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### Professionalism: Restoring the Flame

Donald L. Burnett Jr.

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**TWENTY-SECOND EDWARD H. YOUNG  
LECTURE IN LEGAL EDUCATION:  
PROFESSIONALISM:  
RESTORING THE FLAME**<sup>1</sup>

COLONEL DONALD L. BURNETT, JR.<sup>2</sup>

I. Introduction

Perhaps I should address you as “senior partners, partners, and associates in one of the world’s largest law firms.” That description literally would be true, and it would illustrate my purpose today: to emphasize values held in common by lawyers in military service and members of the general legal profession. It is appropriate to underscore common values here at The Judge Advocate General’s (JAG) School. This is a schoolhouse connected to the world; people come from the field, teach and learn, and return to the field. The JAG School is a place where we reaffirm fundamental values such as ethical conduct, principled decision-making, and personal selflessness (recognizing that life has a meaning larger than our own pains and pleasures).

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1. This article is an edited transcript of a lecture delivered on 26 February 1998 by then-Lieutenant Colonel Donald L. Burnett, Jr. to members of the staff and faculty, distinguished guests, and officers attending the 46th Graduate Course at The Judge Advocate General’s School, Charlottesville, Virginia. The lecture is named in honor of Colonel Edward H. (Ham) Young, who served two tours as the Commandant of The Judge Advocate General’s School. He was the first Commandant of the School when it was established in Washington D.C. in 1942. He presided over the School for two years and oversaw its expansion and transfer to the University of Michigan. He returned as Commandant when The School was reactivated at Fort Meyer in 1950. His distinguished military career began when he received his commission in 1918 from West Point and served with the American Expeditionary Force and the Army of Occupation in Europe after World War I. His impressive legal career in the Army also included assignments as an Assistant Professor of Law at the United States Military Academy, the China Theatre Judge Advocate and legal advisor to the Far East United Nations War Crimes Commission, the Chief of the War Crimes Branch in the Office of the Judge Advocate General, and service on the First Judicial Council and Board of Review at The Office of The Judge Advocate General. Colonel Young ended his career in the Army in 1954 while serving as Staff Judge Advocate, Headquarters, Second Army.

2. Reserve Deputy Commandant, The Judge Advocate General’s School, and Dean, Louis D. Brandeis School of Law, University of Louisville. A.B. *magna cum laude*, Harvard University; J.D., University of Chicago; LL.M., University of Virginia. Former president, Idaho State Bar, and judge, Idaho Court of Appeals.

Values are embedded in a culture of professionalism, sustained by this school. Visionary leaders helped build the culture, as we are reminded by the name of this room—the Decker Auditorium. Colonel Decker, then working with the Special Projects Division of the Office of The Judge Advocate General, oversaw the creation of the first permanent installation for the JAG School at the University of Virginia. Colonel “Ham” Young, for whom today’s lecture is named, provided the spirit, spark, and programmatic concept for the JAG School itself. Their vision has given us a place with a purpose.

In my civilian occupation, I work at another place where a visionary figure gave the school its purpose, the Louis D. Brandeis School of Law. Justice Brandeis, whose remains are buried at our school, provided a tangible legacy in the form of 250,000 of his books and papers, and helped us obtain the papers of Justice John Marshall Harlan. He directed that we receive original Supreme Court briefs (a tradition still honored by the Court today), and he even reached into his own pocket to buy light fixtures for our law school during the Depression.

The most enduring part of his legacy, however, has been intangible. He had a vision of an academic institution expressing the community at its best. “The aim must be high,” he declared, “and the vision broad.”<sup>3</sup>

Today, we in legal education serve a public disaffected with lawyers, and a legal profession, especially on the civilian side, appearing to drift away from high aims and broad visions. I propose to talk about these problems, and the challenge of reclaiming our common values, as a collective responsibility of the academy and the profession. My remarks begin with the early role—what should be the enduring role—of the lawyer as a community leader and as a link connecting persons and groups within a community. Then I will comment on the evolution of legal education, contrasting the Langdell model, which analogizes law to science, with the Brandeis model, which connects law to public service. I will discuss the importance of rekindling our profession’s historic values that resonate with the service mission of the academy. Finally, I will ask you to think of how all of us as lawyers and educators—now in uniform, perhaps in civilian attire during a second career—can improve the profession while responding constructively

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3. Letter from Justice Louis D. Brandeis, to Alfred Brandeis, his brother, Alfred Brandeis (1925) (on file in the Brandeis Collection, Louis D. Brandeis School of Law, University of Louisville).

to unfair attacks upon it. In short, I will challenge you to help restore the flame of professionalism.

