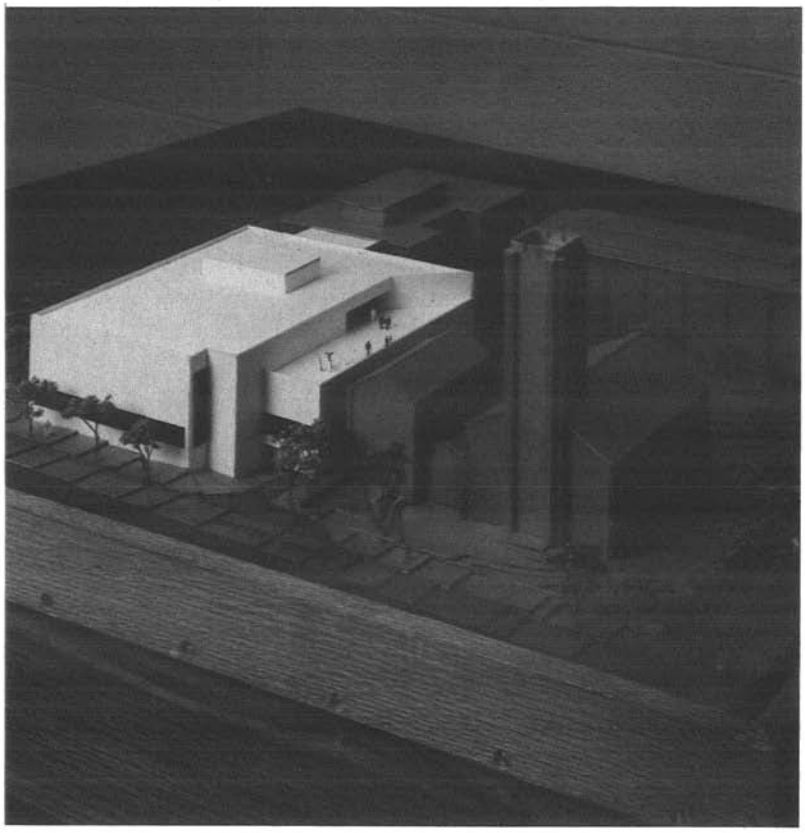
Report of the Dean

The Scandal of American Legal Education

University of Maryland
School of Law
1979



Model of the Law School viewed from Fayette Street. The building in white represents the structure and location of the new law library adjacent to the Westminster Church.

Report of the Dean

University of Maryland
School of Law
1979

THE SCANDAL* OF AMERICAN LEGAL EDUCATION

On the occasion of his eighty-fifth birthday celebration, Thurman Arnold, one of the extraordinary lawyers (and law professors) of his time, remarked that the things he remembered best never happened. Arnold's quip could stand for the way many lawyers must feel about the role of legal education in their professional careers. Unlike much post-graduate professional training in the United States, law has generally kept the schooling years an almost exclusively classroom enterprise. Those special abilities of lawyers to counsel clients, or negotiate agreements, or practice in the courtroom have ordinarily been left to learning which takes place after law school when the law graduate is an apprentice attorney with a firm or agency. Much of what the successful lawyer remembers best never happened during his or her law school training.

Over 33,000 students now graduate from law school each year and a high percentage of them are admitted to practice in the fifty states. Any lawyer or law professor will vouch for the fact that these newly admitted attorneys are by and large utterly incompetent to practice law. They may be intellectually superior, highly motivated, honest and diligent (and of course not all are), but most of what they know is what they have read in books, namely how to read and interpret what the law is. They do not know from their schooling how a lawyer should *act.* Law school, the graduate is told, teaches theory while practical skills are inculcated on the job under the tutelage of a practitioner.

University-based law training: strengths and weaknesses

The story of how law schools came to view their mission in such narrow terms comes from a historic liaison between

*Scandal: *"A grossly discreditable circumstance, event or condition of things*

law and the University. Up until the 20th century, Americans by and large learned law by working for a lawyer. Universities were seen as a haven by reformers concerned over the disarray and unacceptable variability of this apprenticeship system of training of the 19th century. A unique "technology" or method of training, which came to distinguish high quality university-based education, was formulated in both law and medicine at about the same time—the turn of the century—when the shift to University training commenced. For medicine the Johns Hopkins model used the hospital as a focus for teaching and generated a combined emphasis on basic science and clinical practice. For law, the basic institution became the law library, and the formative leader, Harvard's Christopher Columbus Langdell, sought chiefly to elevate law from the status of a handicraft to that of a "science" worthy of a separate place within the University. Harvard established the pattern which has become uniform in American legal education, of requiring three years of post-graduate training as a prerequisite for practice. Langdell also created a unique method of presenting law to students in the form of casebooks, selections of the most important written opinions of judges.

