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A GAPING HOLE IN AMERICAN LEGAL EDUCATION

MICHAEL KELLY*

During the last three decades, the legal profession has undergone major changes that have had little impact on legal education or on groups urging its reform, such as the Carnegie Commission.¹ At the risk of oversimplifying these changes, I argue that three related phenomena are emblematic of the contemporary legal profession and distinguish it from the earlier history of the profession in the United States.

Growth in the number of lawyers, largely stimulated by the number of women entering the profession, was once the big story in law—particularly when the total number of licensed lawyers in the United States passed the one million mark and when the number of women equaled the number of men in law schools. It is not clear, however, that these continuing trends have thus far had any significant structural impact on the profession as a whole, other than increasing the size and quality of the legal talent pool. But, consolidation of the profession—by which I mean the aggregation of practicing lawyers into larger and stronger organizations—has had a profound influence on the shape and trajectory of the profession. The precipitous growth² and geographical diversification of large and gigantic corporate law firms is now the headline story.³

The number of lawyers practicing in the 100 largest firms (measured by revenues) increased more than threefold from 1986 to 2008

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1. See generally WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

2. Substantiation of the term “precipitous growth” may perhaps best be illustrated by comparing median firms in the following Am Law 100 categories between 1987 and 2008:

- Gross revenues: \$60.5 million to \$552.5 million (913% increase)
- Revenue per lawyer: \$255,000 to approximately \$820,000 (321% increase)
- Profits per partner: \$260,000 to \$1,185,000 (455% increase)
- Number of lawyers to equity partners: 230/90 to 654/187 (284%/207%)

THE AM LAW 100: PULLOUT MANAGEMENT REPORT 12–13, 18, 20, 22, 32, 34, in *AM. LAW.*, July–Aug. 1987, at 35; *The Am Law 100: 2009*, *AM. LAW.*, May 2009, at 105, 151–52, 159–60, 169–70.

3. See generally Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867 (2008) (proposing a model to explain changes in BigLaw, such as firm growth and geographic dispersion).

(from 25,994 to 81,992).⁴ The number of lawyers in midsize firms (ranging from eleven to 100 lawyers), which grew phenomenally during the 1980s, actually declined in the 1990s, while the number of lawyers in firms of over 100 lawyers increased 468% during the 1980s and another thirty percent during the 1990s.⁵ These trends have only accelerated in the first decade of the twenty-first century. In 1980, seven percent of all private practitioners worked in firms of over 100 lawyers.⁶ By the year 2000, over fourteen percent of all private practitioners, by then part of a much larger profession, worked in these firms.⁷ Growth is by no means limited to large corporate firms. Legal aid agencies funded by the Legal Services Corporation have been merging into larger organizations around the country, just as many government and in-house corporate law departments have consolidated internally or have grown substantially.

The other, often overlooked, side of consolidation is the sharp increase in lawyers left out of consolidation as their firms merged into larger firms. These lawyers, for whatever reasons, chose not to go with their firms, were not chosen to make the move to the larger firm, or were ultimately let go from larger consolidated entities. From 1960 to 1990, the percentage of private practitioners who were solo practitioners decreased in the United States (from sixty-four percent in 1960 to forty-five percent in 1991). This trend, however, began to reverse during the 1990s, and solo practitioners comprised forty-eight percent of all private lawyers in 2000.⁸ We know from IRS data that as much as twenty percent of solo practitioners and a large number of small firms (only ten percent of law partnerships in the United States have over ten partners) report no net income.⁹ It is thus probably not an exaggeration to suggest that between twenty percent and thirty percent of

4. See THE AM LAW 100: PULLOUT MANAGEMENT REPORT, *supra* note 2, at 12–14 (providing the number of lawyers at each of the largest 100 firms) (author's calculations); Aric Press & John O'Connor, *Lessons of the Am Law 100*, AM. LAW., May 2009, at 107, 107.

5. MICHAEL J. KELLY, LIVES OF LAWYERS REVISITED: TRANSFORMATION AND RESILIENCE IN THE ORGANIZATIONS OF PRACTICE 357 (2007) (citing CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 7–8 (2004)). Research for this Essay draws partly from my book.