## II. Our Historical Legacy: Lawyers, Clients and Communities

Aristotle observed that three great professions—priests, doctors, and lawyers (or “lawgivers”)—confront common ethical questions from different perspectives.<sup>4</sup> Priests answer to a divine power and doctors answer to science, but lawyers answer to society. As servants of the public, we lawyers may have the most difficult of professions, for society can be an arbitrary and ungrateful taskmaster. Moreover, unlike a divine power that can fulfill faith, and unlike a body of scientific knowledge that can verify a medical opinion, society cannot validate the lawyer’s work by achieving perfect, harmonious justice. Rather, justice is an endless pursuit and, in a free society, the subject of an ongoing debate.

Nonetheless, the pursuit of justice is ennobling. During the early history of the United States, the role of the lawyer was understood to be that of seeking justice. The lawyer provided a voice for community values and, by serving many clients of different backgrounds, furnished a dynamic of inclusiveness within the community. Of course, inclusiveness then did not mean what it does now—it certainly did not include people of color or, in most circumstances, women—but to the extent there was inclusion at all, a lawyer’s work generated and protected it. Thus, de Toqueville wrote that although the United States had no ancestral, landed aristocracy, it did have a democratic aristocracy in the practicing Bar.<sup>5</sup> He praised the service of lawyers in holding their communities together.

Even in the first half of the twentieth century, a lawyer was known primarily for service. Sol Linowitz, who wrote a mournful critique of today’s legal profession, recalls:

When I entered the profession fifty-six years ago, a lawyer was a member of an esteemed and honored profession. Becoming a lawyer meant joining a helping profession—one [that] dealt with the problems of people and did so sensitively and effectively.

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4. *THE POLITICS OF ARISTOTLE* (Newman, ed., Oxford Univ. Press, 1887).

5. *ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA* (Alfred A. Knopf 1945) (12th ed. 1848).

Lawyers regarded themselves as charged with public trust—committed to strengthening our systems of law and justice . . . .

I knew the fulfillment of having men and women who entered my office in panic and distress leave it grateful and with peace of mind, and I came to understand that human relations is the stuff of which law is made; that no lawyer worth his salt can practice his calling impersonally; that to be a lawyer in the deepest sense of the word is to concern oneself with people and the things which bring people together; and that being a real lawyer involves knowing how to work with those you must serve. The law was for me truly a human profession.<sup>6</sup>

There is a close nexus between Linowitz's remembrance of a "human profession" and de Tocqueville's description of lawyers serving communities. Each sees something noble in helping real people in real situations, accepting their human imperfections and serving them in response to a higher calling.

As judge advocate officers—members of an organization older than the United States itself—we have a special appreciation for lawyers whose service has helped shape the nation's history. Consider these images of American lawyers, past and present:

Think of a Philadelphian in New York, the first Philadelphia lawyer who undertook the defense of John Peter Zenger, protecting his right to publish what he chose free from censorship or interference. His name was Alexander Hamilton and he was a lawyer.

You would see another at the trial of Captain Preston, the trial that arose out of the Boston Massacre. His name was John Adams. He would become the second President of the United States. He was a lawyer.

You would see him at the Miracle at Philadelphia, the Constitutional Convention of 1787, fighting for a statement of rights that

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6. Sol Linowitz, *Respect for Lawyers, Respect for Law*, 54 BENCH & B. OF MINN. No. 10, 27-28 (Nov. 1997). See SOL LINOWITZ (with Martin Meyer), *THE BETRAYED PROFESSION* (1994).

eventually became the basis of American freedom. His name was James Madison. He was a lawyer.

You would see him at Gettysburg, tears in his eyes, gaunt and morose, rededicating our country to principles of equal justice for all. He said, "As I would not be a slave, so I would also not be a master." His name was Abraham Lincoln and he was a lawyer.

You would see him, an elemental man, fighting for one cause or another and in Dayton, Tennessee, preaching the legitimacy of evolution. His name was Clarence Darrow. He was a lawyer.

You would see him speaking to us from a wheel chair, lifting our spirits, making us stronger with his inspirational philosophy: "The only thing we have to fear, is fear itself." His name was Franklin Delano Roosevelt. He was a lawyer.

You would see her standing before the podium of the United States Supreme Court and insisting that her client, Gerald Gault, a fifteen year old juvenile, had a right to due process -- a radical proposition at the time. Her name was Amelia Lewis and she was a lawyer.

You would also see her in the U.S. House of Representatives in July, 1974, during the most serious constitutional crisis of this century. She gave voice to our fear, our anguish, our hope. She showed us the way. Her name was Barbara Jordan. She was a lawyer.<sup>7</sup>

In this glimpse of history, we find a noble heritage of lawyers serving as the connective tissue in a society torn by divisive forces. That heritage has special meaning today. John Sexton, dean of the New York University School of Law, and immediate past president of the Association of American Law Schools, has observed:

From the beginning, America has been a society based on law and forged by lawyers. For Americans, the law has been the great arbiter, the principal means by which we have been able to

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7. John G. Prather, Jr., *President's Page*, KY. BENCH & B. 2-3 (Summer 1993). These excerpts paraphrase portions of an oft-quoted speech on the American lawyer.