The "Socratic" classroom technique (or question and answer method) evolved from the use of Langdell's casebooks. Students were challenged to recite their analyses of difficult cases before their peers, subject fellow students to criticism, and respond to a professor whose basic task is to lead discussion through questioning. It requires a great deal more preparation by students and teachers than a lecture, and when performed well (which it often is) it leads to a highly effective classroom experience. Although the thrust and parry of this method is an aggressive way of testing a student's preparation and quickness and verbal ability, the performance (as with most classrooms) consists largely of imitation of the terms, the methods of reasoning, and the critical perspectives and techniques of the teacher.

The strengths of Langdell's model are the strengths of legal education today: it created centers of scholarship and

research for the profession which the practicing bar could not sustain; it improved greatly the quality of teaching and training in certain critical areas; and it gave law the status of a university discipline. But the weaknesses are no less glaring. It rested on the premise that intellectual coherence (and respectability) were derived from what lawyers and judges wrote about the rules, principles and doctrines of the law, not from what they did without writing or before writing, or in less formal writing. For Langdell and his followers, finding and delineating the law and pointing the way to more rational, "scientific" law was best done outside of the complicating (if not demeaning) contexts of clients. The rush to establish the independent intellectual status of law in the university inhibited the kind of interdisciplinary explorations which might have revealed earlier the limits of Langdell's perspective. Langdell's specialization brought great force and clarity to legal education as well as real insularity.

It is, of course, misleading to suggest that the 167 law schools in the country today fit the model first established by Langdell before the turn of the century. Most law schools now have clinical programs (i.e. situations in which students can handle clients under supervision) and offer courses that enable students to work on lawyering skills through exercises that simulate "real" counseling or trial situations. A variety of interdisciplinary courses and joint degree programs occur in many law schools. The American Bar Association, most recently through its Task Force on Lawyer Competency, has been urging law schools to focus on training in practice skills. With few exceptions, however, these programs are elective and reach a limited number of students: the curricula at most American law schools are still cut from Langdell's mold and the extent to which the newer developments become a permanent or central feature of legal education is still open to question.

Many law professors resist the expansion of the curriculum into these new areas because they feel it involves softening the finely honed edge of the traditional model. There are fears it may be a throwback to apprenticeship training—

a denigration of the scholarly mission of legal education. One of the country's leading law professors not long ago wrote an article warning about the encroachments of practical skills advocates on the curricula of law schools. The piece was titled "The New Anti-Intellectualism of American Legal Education." Other law teachers might acknowledge that Langdell's limitations on what was worthy of scholarly attention represents the old anti-intellectualism of legal education, but worry that the teaching materials and the conceptual frameworks for analyzing practice skills and relationships are simply not in place. It is a new subject, and although a number of books have emerged in these areas, there is no consensus on principles or issues to help organize our understanding of the vagaries and infinite gradations in judgment called for in the relationship between lawyer and client. Others might be willing to accept the risks of an uncharted intellectual venture but find the financial implications disturbing. One of the great strengths of the Langdell model was its unusually efficient instructional technology which permitted effective teaching in large classrooms. Although more expensive forms of instruction (e.g. small seminars) are present in law schools today, the exceptionally low cost of legal education compared to all other forms of graduate instruction is the joy of university administrators. Law is a gates-receipt operation funded almost entirely from student tuition. Private university law schools have generally paid for themselves (and then some). Cost in higher education is a function of the number of teachers. While the average number of students for each full-time-faculty member in American medical schools is four to one, and the ratio in liberal arts graduate schools (a carefully unkept figure) probably about six to one, the ratio in law schools is anywhere from 20 to 30 to one. Adding to the law school curriculum the close supervision of students by teacher-practitioners would require a substantial increase in the number of law school faculty. Any suggestion in the current university budget environment of a sharp increase in costs to improve the curriculum is an uphill battle. More important, while there are many loyal and generous law

school alumni, lawyers are not generally as important a funding source for legal education as they might be—one suspects because they owe too little of their success to their training in law school.