6. CARSON, *supra* note 5, at 8 tbl.8.

7. Galanter & Henderson, *supra* note 3, at 1869 n.1.

8. KELLY, *supra* note 5, at 357 (citing CARSON, *supra* note 5, at 7). Despite the decrease in the percentage of solo practitioners, their numbers grew during this period owing to a huge influx of new lawyers into the profession. The substantial spike in the number of solo practitioners during the 1990s accounts for the shift. See *id.* (noting that the 1990s saw an addition of 67,700 solo practitioners, compared to the increase of 132,440 between 1960 and 1991).

9. *Id.* at 228–29, 353–57.

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all licensed lawyers in the United States are inactive, primarily employed elsewhere, or only marginally active in the practice of law.

One of the great truisms about the legal profession is Professors John Heinz and Edward Laumann's well-documented statement that the law is divided into two hemispheres: those who represent large businesses or entities, and those who represent individuals and small businesses.¹⁰ The two hemispheres generally represent a great divide in prestige as well as in compensation, and they have grown further apart—or become lopsided in favor of the hemisphere servicing large entities—as Heinz's follow-up study documented some twenty years later.¹¹

Indeed, the phenomenon of consolidation has transformed the great divide noted by Heinz and Laumann into more sharply differentiated hemispheres that indicate the increasingly stratified nature of the legal profession. About half of all legal profession revenues in the United States are now generated by 200 law firms.¹² Since the num-

10. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

11. See JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 6, 79–86, 159–61 (2005) (considering “the nature and degree of change in the Chicago bar over a twenty-year period” and specifically considering increased polarization between the two hemispheres).

12. Using IRS Statistics of Income Bulletins and data compiled by *The American Lawyer* magazine on the Am Law 100 and Am Law 200 data sets, I have calculated that the 100 top grossing firms in 1986 generated around twenty-four percent of the net income and twenty-five percent of the gross revenue of all U.S. law partnerships that report net income. By 2002, these figures had increased to 40.7% of the net income and 40.5% of all gross partnership revenue. KELLY, *supra* note 5, at 362–63. By 2007, the latest date for which I have figures from the IRS and *The American Lawyer*, the gross revenues of the 100 top firms constituted about forty-seven percent of gross revenues from all legal partnerships. Compare *Behind the Numbers: Noteworthy Trends and Newsmaking Firms in This Year's Am Law 100*, AM. LAW., May 2008, at 136, 137 (reporting the Am Law 100's total gross revenue at \$64.5 billion), with Tim Wheeler & Nina Shumofsky, *Partnership Returns, 2007*, in IRS STATISTICS OF INCOME BULLETIN, Fall 2009, at 70, 100 tbl.1 (noting total income for legal services as almost \$138 billion). If I include the gross revenues of solo practitioners, the top 100 firms in 2007 constitute 41.5% of the gross revenues of all lawyers in the United States that report legal services income to the IRS. See Adrian Dungan, *Sole Proprietorship Returns, 2007*, in IRS STATISTICS OF INCOME BULLETIN, Summer 2009, at 5, 19 tbl.1 (listing the business receipts of legal service sole proprietorships at \$38.7 billion).

The gross business receipts of the second Am Law 100 in 2007 totaled \$17 billion, so that the 2007 Am Law 200 gross revenues amounted to around \$82.5 billion. See *The Am Law 200: 2008, The Revenue Gap Widens*, AM. LAW., June 2008, at 139, 139–44 (listing gross revenues of firms ranked between 101 and 199). Based on 2007 IRS statistical estimates that gross income of legal services partnerships totaled \$138 billion and sole proprietors totaled \$38.7 billion, the IRS estimates that business receipts for all legal services entities that report their income total \$175.7 billion in 2007. Dungan, *supra*; Wheeler & Shumofsky, *supra*. This suggests that the gross revenues of the Am Law 200 constituted about forty-seven percent of all revenues of tax-paying lawyers in the United States in 2007.

ber of equity partners (the owners) of these firms has grown much more slowly than the size and revenues of the firms, profits per partner have increased dramatically.¹³ But, the intense focus on legal compensation over the last few decades is not limited to large firms. Bar associations, various continuing education efforts, and the law firm consulting industry work with firms of all sizes to improve billing, accounts receivable management, overall realization practices, marketing, information technology support, and personnel management designed to maximize income for firm equity partners.

