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Professionalism: Restoring the Flame

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Professionalism: Restoring The Flame

By Donald L. Burnett, Jr.

Introduction

My purpose in this essay is to call upon the bench, the bar and our law schools—working together—to recapture the values of professionalism. I offer the perspective of a practitioner, state bar president, state appellate judge, and member of the legal academy. My perspective has been deepened by working at a law school inspired by a legendary figure, Louis D. Brandeis, whose last remains are buried near my office. Justice Brandeis had a vision of an academic institution expressing the community at its best. “The aim must be high,” he declared, “and the vision broad.”¹

Today, we in the legal profession serve a public disaffected with lawyers, a public largely convinced that we have drifted away from high aims and broad visions. Law schools, the bench and the bar cannot avoid responsibility for this problem by blaming each other for it. The challenge of reclaiming our common values is an urgent mandate for us all.

In these remarks, I will begin with the early role—what should be the enduring role—of the lawyer as a community leader, a link connecting persons and groups within a community. I will comment on 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 values in raising our profession’s collective reputation. Finally, I will ask you to think of how all of us can improve the profession while responding constructively to unfair attacks upon it. In short, I will challenge you to help restore the flame of professionalism.

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.² 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, and justice can be an endless pursuit.

Nonetheless, the pursuit is ennobling. During the early history of the United States, the role of the lawyer was understood to be that of seeking justice and providing a voice for community values. Thus, de Toqueville wrote that although the United States had no ancestral, landed aristocracy, it did have a democratic aristocracy in the practicing Bar.³ He praised the service of lawyers in holding their communities together.

Our noble heritage, as the connective tissue of society, 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 principle means by which we

have been able to 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.⁴

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—that is, an agent for someone else—only lawyers are trained to be attorneys in 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 Rules of Professional Conduct.⁵

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.

Science and Service: Two Models of Legal Education

Regrettably, many young lawyers learn little in law school that raises their aim or broadens their vision. Although modern legal education is a trilogy of doctrine, skills, and values, most students find the primary emphasis to be on doctrine, with a secondary (but rapidly increasing) focus on skills. Law schools are still struggling with the task of teaching values across the curriculum, beyond the mandatory single course in professional responsibility.

The dominance of doctrine traces back to the days of Christopher Columbus Langdell at Harvard. Langdell advocated enabling students to learn law the way a scientist learns 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. Similarly, Langdell believed law students should investigate the sources of law—consisting, in

Langdell's time, mainly of judge-made common law—by reading cases. Students would develop hypotheses to explain these legal phenomena and would 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. Students would be guided in this process by a sage professor, 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. It is a method for teaching 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. Langdell's model also lacks insights into the social, economic or political processes that shape law, and into the role of the lawyer as a participant in those processes.

These insights came in the twentieth century largely from Justice Brandeis, whose experiences as a lawyer helped shape his views about legal education. Although he found the Langdell approach intellectually exciting, Justice Brandeis 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.⁶ First, he 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 in Louisville, that have mandatory public service programs.

Second, Justice Brandeis believed the law is dynamic, like a biological entity responding to its environment. In order to understand the law and the forces shaping it, the lawyer needs to be, in effect, a Renaissance person, journeying across disciplines into economics, sociology and other fields. Brandeis put this idea to practical use in his own career as a lawyer, pioneering the citation of nonlegal authorities to support legal arguments in what we now call his famous "Brandeis Briefs."

Third, Justice 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.⁷ He thought innovation and efficiency usually were stifled by large, centralized organizations. He valued small-scale collegiality and collaboration. I think he would have been impressed by the University of Idaho College of Law, where the faculty-student ratio is better than the national average.

Fourth and finally, Justice Brandeis urged law schools and universities to advance ideas for improvement in public policy. In this respect, he 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, which he regarded as a great laboratory for new ideas. In advocating this connection between education and public policy, Justice Brandeis placed a special responsibility upon law schools, not merely to teach the law, but to help make it better.

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.

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, who promote themselves while pretending to serve clients, who try cases in the media while claiming to be courtroom lawyers, and who 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. 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"—and the individual's name will be mentioned later.

Our task as a profession—including

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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. Rather, the true task is to build, or to rebuild, a culture of professionalism. In that culture, the lawyer pursues “a learned art in the spirit of public service.” Jerome Shestack, past 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 nonlitigious resolution. It modifies the antagonisms and aggressiveness of an adversarial society....

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.

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....’