The role of the bar in training lawyers

The one great assumption upon which the Langdell model rests is that the practicing bar assumes a responsibility to teach recent law graduates the fundamentals of practice. This assumption has appeared to work well because a few schools like Harvard placed most of their graduates with large law firms which could afford the investment of bringing new people along at a pace that allowed for several years of well-supervised apprenticeship. Recently the economics of large firms has affected the quality of this training. High salaries paid to recent graduates and high fees charged clients (who have become increasingly cost-conscious) mean that a young attorney must quickly pay his or her way. The short route to high productivity by a novice is intensive specialization. The breadth, the thoroughness, and the leisure of traditional training by the large firm is now under considerable pressure.

"In short, the public is at the mercy of whatever training a law graduate is lucky enough to find, discounted or enhanced, as the case may be, by the personal self-training resources of the young attorney."

More important, the traditional training model which relied on firms to provide supervised practice experience seemed effective if you did not examine what most law graduates were doing. Only a small percentage of American law school graduates work for large firms. In effect we do not really know how (if at all) law graduates are trained. We

suspect many graduates receive excellent training, many receive little or no training, and many receive poor training. The more heterogeneous the bar, the more varied is likely to be the training. Small firms and partnerships have even more economic pressures than the large firms, except that they do not usually enjoy the protective luxury of specialization. Government agencies and law departments of corporations, which are large employers of young attorneys, are also of variable quality in terms of training. In short, the public is at the mercy of whatever training a law graduate is lucky enough to find, discounted or enhanced, as the case may be, by the personal self-training resources of the young attorney.

Theory and practice: school and profession

The most commonly voiced complaint about this system of training law graduates is that law school is too theoretical, and not sufficiently practical. In fact, most legal education is extremely practical. Some of the fundamental practice skills an attorney must use come from his or her schooling. In law school the lawyer learns to evaluate the authority or guidance of a legal precedent (and a lawyer supervisor), to argue the relevance and applicability of court decisions or

"In law school the lawyer learns to evaluate the authority or guidance of a legal precedent, to argue the relevance and applicability of court decisions or statutes in various situations, to write in the style of lawyers, and to assimilate basic rules and principles of many important fields of law."

statutes in various situations, to write in the style of lawyers, and to assimilate basic rules and principles of many impor-

tant fields of law. Learning the methods of reasoning and writing of law is clearly practical to most attorneys. This form of training is especially useful to the more sophisticated employers of graduates, namely the large law firms and institutional law departments who feel they have the resources to undertake appropriate finishing work in corporate or government law specialties.

The case can be made, in fact, that one of the most serious problems with American legal education is not that it is too theoretical, but too narrowly practical. It does not provide a sufficient theoretical introduction for all students to other important functions a lawyer almost invariably encounters even if he or she does not directly perform them: fact-gathering, counseling, planning, litigation, negotiation, mediation and management of the law firm or agency. These are the skills which Langdell characterized as handicraft. It does not take much reflection, however, to realize that performance in these areas entails complicated understandings of human behavior, our legal system, and the range of choices for action. Assembling the facts of a problem, for example, requires a sense not only of their relevance in relation to legal principles, but also how they can be used in the context of the way people and lawyers and courts operate. And the most important understanding of all is that of the lawyer's role as a professional, namely how the lawyer resolves conflicting considerations of an interest in a livelihood, the faithful representation owed the client, the constraints of professional and organizational ideals, and his or her personal morality. The intellectual horizons of American law schools were drawn 100 years ago as a means of distinguishing the doctrinal discipline of law from the practice routines of that day. The assumption underlying this traditional law school model that *performing* as a lawyer either could not be analyzed or lacked intellectual interest and content was simply wrong. The growing complexity of our law and social relationships and the developments in interpersonal "sciences" of the 20th Century have only underscored the original mistake.

"Lawyering" in law school

No one believes the University can or should produce an accomplished trial lawyer or counselor after a semester or two of work any more than it can make an attorney accomplished in contract law after a semester or two of courses. Law schools long ago gave up pretending that they could indoctrinate students into a comprehensive understanding of "the law" through a required curriculum. Law schools introduce students through a largely elective curriculum to various areas of doctrine and practice in the law; they help, so the phrase goes, the student to think like a lawyer. But even if the goal is thinking lawyerly thoughts, practice, such as the process of litigation or negotiation (as potential means of resolving a dispute), may be just as important an analytical framework as is the formal law of civil procedure or contract in judging a client's problem, making critical decisions about gathering further information, and dealing with another party. In addition to the intellectual insight that exposure to practice brings to problems of the law, introducing students to law practice in a University curriculum may enable an attorney to have a clearer idea about what he or she does *not* know, and the extent to which becoming accomplished in these areas takes not only time and practice, but analysis and attention. The teaching of these matters requires treading the difficult line between self-conscious reflection and effective performance that is a part of the tension of being a good lawyer. One of the causes of poor performance by attorneys is the inability to evaluate their performance either because they are too quick to adopt what they think is a conventional way of doing things or because of a conviction that no coherent thinking on such issues is necessary since it is simply a matter of "style". A grasp of the range of ways of dealing with a situation and some self-understanding—learning how to continue learning—are essential to growth as a lawyer. Much of this, just as cognitive ability, derives from personal talent and habits of character, but law school can greatly inhibit or encourage it.