knit one nation out of a people whose principal characteristic always has been diversity. And, just as the law has been a principal means for founding, defining, preserving, reforming, and democratizing, a united America, America's lawyers have been charged with setting the nation's values—a charge that runs not only to “great cases” and major reform movements, but also to the lawyer's day to day dealing with clients. In our society, lawyers are and must be the conscience of both the legal system and the client—for if they are not, no one will be.<sup>8</sup>

As Dean Sexton implies, nobility in the legal profession is not limited to a high-profile public practice. The simple, quiet, competent service rendered to individuals is noble, too. Indeed, the reflective practitioner is the true hero of our profession today—a lawyer who understands that our professional responsibilities are threefold. First, of course, the lawyer is a representative of clients. This is the role of the lawyer as an attorney. Although anyone can be an attorney in a contractual sense—an agent for someone else—only lawyers are trained to be attorneys in the full professional sense, exercising an informed and independent judgment. Second, lawyers—unlike contractual “attorneys”—are officers of the courts and legal system. Third, lawyers are public citizens having a special responsibility for the quality of justice. All these roles are recognized, as you know, in the Model Rules of Professional Conduct.<sup>9</sup>

Because lawyers are expected to perform every role, they cannot be mere contractual “attorneys” or narrow technicians of a legal craft. They should view each client's interests in the broader context of justice, pursued with independent professional judgment, with obedience of duties owed to the courts and legal system, and with awareness of the leadership obligations of lawyers as public citizens. To paraphrase Justice Brandeis, lawyers must have an aim high and a vision broad.

## II. Science and Service: Two Models of Legal Education

Regrettably, most young lawyers learn little in law school that raises their aim or broadens their vision. Although modern legal education is a

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8. John Sexton, *The President's Message: Restoring the Notion that Lawyers are Society's Conscience*, 97-2 THE NEWSL. (Ass'n of Am. Law Schools, April 1997).

9. American Bar Association, *Model Rules of Professional Conduct*, “Preamble: A Lawyer's Responsibility” (adopted 1983).

trilogy of doctrine, skills, and values, most students find the primary emphasis to be on doctrine, with a secondary focus on skills and scant attention paid to values beyond a mandatory single course in professional responsibility.

Legal doctrine has been at the top of the educational agenda since the days of Christopher Columbus Langdell at Harvard. Langdell's approach to law teaching in the late nineteenth century was a brilliant adaptation of the scientific method, which had produced an explosion of new knowledge and, through applications of technology during the Industrial Revolution, had generated extraordinary new wealth in the Western world. Langdell advocated enabling students to learn law the way scientists learn about the natural world. Scientists observe phenomena, develop hypotheses to explain what they have observed, and validate their hypotheses by repeating the observations or by replicating the phenomena under controlled conditions. If they observe new phenomena, they either adjust their hypotheses or create new ones. Through this repetitive process of observation and hypothesis, scientists discover the natural order.

Langdell believed students could learn the law in a similar way. Students would investigate the sources of law—consisting, at that time, mainly of judge-made common law—by reading cases. They would develop hypotheses to explain these legal phenomena and validate their hypotheses against other cases. These validated hypotheses would express the underlying rules of law, actively discovered in the classroom rather than passively absorbed in lectures. A sage professor would guide the students in this process, employing a questioning technique to facilitate the discoveries. Hence, the Socratic method that we have employed in legal education for a century.

Although the Langdell model has served us well, we have come to recognize its limits. The method teaches doctrine; it does not address skills, nor is it well suited to inculcating values. Even with respect to doctrine, it works less well in a world of statutes and regulations than in the common law world where it was born. It also creates a false economy of teaching resources because it can be employed with large audiences of students, unlike the clinical model of medical education developed by Dr. Abraham Flexner of Louisville.<sup>10</sup> Flexner gave to medicine what Langdell omitted from law—an educational process employing a high ratio of faculty

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10. John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993).



to students, developing skills in small working groups, and inculcating professional values through mentoring relationships. Langdell's model also lacked insight into the social, economic, or political processes that shape law—or into the role of lawyers as participants in those processes.

These insights came in the twentieth century from another Louisvillian: Louis D. Brandeis. Although Justice Brandeis is rightly lionized for his profoundly influential service on the Supreme Court, he had fashioned an historic career as a lawyer before President Woodrow Wilson appointed him. While maintaining an active practice, he lectured at Harvard, wrote such landmark pieces as *The Right to Privacy*<sup>11</sup> and *Other People's Money*,<sup>12</sup> became one of the Bar's first international figures, and stirred the idealism of our profession by serving as one of America's first pro bono lawyers (devoting roughly a day per week to clients and causes that could provide him no compensation).