The extent to which compensation has become a major force in the practice of law—and the extent to which the fortunes of law are tied to an expanding business clientele and a vastly more complex regulatory and financial environment that requires legal services—is reflected in national aggregate data about law as an industry. Legal services grew significantly as a percentage of the overall U.S. economy during the post-war years, from 0.44% of the total national GDP in 1945 to 1.23% of the total national GDP in 1986, leveling off at about 1.4% in 2002.¹⁴ The \$108.8 billion generated by legal services in 1990 increased to \$150 billion in 2002¹⁵ and then to \$198 billion in 2007.¹⁶ These numbers probably underestimate the legal profession’s total economic contribution to the U.S. economy since GDP measures of legal services do not capture the growth of in-house public or private law departments.

Compared to the legal profession several decades ago when rules of professional conduct strictly prohibited advertising, the contemporary profession—in almost all corners of private practice—is now inured to the crucial importance of working within the various markets for legal services.¹⁷ Common marketing techniques in the contempo-

13. *See supra* note 2. The number of equity partners more than doubled between 1986 and 2008 (from 9,413 to 18,947), while the number of all lawyers working for these firms more than tripled. Equity partners constituted thirty-six percent of lawyers in these firms in 1986—and twenty-three percent in 2008. *Compare* THE AM LAW 100: PULLOUT MANAGEMENT REPORT, *supra* note 2 (listing the number of lawyers and partners in each of the top 100 firms) (author’s calculations), *with* *The Am Law 100: 2009*, *supra* note 2 (same) (author’s calculations). Although gross revenue grew by 4.1% in 2008, “head count grew faster,” which caused average profits per partner and revenues per lawyer—key indicators tracked by *The Am Law 100*—to shrink from the prior year as a result of the recession. Press & O’Connor, *supra* note 4.

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14. KELLY, *supra* note 5, at 352.

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15. *Id.*

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16. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at tbl.654 (129th ed. 2010), available at <http://www.census.gov/compendia/statab/2010/tables/10s0654.pdf>.

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17. *See, e.g.*, HEINZ ET AL., *supra* note 11, at 313 (noting law firms’ increasing reliance on active marketing efforts).

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rary profession include entertaining and directly soliciting business from potential clients and existing clients (cross selling); accessing—or acquiring in-house—public relations, marketing, and branding capacities; boasting of achievements, experience, and awards; and performing philanthropy and pro bono work that might attract positive exposure or please existing clients.

To grow, a lawyer or a firm commonly buys a client base by attracting lawyers who bring those clients with them and who can be motivated—through compensation arrangements—to ensure that the acquiring lawyer or firm retains the new client’s business. Widely publicized comings and goings of lawyers, specialty units within firms, or entire law practices are less an expression of the search for talent than of the search for clients.

These three elements are integral to the changes that have taken place in the legal profession over the last three decades. The three elements share one crucial component: they are driven, indeed generated, by organizations strategizing how best to protect and to prepare for their futures by exploiting and expanding their positions in the legal marketplace. They are all *organizational decisions* that are driven by *organizational perceptions* about what is needed to serve present and future clients.¹⁸ For large firms, the planning for future clients might include staffing for the ability to handle any client emergency, offering a broad range of corporate specialty services, and diversifying the geographical reach of the practice to appeal to regional, national, and international clients.¹⁹ For practices of all sizes, *organizational moves* involving competition, compensation, and consolidation are primarily adopted to strengthen and preserve the organization, insulate the practice from the vicissitudes and uncertainties of a volatile market, build a stable client base, and reward the best attorneys in order to retain them.