Another important reason to emphasize the teaching of "lawyering" skills is that introducing young lawyers to counseling, conciliation, negotiation or arbitration may help to counter-balance one of the principal value orientations of law school—the adversary system as the fundamental means of problem solving. The public criticisms of Chief Justice Burger of the poor quality of litigation in the profession have placed far too much emphasis on teaching trial advocacy in law schools. The "casebook" devised by Langdell and his followers consisted of reported decisions of appellate courts. The extraordinary growth of the law in this

"The public criticisms of Chief Justice Burger of the poor quality of litigation in the profession have placed far too much emphasis on teaching trial advocacy in law schools."

century has led to additional basic material from legislatures and administrative agencies, among other sources but the model for most casebook analysis is the adversary system. While there are notable exceptions (e.g. the teaching of planning in courses on wills and estates, and business law), much of legal education is posited on problem definition and solution through conflict. The adversary system has some extraordinary advantages in settling certain kinds of issues, but it has some important disadvantages, not the least of which are the human and monetary costs of sharpening conflict in order to prepare for its resolution. Obviously, law students should be completely familiar with the ultimate mode of action in court, and a substantial portion of law school time should be devoted to the study of lawsuits. But it is often difficult to find, either in terms of basic training or general perspective, any serious introduction for students to other, less expensive and more efficient means of settling issues such as preventive action, arbitration and negotiation. Our courts are overcrowded, our society is ex-

ceptionally litigious, and our training of students in law does not focus enough of its heralded skepticism on the disadvantages of lawsuits and the advantages of other modes of problem resolution.

"Our courts are overcrowded, our society is exceptionally litigious, and our training of students in law does not focus enough of its heralded skepticism on the disadvantages of lawsuits and the advantages of other modes of problem resolution."

Law schools and lawyer's ethics

Since a fundamental assumption of the Langdell model was that the goal of law school was to help students understand how to think like a lawyer, not how to act like a lawyer, the subject of lawyer's ethics held a rather limited role, apart from what was intended to be the uplifting effect of great teachers and intellectual challenges. Today, however, the teaching of ethics is definitely a growth business in law schools. In 1974 the American Bar Association established in the wake of Watergate a new requirement that law schools teach ethics in order to receive official ABA approval. Most law schools satisfy this mandate by a required course in the second or third year. Some courses include a heavy stream of visitors from the local bar; others put emphasis on the sociology of the profession, but virtually all focus on the Code of Professional Responsibility.

Clearly the quality of the ethics course varies from school to school, and teacher to teacher, but it is probably a fair generalization to suggest that the course does not rank high in student esteem. Part of this may be a function of stimulating the already high levels of cynicism in students by a single course on ethics which represents just over 2% of the credit hours they need to graduate and seems not to "fit" into the rest of the required curriculum (or be taught, with few ex-

ceptions, anywhere else in the curriculum). Another difficulty with the course is that the most interesting issues seem not to be susceptible to the kind of rigorous analysis typical of law school. The Code of Professional Responsibility spells out with reasonable clarity the protocol issues (e.g. rules regarding contact with jurors and the adverse party to a lawsuit, or the keeping of funds entrusted to an attorney by a client). But the limitations of a statute like the Code become clear when difficult issues arise involving conflicts between a lawyer's self-interest (e.g., his fee and his own sense of what is right), the interests of the client (who the lawyer is required by the Code to serve zealously), and the interests and esteem of a judge or colleagues or other people involved in a matter. The limits of the required zeal for a client, and the variety of models of behavior appropriate for dealing with a client are left unattended or open-ended by the Code. The answers to essential questions about how to act professionally seem left ultimately to depend on the personal predilections and morality of the student, and thus the course appears to be "flabby", to lack the coherence of other courses in the curriculum.