Justice Brandeis' experiences as a lawyer helped shape his views about legal education. Although he saw a continued role for Langdell's approach, he envisioned a new educational model, anchored in four ideas that took the study of law beyond a Socratic classroom dialogue and connected it with the outside world.<sup>13</sup> First, Justice Brandeis drew upon his own pro bono experience to argue that lawyers should be imbued with a sense of public responsibility—not necessarily to become career public servants, but to become practitioners who would donate some time to worthy clients and causes without expectation of payment. The power of this idea is evidenced in the growing number of law schools, including the Brandeis School itself, that have mandatory public service programs. Students in these programs learn that giving something back to a community is as much a part of being a lawyer as drafting a contract or delivering an oral argument.

Second, Brandeis believed that the law was not quite what Langdell thought it was—an immutable set of principles to be discovered in the way a scientist discovers the natural order by observing phenomena in the field. Figuratively speaking, Langdell might hold up a crystal and say, "Look at this from different perspectives, experiment with it, discover its structure. This is the law." Brandeis, however, would say the law is not inert like a

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11. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1880).

12. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* (1914).

13. "The Brandeis Legacy," Catalogue of the Louis D. Brandeis School of Law, University of Louisville (1996-1998).

crystal, but is dynamic like a biological entity responding to its environment. In order to understand the law—to find the wellsprings of both its wisdom and its foolishness—the lawyer needs to be, in effect, a Renaissance person, journeying across disciplines into economics, sociology, and other fields. Brandeis put this idea to practice in his own career as a lawyer, pioneering the citation of non-legal authorities to support legal arguments in what we now call his famous “Brandeis Briefs.” Today, at law schools engaged in interdisciplinary scholarship and teaching, students learn that broad-based learning increases a lawyer’s capacity to understand a client’s problems. It also enhances the lawyer’s ability to serve the client by rendering an informed opinion about the future direction of the law.

Third, Brandeis thought law schools should be small in scale. This idea was an outgrowth of his general philosophy on the scale of any human enterprise. He thought that innovation and efficiency usually were stifled by large, centralized organizations.<sup>14</sup> He valued small-scale collegiality and collaboration. I think an institution like the JAG School would have impressed him, where the faculty-student ratio is relatively high, where students learn much from each other as well as from a highly accessible faculty, and where members of the faculty share the students’ paths of professional development.

Fourth and finally, Brandeis urged law schools and universities to advance ideas for improvement in public policy. In this respect, Brandeis presaged the role of the lawyer as a public citizen, and he saw an opportunity for law schools to contribute to the dynamism of our federal system. Expressing a view closely akin to his fondness for creativity in small-scale organizations, Brandeis wrote: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>15</sup> Brandeis thought that law schools and universities throughout the country could be the engines for such new ideas, that the states could experiment with them, and that the nation could emulate the most successful experiments. In advocating this connection between education and public policy formation, Brandeis placed a special responsibility upon law schools, not merely to teach the law, but to help make it better.

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14. See LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* (1934).

15. *New State Ice Co. v. Leibman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Taken together, these elements of the Brandeis model of legal education—public service, interdisciplinary study, collegial learning, and policy formation—have provided a framework for developing law students into public-spirited lawyers, aware of their responsibilities to our profession and of our profession's responsibility to society. The model implicitly moves law schools toward teaching values, without imposing any narrow orthodoxy of values. It gives the modern legal academy a service mission and a stake in professionalism.

### III. Reclaiming Our Legacy: High Aspirations and the Lowest Common Denominator

The profession envisioned by Brandeis, and exemplified by his work, has no place for those who today are the strip miners of our heritage. These are the lawyers who stretch rules and ignore ethics, promote themselves while pretending to serve clients, try cases in the media while claiming to be courtroom lawyers, and engage in tasteless or predatory marketing of legal services—asserting, sometimes correctly, a First Amendment right to do so, but forgetting that professionalism means choosing a course of conduct higher than the minimum allowances of the law.

The strip miners also forget (or do not care) that all members of our profession, civilian and military lawyers alike, are bound together by a collective reputation. In a profession, unlike a business, one's reputation depends significantly on everyone else's conduct. In contrast, reputations in the world of commerce usually are specific to the individual or entity; indeed, damage to one firm's reputation actually may benefit another. Thus, if Chevrolet builds a defective car, Ford or Toyota products may become more popular; or if America On-Line goes off line, Prodigy or CompuServe may increase their market share. But in our profession, if any lawyer displays incompetence or engages in misconduct, then all lawyers are tainted. When such an incident is publicized, the media is likely to feature the story as one of wrongdoing by "a lawyer"—the individual's name will be secondary.

Perhaps we should take comfort that the media and the public still consider lawyer wrongdoing uncommon enough to be newsworthy. The fact remains, however, that when we look at ourselves in the media mirror, the reflection is not of our noble heritage, nor of our highest aspirations, but of the lowest common denominator in our profession. Today, as I speak, the least caring and least competent members of our profession are

making your reputation and mine. We may extol the best among us, but we are held hostage by the worst. This unfortunate dichotomy is one reason why society dislikes lawyers generally, even though clients usually respect their own lawyer.

