possible directions. All of this activity would occur over a four- or so week period during the semester.

Eventually, the program might facilitate simulations that involve scenarios that cut across substantive course lines. In such a simulation, for example; students in a social programs course could work in a simulated state attorney general's office.

representing the state child services administration, students in a juvenile law course could work in a simulated legal aid office representing a pregnant teenager who is contemplating an abortion, students in a health law course could represent a hospital at which the pregnant teenager seeks abortion services, students in a family law course could represent prospective adoptive parents who seek to place an advertisement offering extraordinary benefits to birth parents who will give them a healthy child for adoption, and students in a First Amendment course could represent the newspaper in which the prospective adoptive parents place their advertisement. The multiple interactions among such a group of clients would make for a fascinating, invaluable semester for the students.

On the merits of the educational experience for students, the debates have long been framed as in-house clinic versus externship 206 or in-house clinic versus simulation 207 contests. Those debates were argued long, fully, and well. 208 The proposed program’s combination of simulation and externships in a single coordinated program, however, changes the parameters of that debate. Every advantage of in-house clinics over either externships or simulations standing alone can be countered by a similar strength originating from the combination of externships and simulations. For example, although in-house clinics have an advantage over simulations in providing service to the community, externships can provide as much or more service. 209 Although in-house clinics have an advantage over simulations in exposing students to real-life situations, externships are more realistic than in-house clinics because students are placed in the actual legal aid office, to take one example, rather than in the law school’s internally created model of a legal aid practice. 210 Likewise, although in-house clinics offer more predictable supervision than externships, simulations can be more stably and predictably supervised than in-house clinics. Although in-house

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206. See, e.g., Condlin, supra note 196, at 63 (discussing benefits and drawbacks of in-house clinics and external practice settings).
207. See supra notes 119-34 and accompanying text.
208. See supra notes 119-34 and accompanying text.
209. See Condlin, supra note 196, at 63-74.
210. See id.
clinics offer more predictable levels of quality work than externships, simulations are created and managed with the express purpose of providing even levels of work, escalating levels of challenge, varying case types and issues, and consistent opportunities to see client matters through to completion. The advantages of different aspects of both externships and simulations over in-house clinics remain valuable features of the proposed coordinated program. Advantages of the in-house clinic over either externships or simulations standing alone will become largely irrelevant.

C. How To Pay for The Program

While it may be entertaining to propose curricular developments without regard to their funding, the economics of such proposals can never be ignored.\(^{211}\)

1. Reallocating Existing Resources

A program such as the one proposed does not require as many new resources as may appear at first blush, at least at schools that now spend average amounts on legal research and writing courses and programs.\(^{212}\) Such a program would replace courses already in the curricula of most law schools, and can make use of the resources now allocated to those courses. The proposal replaces the freestanding professional responsibility, research and writing, appellate advocacy, basic trial advocacy, interviewing, negotiating and counselling, and pretrial practice courses, and also replaces some elements of an alternative dispute resolution course.\(^{213}\) These classes already exist at most schools.\(^{214}\) As such, most of the resources needed to fund the


\(^{213}\) As the evidence now shows, lawyers who have experienced the basic, broad-based component of the program regard their own preparation for ethics issues in practice, research, writing, advocacy, interviewing, counselling, and negotiating as being significantly superior to graduates of more traditional skills and ethics curricula. See Moliterno, supra note 192, at 35-51.

\(^{214}\) See Myers, supra note 212, at A16.
proposed program need only be reallocated, not generated anew. Some additional resources will be needed, however, and the following ways of generating them should prove more than adequate.

2. Foundation or Government Support

Law schools have not traditionally been the recipients of foundation or government support in the way that medical schools or hard science programs have been. Therefore, almost any funding from such sources is new. Broadly viewed, the professional responsibility of lawyers is perhaps chief among law school subject matter with a direct and substantial link to the public interest. The W.M. Keck Foundation has recognized as much in its program to support advances in the teaching of professional responsibility. Other grant-giving organizations will take up the cause as the case is made for the importance of professional responsibility teaching to protect the public interest.

Government support in the form of Legal Services Corporation (LSC) funding and Department of Education funding, of course, has been threatened. LSC has traditionally supported live-client clinics. In the competition for what remains of government support for legal education beyond the next budget crises, grant proposals for portions of the proposed program that involve service (the externships) could begin to fare well, especially as LSC increasingly focuses on service-per-dollar. The externships will reach more students and arguably provide more service to the public than do in-house, live-client clinics.