The appearance of anomoly which the legal ethics course presents in the law school curriculum is probably a fair reflection of the attitude of most law faculties to the subject. Law reform issues crop up in many courses but the more important lesson of law school is that some of the most difficult ethical issues are not susceptible to intellectual analysis and resolution. Many law teachers are simply uncomfortable with morality in the classroom: for some it violates pedagogical precepts of neutrality and skepticism. For others, it introduces an element of law with which they have had no experience or distasteful experience: clients. Still others hold the view that there is little one can do about the ethics of adults by the time they reach graduate school. As a result, there is little conscious teaching of ethics in American law schools apart from the single course which tends to dramatize how little ethics is being taught elsewhere in the curriculum.

Practice as an intellectual discipline

Part of the reason the legal ethics course seems so peculiar to students is that the abstraction of cases or problems which works well in the typical classroom becomes a disadvantage in dealing with a subject so rooted in practice itself. Law practice has not generally been a fit study for American legal educators (with the exception of legal services for the poor where some teachers had their start). Despite the fact that the financial, organizational and information system structure of practice bears heavily on decision-making by lawyers, writing about practice is left largely to journalists and sociologists. There are few materials that systematically analyze the environments of various forms of practice since most faculty do not view these issues as important in law. There is no equivalent in law to a business school "case study" which integrates a variety of information about practice such as cash flow, training and supervision of support personnel, billing and record keeping, or firm governance. Law graduates are extremely unsophisticated, not to say naive, about the various organizational settings in private and government practice that affect decisions involving quality of service, the acceptance or rejection of clients, or the taking of ethical "risks" with (and for) clients. Some introduction to relevant theories of law practice management would enable graduates to make better judgments about employment, contribute more effectively to the development of their firms or organization, and be more conscious of the impact of practice management on their judgments as attorneys.

The creation of the part-time law school

What do students think of law school? There have been a variety of student surveys published which suggest that students in the 70's are not critical of their training compared with the bitterness of their predecessors in the late 1960's. A report prepared for the Council on Legal Education for Professional Responsibility documents the fact that in some

schools at least, students are voting with their feet. Law teachers have observed for some years now that a large number of students are part-time. After a year or two of classroom work, the "Socratic" method loses some of its holding power. Students become adept at techniques of classroom response, and its inefficiency as a means of covering significant amounts of course material leads teachers in the second and third year of law to jettison the method or to rely on a few bright students who will carry the class. The classroom becomes less an original intellectual challenge and more a high level recitation. Students therefore who have an opportunity to work outside of school will often do so not simply because of the money, but because the demands of the curriculum are modest (absent some heavy commitment to a publication like a Law Review) and the stimulation of "real" law work is rewarding.

The ambitions of legal education

The scandal of American legal education is not that law schools do what they do badly, but that they do so little. American law students are provided no systematic introduction to that most clarifying perspective in the law, the client. It is clarifying because it offers the first opportunity to analyze and reflect on the special synthesis of theory, skills, moral decision, and human understanding that make up the role of the lawyer. The American law student typically does

"The narrowness of present law school goals—can perhaps best be perceived by imagining medical school training without patients."

not learn what it means to represent another person. The severity of this abstraction—the narrowness of present law school goals—can perhaps best be perceived by imagining medical school training without patients. Law graduates today emerge from their schooling unprepared (i.e., without

theoretical equipment to help them cope) in areas of the law other than formal legal doctrine. How to perform as a lawyer takes as much thought and reflection as how to think like a lawyer. It also may be a more difficult undertaking because it involves some of the complications of emotional life, the tensions between performance and reflection, and the engagement of the teacher in these matters which is demanding and radically different from the traditional hierarchy of the classroom.

There are some formidable obstacles to broadening the scope of American legal education to include a complete theory or introduction to the practice of law. There is difficult intellectual terrain to be explored. We have no clear view whether the variety of lawyers' roles and relationships with clients can lead to generalizations coherent and systematic enough to be appropriate for University training. Distilling significant, controllable and replicable learning experiences from the mixture of theory and practice is not—apart from the sciences—a tradition in American intellectual life. There are the usual risks that the teaching job will be done poorly, just as there are poor classroom performances in law schools today. There may even be greater risks that a how-to-do-it practice course will generate no intellectual challenge, or that the theory of these courses will not be relevant to the realities of law practice.

"We have no clear view whether the variety of lawyers' roles and relationships with clients can lead to generalizations coherent and systematic enough to be appropriate for University training."