Our task as a profession—including the legal academy—is to raise the lowest common denominator and to reinforce the highest aspirations that bind us together. This does not mean that we should engage in a contrived public relations campaign. Our task is to earn respect, not merely to claim it. Moreover, popularity for its own sake is a false goal. As Emile Fourget, the French essayist, once wrote: “The law should be loved a little because it is felt to be just, feared a little because it is severe, hated a little because it is always to a certain degree out of sympathy with the prevalent temper of the day, yet respected because it is felt to be a necessity.”<sup>16</sup>

The true goal is to build, or to re-build, a culture of professionalism that legitimates this “necessity” of law. Within that culture, the lawyer pursues “a learned art in the spirit of public service.”<sup>17</sup> Building upon this definition, Jerome Shestack, president of the American Bar Association, has enumerated the elements of professionalism:

First is fidelity to ethics and integrity as a meaningful commitment . . . .

Second is service with competence and dedication—but with independence . . . .

Third is meaningful legal education—not as a chore to meet some point system but as a means for growth and replenishment . . . .

Fourth is civility and respect for authority. Let us resist the Rambo-type tactics in which civility is mocked and ruckus is routine. Civility is more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to non-litigious resolution. It modifies the antagonisms and aggressiveness of an adversarial society. . . .

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16. ELBERT HUBBARD, *ELBERT HUBBARD'S SCRAPBOOK* 38 (1923).

17. Roscoe Pound, *quoted in Jerome Shestack, President's Message: Defining Our Calling*, 83 A.B.A. J. 8 (Sept. 1997).

Fifth is a commitment to improve the justice system and advance the rule of law. The justice system is our trust and our ministry. And we bear the brunt of public dissatisfaction with the justice system's flaws and deficiencies . . . . To make that limping legal structure stride upright is the obligation of every lawyer.

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The final element of legal professionalism is pro bono service. . . . Much has been given to our profession; it seems right to give something back—indeed, it is an ethical obligation . . . .<sup>18</sup>

Unfortunately, most members of the general public doubt that we really stand for these things. They hear about lawyers whose words and actions impugn professionalism. Within the legal community, we even hear some lawyers attack professionalism as political correctness or a threat to freedom. Needless to say, the First Amendment, which we all cherish, protects the expressive rights of those who disavow professional duty while trading on professional privilege. But the rest of us have First Amendment rights, too. We can and should speak up when someone in our profession's lowest common denominator brings core values into disrepute.

One voluntary association doing so is the Federal Bar Association (FBA), which recently adopted standards of civility. Lawyers who do not behave civilly are no longer welcome in that organization. In words that military lawyers can appreciate, FBA president Robert Mueller recently made this observation:

Make no mistake. If the profession truly is to shed its image of excess in the adversary process, it is nothing less than an entire subculture that will have to get that message. Too many among us not only do not conduct themselves civilly but do not want to do so. They wear their discourtesies and their offensiveness in tone and tactics the way warriors wear their campaign ribbons. While the latter reflect honor and courage, the former do not.<sup>19</sup>

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18. Shestack, *supra* note 17.

19. Robert L. Mueller, *President's Message: Standards of Civility—A Lesson in Good Manners*, THE FED. LAW. 2-3 (Jan. 1998).

We in legal education should support the profession's effort to reclaim its heritage. The American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap (sometimes called the "MacCrate Commission") has made a number of recommendations on which law schools are now working. The Commission has urged law school deans, professors, administrators, and staff "to convey to students . . . the need to promote justice, fairness, and morality . . ." <sup>20</sup> The Commission envisions professional development occurring throughout an educational continuum that begins in law school (or perhaps even earlier) and extends over an entire career. Professionalism is viewed as a life's work.

At the front end of this educational continuum, law schools are ill situated to produce professionalism for life; but we can provide a "values inoculation" against the diseases of rule-skirting behavior and purely market-driven practice. To be sure, there is nothing wrong with a lawyer providing services in a market that rewards high standards of performance; but the lawyer also must exhibit high standards of conduct, even though the market may not require or reward them. If we give students such a "values inoculation," the profession—throughout its broad part of the educational continuum—must provide periodic "booster shots" by vigorously disciplining those who engage in misconduct and by speaking out, as individuals or through voluntary associations, whenever our lowest common denominator demeans us.

Because we are a profession, not a mercantile occupation, we should not shrink from espousing values, so long as we focus on foundational elements of professionalism—as Shestack has done—and do not become self-righteous or attempt to prescribe wholly private conduct. We also need to back up what we say with what we do. We are being watched. Our actions convey our values to students, to each other, and to members of the general public—who logically believe our profession is entitled to no greater respect than we ourselves show it.