215. See id.
216. See STEVENS, supra note 1, at 283 n.35.
217. For descriptions of the programs thus far supported by the W.M. Keck Foundation grants, see LAW & CONTEMP. PROBS., Summer/Autumn 1995, passim.
219. AALS, supra note 197, at 552 n.3.
220. See Neville, supra note 218, at A21.
221. See supra notes 196-97 and accompanying text.
3. Self-Perpetuation and Redistribution to Successful Programs

It is in the self-interest of law schools to support programs like the one proposed. Student and employer demand will produce economic incentives for law schools to better prepare graduates for lawyering. Schools that can effectively implement such models while maintaining the quality of their core teaching of doctrine and analysis will, over time, enjoy a competitive advantage over other schools, eventually making the implementing schools successful ones. Employers who are not doing their own educating\(^\text{222}\) and enculturation will prefer to hire graduates of the implementing schools. Placement data will then influence prospective students' choices, and private dollars largely in the form of alumni giving will flow. Private funds can be raised to support professional skills teaching programs. For example, schools such as the University of Michigan and the University of Virginia have recently begun new skills-teaching offerings that are largely supported by private funding.\(^\text{223}\) Programs that can offer advances in professional responsibility as well as in skills areas provide competitive advantages that will ensure that such funding will flourish. Several schools have begun steps in the direction of the proposed program, with support from a variety of sources.\(^\text{224}\)

In the longstanding tradition of law schools, as faculty inter-

\(^{222}\) Few employers are doing their own educating. See VOORHEES, supra note 148, at vii. Remember also the distinction between educating and providing learning opportunities. See supra notes 22-43 and accompanying text.

\(^{223}\) See Lehman, supra note 163, at 2; Scott, supra note 163, at 4-5.

\(^{224}\) See Ted Gest, Realism on the Docket: Building a Case for More Clinical Training of New Lawyers, U.S. NEWS & WORLD REP., Mar. 23, 1992, at 70. New York University has had in place for several years a lawyering course without the explicit ethics teaching component; William & Mary has had the basic two-year program in place since 1988, Moliterno, supra note 192, at 146; Northwestern University has an advocacy and professional responsibility course, Karen Wagner, Northwestern University School of Law’s Dean Stepping Down: Improve Our Ranking Is Advice for Whomever Fills His Post, ILL. LEGAL TIMES, Nov. 1994, at 13; Temple University has an advocacy/evidence/professional responsibility course and a trusts and estates/professional responsibility course, ABA Annual Meeting NYC ‘93: Awards, N.Y.L.J., Aug. 6, 1993, at 7; Loyola University of Los Angeles has an advocacy/professional responsibility course, Michael E. Wolfson, Professional Responsibility As a Lawyering Skill, LAW & CONTEMP. PROBS., Summer/August 1995, at 297, 299.
ests turn toward activities like the proposed program, schools will begin implementing it. Live-client clinicians are moving toward both simulation and externship teaching, and classroom teachers of substantive law courses are adding simulation components, especially ethics-related ones, to their courses.\textsuperscript{225} This phenomenon seems to be happening on its own, without any particular addition of new resources, and seems likely to continue.

4. \textit{Support from the Profession and the Organized Bar}

The profession, particularly the organized bar, should, for varied reasons, support law schools' movement toward the proposed program. Before the days of high lawyer mobility, the serious onset of which occurred in the late 1970s,\textsuperscript{226} law firms invested a great deal of time and money in the training and enculturation of new lawyers.\textsuperscript{227} This training investment did not always take the form of formal training programs, more often it was the result of large amounts of nonbillable or reduced-billable time being spent by partners and associates alike working through multiple document drafts and discussing case management and client relations issues.\textsuperscript{228} This intensive investment changed form and was greatly reduced in the 1980s and 1990s when it no longer made economic sense: law firms could not protect their investment because associates frequently departed, taking their training with them; lower percentages of associates became partners; and associate salaries increased sharply, making such an investment of time far more costly.\textsuperscript{229} Major employers changed the way in which they trained new lawyers, moving from time-intensive and expensive mentoring to more formal training programs that demand less of partners'

\textsuperscript{225} See, e.g., Burnham, supra note 199, at 108-11 (discussing the addition of ethics simulations in contracts courses); Ian Johnstone & Mary Patricia Treuthart, \textit{Doing the Right Thing: An Overview of Teaching Professional Responsibility}, 41 J. LEGAL EDUC. 75, 99-100 (1991) (discussing the use of simulations in substantive courses).