To talk about the legal profession without attending to the ways *organizations* of lawyers have become more sophisticated, aggressive, and effective is to miss entirely a key element in the story of the contemporary legal profession. It is the practice organization, not the community of all licensed practitioners or bar associations, that today represents, and acts out, the meaning of the profession.

18. See KELLY, *supra* note 5, at 261–62, 289–90.

19. A number of major firms have taken a different and apparently highly successful course, avoiding high growth and diversification strategies in favor of building on already strong reputations for handling “bet your company” cases. These tend to be practices specializing in mergers and acquisition (for example, Wachtell, Lipton, Rosen & Katz in New York) and litigation (for example, Williams & Connolly in Washington, D.C.).

The emerging power of law practice organizations in the profession is not just the story of giant law firms, although they have definitely been leaders that point the way to others in the profession. Practice organizations of all sizes have tightened and strengthened their management capacities, including small and midsize private practices, public agency law divisions, legal services and legal aid organizations, and corporate in-house law departments. Even solo practitioners have become more adept as they think about how best to act like organizations, identify and respond to their client marketplace, manage their internal staff and records, and integrate information technology into their practices.²⁰

As organizations have become more self-conscious about how to succeed in a volatile marketplace, one strategy has emerged that permeates all levels and segments of the profession: specialization. Specialization is a way to market the organization (or solo practice) and to exploit, within a competitive market for clients, the organization's experience in fields of law swollen by complex regulatory and business transaction environments.²¹ Many, if not most, large firms and legal departments are aggregations of specialties. They face their fiercest competition from small firm specialty boutiques, which are often staffed by large firm expatriates.²² In the corporate services sector, all firms face a marketplace dominated by selective in-house corporate law offices that are sophisticated about their organizational needs, attracted to specialists with strong reputations in their field, and responsive to their corporate parents' cost-reduction goals.

Another form of rampant specialization in law relates to the world of legal ethics. Through the strategic use of conflicts of interest rules, firms have attempted to enlarge the reach of the traditional conflicts doctrine beyond direct or imputed conflicts between two clients to encompass business or issue conflicts. Business conflicts are used to justify refusals to handle a matter that might conflict with the interests of, or simply upset, another client in the same industry.²³

20. See, e.g., CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 87, 90, 92–93 (1996) (describing how solo and small firms have become more sophisticated through the use of marketing plans, advertising, and computerization).

21. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 45 (2003) (describing the increase of legal specialization and noting its causal connection “to competition and the growth of the administrative state”).

22. Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 351 (2011).

23. See Spaulding, *supra* note 21, at 47 (noting the increase in conflicts of interest cases due to firms' attempts to “impute identification between the [opposing lawyers] and the person or position of their clients”).

The growth of issue conflicts fragments the profession by segmenting lawyers and organizations into alignments with their clients' broader interests, thus widening social, ideological, and economic fragmentation within the legal profession.²⁴ Law is now a profession divided, balkanized by the causes and interests of practice organizations beholden to their clients.

The "gaping hole" of my title refers to the way that law schools fail systematically to address the dominant role that organizations now play in the legal profession. Negotiating organizational life in the law is now an important element of a successful career in the profession—a lesson recently learned by partners jettisoned from firms, and by lawyers categorized as nonequity partners, of counsel, staff, permanent associates, or underperforming partners. Surely law schools have an obligation to inform and educate law students about the nature of the profession they are entering to help them understand what is different about the legal profession today than during the periods in which many of their professors were educated, including the growing divide in private practice between owner lawyers and employee lawyers.