Although professional responsibility is taught in every accredited law school, the real lessons in professionalism are taught every day in courtrooms, conference rooms, lawyers' offices, even on the telephone. Whether we are professors, judges or practitioners, all of us are teachers; we simply provide instruction in different venues. Together, we should

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20. American Bar Association, *Task Force on Legal Education and the Profession: Narrowing the Gap*, LEGAL EDUC. & PROF. DEV.: AN EDUC. CONTINUUM 333 (1992).

strive toward education in the sense described a century ago by John Ruskin:

Education does not mean merely teaching people what they do not know. It means teaching them to behave as they do not behave. It is a painful, continual and difficult work to be done by kindness, by watching, by warning, by precept, by praise, but above all by example.<sup>21</sup>

Accepting responsibility for setting an example means that we cannot disregard the values expressed in the jobs we are trained, and that we train others, to do. Unfortunately, as a profession, we may have diminished our own perception of values when we made a transition from the aspirational Canons of Ethics to the partly aspirational and partly prescriptive Code of Professional Responsibility, and, more recently, to the entirely prescriptive Rules of Professional Conduct. To young lawyers who lack their own moral compass, reducing ethics to a set of prescriptive rules may send a message that professional responsibility consists simply of knowing what you can, and cannot, get away with.

Here is an example. Last year, the *Arizona Republic*, a newspaper in Phoenix, carried a criminal defense lawyer's advertisement enumerating mistakes that cause some drug dealers to get caught. An ensuing controversy caused the newspaper's business office to terminate the advertisement. A newspaper columnist, however, contacted the lawyer and later reported the following colloquy:

"Your ad tells bad guys how to avoid getting caught," I said.

"I'm exercising freedom of speech. I'm not telling anyone how not to get caught. I'm telling how some people get caught."

"Same thing, isn't it?"

"No, it's different. I can't advise people how not to get caught. Lawyers can't be doing that."

"Think your ad might bother people?"

"I don't care. They don't have to do business with me."<sup>22</sup>

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21. HUBBARD, *supra* note 16, at 17.

In that exchange, we see a lawyer invoking the First Amendment and disavowing any professional obligation to operate above the minimum level of legal protection. We also see a failure to distinguish between a profession and a business, with an accompanying disregard for the collective reputation of all lawyers. Indeed the newspaper columnist concluded his story with the observation, "Attorneys can advertise all they want. If they sound more like used-car salesmen than legal professionals, fine by me . . . . [They] have enough problems with public approval these days. They don't need to take out ads to create more."<sup>23</sup> This is the lowest common denominator at work.

We cannot raise the bottom of the profession by rules alone. Legal educators, lawyers, and judges, joined in common cause, must teach and display the virtues that characterized the ideal lawyer a century ago. Anthony Kronman, dean of Yale Law School, described this ideal lawyer in his book, *The Lost Lawyer*, as "a devoted citizen[, one who] cares about the public good and is prepared to sacrifice his own well-being for it, unlike those who use the law merely to advance their private ends."<sup>24</sup> Elsewhere, Dean Kronman has warned:

If the legal profession is to retain its moral stature (the only thing that can justify the influence lawyers possess), everyone in it—lawyers, judges, and legal educators—must now act to recapture the ideals of citizenship and public service that have been the pride of the profession in the past.<sup>25</sup>

If we heed this warning—if we teach values in all venues where professional behavior is shaped—we can reclaim a heritage that was noble once, and could become so again.

#### IV. The Other Side of Professionalism: Answering Unfair Attacks

If we have a high calling to recapture the historic ideals of our profession, we also have a daunting task in combating the cynicism of the late twentieth century. The corrosive effects of this cynicism are evident in

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22. Steve Wilson, *Lawyer's Ad May Hit a New Low*, ARIZ. REPUBLIC, reprinted in LOUISVILLE COURIER-J., Oct. 24, 1997, at B-3.

23. *Id.*

24. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 14 (1993).

25. Anthony T. Kronman, *Letter to the Editor*, WALL ST. J. (Oct. 1, 1995).



today's lawyer-bashing, a national sport that has dispirited many of our most idealistic lawyers and, I fear, is now deterring many idealistic young people from considering careers in law. The sheer meanness of our times is apparent in a modern cultural icon—the lawyer joke.

I do not wish to make too much of a seemingly narrow subject, but I must disclose that I am no longer as tolerant of lawyer jokes as I once was. Like many lawyers, I used to laugh at such jokes, even re-telling them, as a way of getting along, showing a lack of pretense or undue sensitivity, and mollifying people who harbored bad feelings (sometimes justifiably) toward our profession. But now I have come to view the casual cruelty of lawyer jokes as a means by which negative stereotypes are perpetuated and positive aspirations are discredited.