Unfortunately, most members of general public doubt that we really stand for these things. They hear—or 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.

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 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

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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.¹⁰

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, has 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."¹¹ 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.¹²

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.

The Other Side of Professionalism: Answering Unfair Attacks

Our high calling—to recapture the historic ideals of our profession—is coupled with the daunting task of combating the cynicism of the late twentieth century. The corrosive effects of this cynicism are evident in 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." (Of course, not every situation calls for being a killjoy, and you may not feel comfortable playing that role. (It is difficult for me as well.) 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.

Our profession also is buffeted by misinformation, much of it reflecting what I call the "little truth/big truth" dichotomy. 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



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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 were 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 would rank about 35th among the nations of the world in "lawyers" per capita.¹³

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 many (perhaps too many) disputes in our society are resolved by litigation, and that some contemplated business transactions founder upon problems raised by a lawyer. 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.

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.¹⁴ 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.¹⁵ 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 \$51,000.¹⁶ 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. Laypersons do not grasp intuitively the concept that one of our three branches of government should implement the rule of law, even when unpopular, rather than simply following the majoritarian 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 constrained by a written charter. 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. The judiciary would be independent, insulated from elective politics and charged simply, but inspiringly, to uphold the laws and the Constitution of the United States.

Many states, however, 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. In Idaho (as in Kentucky), the judicial candidates do not run as Republicans or Democrats; but they still must engage in elective politics. Even if they receive an initial appointment to judicial office, Idaho judges other than magistrates must think about potential opposition at an upcoming election—a prospect that could force them to wage a campaign, to obtain help in paying for it, and to position themselves strategically in the voters' minds.

My object here is not to argue about judicial selection systems; there is ample room for reasonable people to disagree on that topic. Rather, it is to remind you that a judge who adheres to the rule of law, rather than embracing the politics of the moment, is exhibiting the highest form of professionalism. We lawyers, who possess 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, after all, threads of the same fabric.

Conclusion

Washington Irving told us that "great minds have purposes, others have wishes."¹⁷ 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? The answers must come from each of us, from our common values—inspired, we hope, by a lifetime of legal education, but sustained ultimately by our character and our sense of justice.

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 (yes, 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."¹⁸

In that spirit, I beckon you to reaffirm your bond to the lawyers who love this country, founded upon legal principle; who are called to a profession, troubled yet restorable; who claim no individual perfection, but are keepers of the flame; and in whom justice, now and forever, resides as a great yearning.

ENDNOTES

¹Letter from Justice Brandeis to his brother, Alfred Brandeis, in 1925, on file in the Brandeis Collection, Louis D. Brandeis School of Law, University of Louisville.

²NEWMAN (ed.), *THE POLITICS OF ARISTOTLE* (Oxford University Press, 1887).

³ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (12th ed. 1848) (republished, Alfred A. Knopf, 1945).

⁴J. Sexton, "The President's Message: Restoring the Notion that Lawyers are Society's Conscience," *The Newsletter*, No. 97-2 (Association of American Law Schools, April 1997).

⁵American Bar Association, *Model Rules of Professional Conduct*, "Preamble: A Lawyer's Responsibility" (adopted 1983). The *Idaho Rules of Professional Conduct* are based largely upon the ABA model rules, with some Idaho variations.

⁶"The Brandeis Legacy," Catalogue of the Louis D. Brandeis School of Law, University of Louisville (1996-98).

⁷See LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* (1934).

⁸Roscoe Pound, *quoted in* Jerome Shestack, "President's Message: Defining Our Calling," 83 *American Bar Association* 8 (September, 1997) (*hereinafter cited as Shestack*).

⁹Shestack, *supra* n. 8.

¹⁰Elbert Hubbard, *Elbert Hubbard's Scrapbook* 38 (1923).

¹¹Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 14 (1993)

¹²Anthony T. Kronman, Letter to the Editor, *The Wall Street Journal* (October 1, 1995).

¹³Ray August, "The Mythical Kingdom of Lawyers," 78 *American Bar Association Journal* 72 (September, 1992).

¹⁴Brian Ostrom, David Rottman, and John Goerd, "A Step above Anecdote: A Profile of the Civil Jury in the 1990s," 79 *Judicature* 233 (March-April, 1996).

¹⁵*Id.*

¹⁶*Id.*

¹⁷David Kin, *Dictionary of American Maxims* 219 (1955).

¹⁸Quoted in HUBBARD, *supra* n. 14.

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