Many commentators, both within and outside the legal profession, are convinced that lawyers are generally resistant to organizations, do not understand how they work, and are uncomfortable operating within them.²⁵ For one, virtually all law practices are structured in decentralized ways, and lawyers work relatively autonomously without much hierarchical oversight or group decision making. Many lawyers consider practice organizations as more a marriage of convenience than a necessity integral to serving their clients. Although the examples of self-effacing team players in the law must be legion, the desire for autonomy runs deep in most lawyers' psyche. Law school, in which there is little or no group work or thinking about clients and their situations, tends to accentuate the autonomy gene. Moreover, personality tests suggest that, relative to the general population, lawyers display a disproportionately large number of personality traits that inhibit organizational success (cynicism, questioning, argumenta-

24. See HEINZ ET AL., *supra* note 11, at 202 (suggesting that "lawyers can usually be counted upon to identify with [their clients'] interests"); Spaulding, *supra* note 21, at 38–51 (arguing that "a broad array of forces," including "increased competition, specialization, and conflict of interest litigation," is pushing the profession toward thick identity, in which lawyers more fully identify with their clients' interests).

25. See, e.g., Larry Richard, *Herdning Cats: The Lawyer Personality Revealed*, ALTMANWEIL REP. TO LEGAL MGMT., Aug. 2002, at 1, 4, available at <http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20WEBSITE%20-%20ARTICLE%20-%20Herdning%20Cats%20-%20Richards1.pdf>.

tiveness, impatience, brusqueness, poor listening, and resistance to being managed or being told what to do) and disproportionately fewer traits that promote organizational success (disinclined to interact with others, defensiveness, and resistance to feedback and criticism).²⁶ Lawyers tend to skirt “issues of rivalry, authority and mutuality in groups.”²⁷

If I am right that lawyers, both by virtue of their law school training and by nature, tend to be “organizationally challenged,” then appropriately designed efforts to introduce students to organizational dynamics—whether experientially or vicariously through case-oriented class discussion—would be a form of learning of significant service to students. This kind of learning would be relevant to students’ immediate postgraduate situation, as well as to students’ potential—and motivation—to ripen into organizational leaders within and outside the law. An analytical understanding of the nature of organizations would help inform and shape law students into intelligent followers, instead of passive followers who go with the flow of organizational drift. Students would be well served to become active and analytical observers and participants in the organizations they join after graduation, regardless of whether those organizations are large or small, public or private.

What might be the value of teaching about law practice organizations in law schools? For one, it would enable students to deploy different frameworks of understanding, such as:

- How the structure of legal work—typically decentralized at the operational level of the lawyer-client relationship—poses major organizational challenges and stimulates various ways of motivating lawyers through different compensation and personnel management systems.
- How those who own or greatly influence organizations seek to address, or fail to control, the inherent tendency of practice organizations to engage in the politics of self-advancement and conflict.
- How the influence of clients and the projection of future clients drive decisions in a practice organization. For example, any client-driven decline in the billable hour, if it occurs, will profoundly change the work structure, management, and dynamics of a firm.

26. Larry Richard, *How Personality Affects Your Practice: The Lawyer Types*, A.B.A. J., July 1993, at 74, 74–78.

27. KELLY, *supra* note 5, at 257–58 (quoting Larry Hirschhorn, *Professionals, Authority, and Group Life: A Case Study of a Law Firm*, 28 HUM. RESOURCE MGMT. 235, 251–53 (1989)).

- How powerful perceptions of status and legitimacy, standardization of personnel, and assumed best practices affect organizational decisions.²⁸

A good argument could also be made about the need for law students to learn about organizations other than professional services organizations like law practices.²⁹ Managing partners long for young lawyers who know something about organizations and therefore understand their organizational clients. Training in law school that strengthens students' abilities to understand organizational clients and adversaries provides an important—not to say marketable—asset for someone entering the legal profession. And since lawyers now rarely spend their careers with one practice but move between practice organizations and to other nonlegal fields, such training can inform a lawyer's judgment in assessing opportunities in other organizational settings.

There is another huge payoff to studying organizations in law school. Every one of the major changes in the legal profession outlined earlier in this Essay concerns law as an enterprise or as a business, which beneficially puts to rest the old bromides about professions as fundamentally altruistic endeavors. Of course private practice is a business, and even public law and nonprofit practice organizations resemble private practice in many respects, if not in the allocation of profits. The advantage of studying legal organizations comes from the opportunity to explore in depth what is distinctive about the business of law and what the meaning of a profession is in the context of the organizations that propel it.