Today, if I hear the beginning of a familiar lawyer joke, I may interject something like, "Sorry, I've heard this one, so I already know the punchline. It's a joke that hurts the best people in my profession and makes no difference to the worst." The response, after an awkward moment, usually is a disclaimer against wanting to hurt anybody—sometimes followed by an apology or by a reminder that "it's just a joke." Of course, not every situation calls for being a killjoy, and you may not feel comfortable playing that role. But I urge you to ponder what we convey about our high calling whenever we nod and laugh appreciatively at a story that mocks the values of our profession or denigrates the humanity of lawyers as a group.<sup>26</sup>

Misinformation also buffets our profession, much of it reflecting what I call the "little truth/big truth" dichotomy. Permit me to go outside the legal profession, for a moment, to illustrate this dichotomy with a story. A rural county sheriff was besieged with negative stories in the local newspaper; anything that went wrong in his office, any allegation of wrongdo-

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26. In my presentation of the Young Lecture, I distinguished between stories that attack lawyers' values and those that merely poke fun at individual foibles. As an example of the latter, I recalled a purportedly true (although probably apocryphal) account of a deposition in which a lawyer asked a medical examiner whether the patient was dead when the autopsy was performed. When the doctor said "yes," the lawyer asked how he could be sure. "Because," the doctor replied, "the patient's brain was in a jar on my desk." When the lawyer, persisting, asked if it was possible that the patient was alive nonetheless, the exasperated doctor reportedly said, "Well, yes, I suppose he could have been practicing law somewhere." I characterized this story as funny because it was so extraordinarily silly, and suggested that any objection to it would be sanctimonious. After the lecture, however, an earnest young judge advocate officer told me he felt the story was hard to distinguish from many offensive lawyer jokes he had heard. His observation shows how thin the line is between humor that entertains and humor that denigrates.

ing, was reported on the front page. Meanwhile, good works performed by the sheriff's employees went largely unreported. When the sheriff complained about the coverage, the newspaper editor replied simply, "Have we written anything that is not true?" Some time later, the editor decided to visit a South American country that required, as a condition for issuing a visa, a letter of good character from a law-enforcement official. The sheriff duly obliged, writing that the editor "is a citizen of this community and, so far as our records show, has never been convicted of a felony or crime of moral turpitude. However, our files are very incomplete." The sheriff sent a copy to the editor, with a hand-written note at the bottom: "All of this is true, too."

As the story suggests, a little truth is an assertion that seems plausible when viewed in a narrow context, but which is revealed to be inaccurate or misleading when all relevant information is considered. A big truth withstands the broader inquiry. Many lawyers, in the role of advocates, are tempted to use little truths; but they are (or should be) restrained by their duty of candor as officers of the courts and legal system, and by their obligation of leadership as public citizens. Thus, it was disheartening several years ago when a national political figure, a lawyer, asked, "Does America really need seventy percent of the world's lawyers?" The question fueled a public outcry about "too many lawyers." The little truth was that if all lawyers in the world are measured by American legal educational standards, then we do indeed have approximately seventy percent of the world's "lawyers." But the big truth was that if legal service providers are counted according to the legal education standards of their own countries, then—according to a study by a business law professor at Washington State University—the United States actually ranks about thirty-fifth among the nations of the world in "lawyers" per capita.<sup>27</sup>

Another commonly expressed little truth is that the legal profession is a burden to the economy because lawyers are all litigators or "deal breakers." It is true, of course, that litigation resolves many disputes in our society, and that some contemplated business transactions founder upon problems that a lawyer has raised. But the big truth is that, to an increasing extent, litigation these days follows concerted efforts to resolve disputes by negotiation, mediation, or other alternative means. Moreover, the lawyer who "breaks a deal" by saying "no" or by asking hard questions is serving society, and probably is protecting the parties' long-term interests as well.

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27. Ray August, *The Mythical Kingdom of Lawyers*, 78 A.B.A. J. 72 (Sept. 1992).

In addition, the little truth about “deal breakers” ignores a big truth about the broad and constructive role that modern lawyers play in legitimate business transactions. I was reminded of this growing role two years ago when I was part of a University delegation visiting Pacific Rim countries. One of our delegates asked a businessman in South Korea what kind of higher education was most needed to promote economic development, and his answer was “law.” My colleagues were stunned; they never had thought of “litigators” as the enablers and organizers of transactions, or as the community leaders who could marshal resources necessary for investing in economic development. Limited experience and little truths had cramped how they perceived lawyering.

Some little truths, of course, are hardly truths at all. I acknowledged a moment ago that we may rely too much on litigation as a way to resolve disputes in this country. But popular rhetoric about a “litigation explosion” has greatly exaggerated the problem in the public mind. For example, if asked how many tort jury trials are held in the nation’s state courts every year, people are likely to imagine such trials occurring in thousands of courtrooms across the country every week—hundreds of thousands of trials in a year. But the answer is fewer than 25,000 per year in all the state courts.<sup>28</sup> Or, if asked how often plaintiffs receive jury awards in tort cases, including medical malpractice claims, people are likely to surmise that plaintiffs usually get *something*. But the truth is that just under half receive anything, and the fraction is less than one-third in medical malpractice cases.<sup>29</sup> If asked to estimate the median damage award in those tort cases where juries actually do find for plaintiffs, people are likely to envision lottery-level figures because those are the outcomes reported in the media. The truth, though, is that the median award is about \$51,000.<sup>30</sup> Providing the public this kind of factual information and debunking harmful myths—whether in a conversation at a coffee shop or in a speech to a local service club—is part of a lawyer’s function as a public citizen. It is part of our professionalism.