\textsuperscript{226} See ABEL, supra note 152, at 185-95.

\textsuperscript{227} See LEGAL EDUCATION, supra note 141, at 299-301.

\textsuperscript{228} See VOORHEES, supra note 148, at 3-4.

\textsuperscript{229} ABEL, supra note 152, at 194-96.
Major employers, perhaps through the organized bar, have a responsibility to contribute to reform. Because the proposed three-year program is designed to fill the gap left in the legal profession when firms moved away from their extensive programs of enculturation and mentoring, firms should redirect some of their resources to law schools for providing this necessary function to the profession. Individual employers will no longer use the resources in the old way because an employer cannot protect its investment. Shifting the use of the resources to law schools will enhance the qualities of the typical entry-level lawyer.

The organized bar eventually will contribute to this reform as well. The bar, looking for someone to blame for the late-twentieth-century professionalism crisis has responded as it did during the late-nineteenth-century professionalism crisis; it has turned its gaze on law schools. In the nineteenth century, the bar worked to establish higher educational standards and encouraged the Harvard-style law school reforms as a way to further the profession's public image and stature. In the current professionalism crisis, the bar has turned once again toward law schools to express its dissatisfaction with the services of the new lawyers whom it is no longer willing to enculture during employment. Several state bars have convened so-called “conclaves” on the education of lawyers for the dual purposes of venting the bar’s frustration with what it thinks is happening in law school and of fostering a dialogue about the relative roles of the bar and the law schools in training new lawyers. The law schools told the bar that they could only train more effectively if student-faculty ratios could be reduced and that such reductions were impossible unless the bar would help

230. For an illustrative course plan, see VOORHEES, supra note 148, at 3-7.
231. STEVENS, supra note 1, at 57-64 (discussing the reaction of the organized bar to late-19th-century problems with the legal profession).
232. Id.
233. Id.
234. See LEGAL EDUCATION, supra note 141, at 6.
235. See Rost, supra note 165, at 43.
Given proper urging, the bar may respond favorably, perhaps by creating programs that resemble the Interest On Lawyers' Trust Accounts (IOLTA) schemes to raise money for skills and professional responsibility teaching in law schools. These funds could effectively consolidate the bar's training investments in a way that would spread the financial burden and protect the individual employer's investment. The bar may be induced to explore such support for the same reasons it supported educational reform during the last crisis in professionalism; to improve the public perception of the profession.

V. CONCLUSION

Legal education's encounters with experiential education have been less than illustrious. One aspect, the mental processes associated with reading and analyzing appellate cases, has dominated the methodology of legal education since the university-based legal education revolution. This case-reading focus, although incredibly important to lawyering, is both narrow and narrowing for the student. Legal education could not and should not have developed with the dominant experiential learning base that medical education enjoys. A useful movement toward experiential education, albeit disorganized, has occurred through the innovations of the clinical legal education movement.

A proper response to a changing legal practice environment would incorporate a stronger and better-organized movement toward experiential legal education. This movement most appropriately should emerge from the professional ethics teaching area. Creating experiential models for the education of lawyers

236. LEGAL EDUCATION, supra note 141, at 390.
237. See Risa I. Sackmary, IOLTA'S Last Obstacle: Washington Legal Found. v. Massachusetts Bar Found.'s Faulty Analysis of Attorneys' First Amendment Rights, 2 J.L. & POLY 187, 188-92 (1994) (discussing the history of IOLTA plans). The IOLTA schemes, begun in the 1980s, serve as a mechanism by which the interest on client trust accounts is directed to organizations that provide legal services to the poor. Id. In fact, the IOLTA schemes do not cost lawyers anything because the interest belongs to clients whose money is on deposit. See id. Before IOLTA, the banks reaped the benefits of lawyers' using non-interest-bearing checking accounts for client trust purposes. See id.
238. See STEVENS, supra note 1, at 57-64 (discussing the reaction of the organized bar to the late-19th-century problems with the legal profession).
that are about the ways in which lawyers behave and about professional ethics and professional techniques can usefully advance the teaching and learning of professional ethics law and practice.