Many practical problems confront the implementation of these ideas. The costs, in terms of additional faculty (and faculty of a different kind) will be significant. It is simply not possible to engage students in this form of learning in a large classroom. Law schools will not find it easy to make the case

for additional funding despite (or because of) the extraordinary efficiency of their traditional operation. Present law school faculty may oppose change because they are committed to ideas either that students should be entirely free to choose their curriculum (and therefore may choose to reject this kind of learning), or that students do not receive in the present three years an adequate classroom review of all important subject areas of the law. Students, despite their eagerness for a taste of practice, may not be enthusiastic about courses which are more pressured than the classroom, and place heavy demands on their time. Yet this part of the curriculum could prove helpful by enabling students to make sensible decisions based on their experience not to enter practice, or to persevere in a difficult job market or a poor employment experience. It could stimulate a healthier dialogue within law faculties over the jurisprudential assumptions underlying various parts of the curriculum, and over the variety of teaching methods effective in stimulating students. It could lead to graduates more competent as practitioners and more sophisticated about the pressures of the profession and the limits and extent of their responsibilities to clients. And ultimately perhaps, law schools could be better remembered by future generations of law students as the place where they were first introduced to the richness, the depth, and the human complexity of doing justice.

EPILOGUE
The Maryland Experience

This essay—the product of some summer reflections about the implications and directions of my work at the Law School—may only reinforce the views of those who believe that law school administrators should not be permitted vacation time for thinking. The fact that I would dare to publish these views (which no doubt many, if not most, of the faculty would disavow) suggests how open, healthy, and wide ranging are our discussions and explorations of the mission and curriculum of the University of Maryland School of Law. This essay is designed not only to stimulate

faculty analysis of our goals as an institution but also, since it is sent to every member of the Maryland State Bar Association, to provoke more thinking about these matters within the profession and the Maryland community.

One obvious question is how has the University of Maryland responded to what I characterize as a "scandal." We have first of all committed substantial faculty and institutional resources to "clinical" education. Out of a full-time faculty of 43, 8 devote substantially all of their teaching to supervision of students in practice settings with clients. In addition to the 84 students in these practice clinics, about 120 out of some 500 second- and third-year students at Maryland are enrolled in five classes of the simulated or performance course of counseling and negotiation, and 140 students are in seven classes of trial practice. The quantities, however, are less significant than the quality of this effort. Our clinical programs have systematically explored the theory of their enterprise in a way that has enlivened the intellectual climate of the Law School. Indeed, one of the special features of the faculty environment at Maryland today is the vitality of intellectual exchange and growth in scholarly product of which the clinics or practice curriculum are one part.

Another phenomenon at Maryland is the renewed interest in the ethical dimensions of legal education. The faculty has been discussing the possibility of shifting the two-credit required course in "The Legal Profession" to a time earlier in the curriculum, such as the second semester, first year, or the first semester, second year. The object of this change, and a suggested increase in the number of credits to three and improvements in the methods used to teach the course, is to make the study of the profession and the special ethical dilemmas of practice a more important part of the basic core of courses that are the backbone of our curriculum. No final decisions have been made, but I believe it is fair to say the prospects are good for this upgrading of the traditional required course in legal ethics at the Law School.

Through the generosity of Judge J. Dudley Digges, a number of our faculty have been able to undertake summer or sabbatical research projects to develop teaching materials on ethical problems within their specialty. The idea of this program is to make the subject of legal ethics a more pervasive part of the Law School curriculum by systematic introduction of professional responsibility issues in the subject matter of individual courses. We have also embarked on a promising interdisciplinary effort with the Center for Philosophy and Public Policy at the University's College Park campus, which has brought to our Law School a philosopher whose responsibility is to help us develop more relevant legal ethics teaching materials in the required course, our clinical programs, and the curriculum as a whole. The collaboration with the Center for Philosophy and Public Policy has just begun, but we are optimistic that it will have a salutary effect on legal education in Maryland, and important implications for law schools elsewhere in the country.

There is at Maryland a distinct sense that the school is making an important place for itself in the ranks of American legal education. Those of you who have visited the campus know how significant are the physical changes underway through construction of the new Law Library and the possible addition of the Westminster Church and Graveyard to our plant and grounds. By traditional measures (scholarly productivity, student and faculty quality, general reputation), I think it fair to say Maryland is improving dramatically. These traditions are important and useful benchmarks by which we can evaluate our progress, but, as I hope this essay makes clear, it is essential for us to reevaluate our mission and our goals and to explore what are the criteria of success relevant for the extraordinary times—and demands of the profession of law—in which we now live.