To what extent have major changes in the legal profession affected the ways in which lawyers perceive their role of mediating between client goals and responsible readings of relevant law? This, after all, is the core issue in a profession whose members are dedicated to interpreting and safeguarding law as a critical function of society and to operating within carefully structured relationships with nonlawyers to assist them in negotiating the complexities of law. Helping law students see how practice organizations operate unveils the range of economic, competitive, political, internal, and ethical

28. For an elaboration of these frameworks, see KELLY, *supra* note 5, at 261–91.

29. If one ignores the unique challenges that necessarily arise in any attempt to define law as a profession and focuses instead on the sector of the profession servicing business clientele, law practice organizations share many of the same managerial and leadership challenges as do accountants, advertising firms, business consultants, executive search firms, and investment banks. See JAY W. LORSCH & THOMAS J. TIERNEY, *ALIGNING THE STARS: HOW TO SUCCEED WHEN PROFESSIONALS DRIVE RESULTS* 4–5 (2002) (discussing how these types of service firms occupy a single coherent field).

constraints within which they function, giving students a rounded and grounded sense of the profession they are about to enter.³⁰ Studying practice organizations is an insightful and palpable way to understand the current legal profession. It is the right chassis on which to examine the relevance of different concepts of what a profession is, including:

- An occupation that has been unusually successful at legitimating its distinctiveness, taking control of how it is regulated, and establishing the requirements and credentials of those who enter it;
- A trustee “for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends”;³¹ and
- An industry (the professional services business).³²

Recognizing the formative influence of organizations can help students build a deeper understanding of how these different conceptions of a profession are enacted within the variety of entities that constitute the contemporary profession.

One other advantage of studying organizations, particularly law practice organizations, in law school is that it shows the limitations of our concept of legal ethics. Professional ethics curricula focus almost exclusively on the rules, rights, and obligations that govern lawyers and their relationships with clients—and appropriately so. This might be termed “horizontal professionalism”—the principles and rules governing all lawyers regardless of station or position. It is the glue that holds together the increasingly fragile concept of law as a unitary profession. But, this ignores matters of enormous importance in the practice of law, what might be called “vertical professionalism”—the domain of ethics that takes into account the landscape of a nonunified profession, particularly matters of rank and context in the practice of law, clients, markets, affluence, and authority.³³ Vertical professionalism poses crucial questions: Is this a good life? A desirable career? A calling worthy of lawyers’ talents?

Law schools have been loathe to approach such matters, but lawyers at all levels in practice organizations are deeply concerned about

30. The law practices being “experienced” vicariously through case studies or other means should include a wide range of practices: public and private (both for-profit and nonprofit), large and small entities, in-house departments, and so forth.

31. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958).

32. KELLY, *supra* note 5, at 227 (describing the emergence of law as “a significant industrial sector”).

33. *See id.* at 13–14 (describing the horizontal and vertical axes of professionalism).

the way organizations affect their, and their colleagues', lives—not to mention the way organizations affect their clients. Surely studying the ways in which organizations work and impact life and legal practice can discipline and ground an ethics discussion that might otherwise degenerate into blather. A critical understanding of how practice organizations work is as important to those entering the legal profession as traditional legal ethics. Looking analytically at the organizations of practice will enrich and enlarge the ethical dimensions of professional responsibility addressed in legal education.

Assuming that I have made a case for filling a gaping hole in legal education with a curriculum that is more focused on organizations, there remain daunting and important challenges about how best to proceed—beyond hints about the value of using business school materials to renovate the law school case method. Addressing these challenges resurrects old issues about the effectiveness of pervasive versus individual course approaches, as well as the desirability of group work and reflective skills work and the broader contextualization of lawyers' decision making frameworks. Integrating interdisciplinary insights into the construction and teaching of cases and making intelligent use of insights from ethics, economics, and sociology of organizations and law involves no small amount of work. But, bringing legal education into a more thoughtful and intellectually robust relationship with the contemporary legal profession is a worthy task.