Finally, I invite you, as officers of the courts and legal system, to consider the harm done by public misperceptions about the role of the judiciary in a democratic society. Lay-people do not grasp intuitively the concept that one of our three branches of government should implement

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28. Brian Ostrom et. al, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 (Mar.-Apr. 1996).

29. *Id.*

30. *Id.*

the rule of law, even when unpopular, rather than following the majority impulse. Many citizens grow angry when judges do not follow the “will of the people.” Yet that, precisely, is what our Constitution demands.

The signing of the Constitution in Philadelphia represented a turning point in history. Government then ceased to be merely the product of raw political will and became instead a force controlled by a written charter. If the idea of a charter was unique, the document itself was truly remarkable. Our Constitution dispersed authority among three branches of government and provided that the third branch, the judiciary, would be profoundly different from the other two. Unlike Congress, which would consist of representatives elected by the people and of senators elected (in those days) by state legislatures, and unlike the President, who would be chosen by the Electoral College reflecting the vote of the people, the judiciary would be insulated from elective politics. Federal judges, appointed by the President with the advice and consent of the Senate, would serve for life or good behavior. The judiciary would be independent—a branch of government beholden to no special interest and charged simply, but inspiringly, to uphold the laws and the Constitution of the United States.

This idea of an independent judiciary, responsible for upholding the rule of law and for protecting constitutional rights, even when disfavored by the politics of the moment, is one of America’s most fundamental contributions to the cause of liberty. It is still an idea in need of nurturing. Wherever we see power abused elsewhere in the world—whether in the suppression of dissident views in China, or in the jailing of journalists in Turkey—we see judicial systems succumbing to political control. Indeed, reflecting on our own nation’s history, one might wonder when, if ever, a politicized Supreme Court would have held that the Constitution forbids racial segregation, that every person’s vote is entitled to equal weight, or that every person charged with a serious crime has a right to counsel.

This does not mean that judicial independence should translate into lack of accountability. Federal judges can be impeached, or they can be disciplined within the judicial branch. State systems also have mechanisms to remove judges for cause, such as incapacity or conduct prejudicial to the administration of justice that brings judicial office into disrepute. These are important but narrowly tailored forms of accountability. Many states have gone beyond accountability, however, and have created elective systems in which judges must compete for the voters’ favor, in much the same manner as candidates seeking office in the other two branches of government. Sometimes the judicial candidates run as Republicans or

Democrats, sometimes there are no party labels; but the bottom line for all of them is that they must engage in elective politics. Even if they receive an initial appointment to judicial office, they must think immediately about waging a campaign at the upcoming election, strategically situating themselves in the voters' minds for approval at the ballot box, and finding a way to raise money for a contested campaign. Unfortunately, such judicial electioneering undermines judicial independence, both in fact and in public perception, thereby eroding the capacity of our third branch of government to protect the rule of law and to uphold constitutional rights when the political tide is flowing against them.

My object here is not to lobby you about appointive or elective systems, or about the impact of campaign finance upon judicial independence and integrity—although I hope you will think about those issues. Rather, it is to remind you that we as lawyers, possessing a special understanding of the judicial function, have a duty to defend judges—especially those facing elections—who make courageous and legally principled, but unpopular, decisions. We can educate the public about that great American innovation—the independent judiciary—and in so doing, we can reaffirm the values of the legal profession itself. They are woven from the same fabric.

## V. Conclusion

Washington Irving told us that “great minds have purposes, others have wishes.”<sup>31</sup> The essence of professionalism is to dedicate oneself to a purpose higher than any personal wishes. What, then, is your purpose? Is it to be a contractual “attorney?” Is it, instead, to be a lawyer who pursues justice while exercising independent judgment, honoring duties to the courts and legal system, and earning respect as a public citizen? Is it to become a teacher in every professional venue, demonstrating by word and example your dedication to ethics above minimal rules and marketplace rewards? Is it to raise our profession's lowest common denominator and to defend the profession against unfair attack? These questions demand answers that will give genuine meaning to your career now and, perhaps, to a second career later. The answers must come from you, from your values—inspired, we hope, by a lifetime of legal education, but sustained ultimately by your character and your sense of justice.

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31. DAVID KIN, *DICTIONARY OF AMERICAN MAXIMS* 219 (1955).

George Eliot, the nineteenth century novelist and essayist, once asked, "Who shall put his finger on the work of justice and say it is there?" Then, answering her own question, she observed, "Justice is like the kingdom of God. It is not without us as a fact; it is within us as a great yearning."<sup>32</sup> In that spirit, I beckon you to join the lawyers who love this country, founded upon legal principle; who are called to a profession, troubled yet restorable; who claim no perfection, but are the keepers of the flame; and in whom justice, now and forever, resides as a great yearning.

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32. HUBBARD, *supra* note 16, at 14.