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Becoming America's Best Small State Law School: A Vision for the University of Idaho College of Law

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An Aim High and a Vision Broad: The Public Responsibilities of a Public Profession

by Don Burnett

When I open the window of my office and look toward the law school's classical portico, my eye follows the descending lines of Greek columns to one of the nation's least-publicized landmarks in legal history. There, beneath the portico, identified only by a modest bronze plaque darkened by age, is the last resting place of an American giant: Louis D. Brandeis.

Every lawyer today is touched by some element of the Brandeis legacy. As a young scholar and practitioner, Brandeis played a leading role in creating the concept of a "right to privacy" and in developing the principle of fiduciary responsibility in managing "other people's money." He pioneered the use of empirical evidence and interdisciplinary research to shape the law, as illustrated in his own groundbreaking "Brandeis Briefs". He espoused the role of the states as public policy innovators in the great "laboratory" of our federal system. He blended a "liberal" commitment to social justice with a "conservative" (some would say "Jeffersonian") advocacy of small-scale institutions and individual responsibility.¹

Most importantly, perhaps, Brandeis championed the idea that American lawyers must be guardians of a stable democracy. "It lies with our lawyers," he wrote, "to say in what lines [progressive social] action shall be expressed: wisely and temperately or wildly and intemperately; in lines of evolution or in lines of revolution." He memorably added: "There is and there will be a call upon the legal profession to do a great work for this country."²

Just as Brandeis thought the legal profession was called to serve the country, so, too, he believed that every individual lawyer was called to public service. Some members of the profession might answer the call through work in the public sector; others, like Brandeis himself (before ascending to the Supreme Court) might answer the call as private practitioners taking cases *pro bono publico*. But all lawyers would hear—and all lawyers in some way would answer—the call. Indeed, Brandeis made no exception for himself, even at the height of his prosperous law practice in Boston. In the early twentieth century, when fewer than ten percent of all Boston lawyers made more than \$5,000 per year, Brandeis made \$50,000 per year; yet he found time to become known as "the people's lawyer." He devoted the equivalent of at least one hour per day to *pro bono* service. He even compensated his law firm for his *pro bono* time!³

Brandeis not only demonstrated a personal commitment to public service; he also expounded the importance of legal education in sustaining public service as a value of the legal profession. (Felix Frankfurter would later say that Brandeis was "one of the few thinkers in the profession concerned with the fundamental problem of legal education.")⁴ Brandeis, in his famous address, "The Opportunity in the Law," delivered in

1905 to the Harvard Ethical Society, argued that "whole training" in law school should include not only the development of reason and judgment, but also the inculcation of a dedication to the legal profession's public trust.⁵ His challenge to legal educators matched his soaring aspirations for education generally. To become great, he once said, "a university must express the people whom it serves, and must express the people and the community at their best. The aim must be high and the vision broad"⁶

Much of what Brandeis said about our profession—against considerable resistance in his day—seems well accepted now. We understand that law is a public profession with public responsibilities; we know there still is a "call upon the legal profession to do a great work for this country"; and we proclaim the importance of public service. Indeed, every Idaho lawyer has subscribed to the statutory oath or affirmation, solemnly recited before the Supreme Court, never to decline, for personal considerations, the cause of the defenseless or oppressed. Every Idaho lawyer also is subject to Rule 6.1 of the Idaho Rules of Professional Conduct (which tracks the original version of the American Bar Association's Model Rule):

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

This rule, though not enforceable by discipline, expresses a universal expectation. As noted in the rule's commentary, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." Similarly, Jerome Shestack, past president of the American Bar Association, has noted that public service is one of the "elements of professionalism that ... define our calling."⁷

Unfortunately, however, not everyone in the profession today hears, or answers, the call. For this reason, Idaho's Chief Justice has found it necessary to ask for "more genuine public service from the legal profession—for poor and frequently desperate people—who otherwise risk being left at the ragged edges of our society."⁸ The problem is that although we now accept much of what Brandeis said about public responsibility in the legal profession, we have not completely infused a sense of that responsibility into our professional culture. This problem, in turn, reflects the fact that we have not yet implemented fully what Brandeis said about the need for legal education to inculcate an early commitment to public service. Until law schools demonstrate the fundamental importance of this commitment—not only by mentioning it

during Professional Responsibility classes, but also by providing every student a public service learning experience—we will leave room for our students to infer that public service is a universal aspiration but not a universal expectation.

The American Bar Association has recognized the critical link between public service in the profession and public service in law school. In its report on “bridging the gap” between legal education and the profession (the “MacCrate Report” of 1992), the ABA has recommended that law schools, along with the organized bar, make law students aware of the profession’s expectation that all lawyers will fulfill their responsibilities to the public and will support *pro bono* legal services for those who cannot afford a lawyer.⁹

The legal academy is responding. Legal education today consists of more than the teaching of legal doctrine; it also embraces the development of lawyering skills and values. Recent presidents of the Association of American Law Schools have emphasized the values component, challenging member law schools to provide “professional education and professional values” and to help “restor[e] the notion that lawyers are society’s conscience.”¹⁰ In meeting this challenge, approximately twenty American law schools to date have adopted public service learning as part of their required curricula. (The University of Idaho College of Law has yet to take this step, although those students who have participated in the College’s clinical offerings have found their experiences to be exceptionally worthwhile.¹¹)

Some opponents of incorporating public service into the required curricula of law schools have asserted that public service

is not a professional duty but merely an individual choice. Therefore, the argument goes, public service should not be mandated in legal education. The premise of this argument, of course, is refuted by attorneys’ oaths and rules of professional conduct such as those found in Idaho. But even if the premise were accepted, it would fail to support a conclusion against requiring a public service learning experience in law school. After all, every accredited law school requires students to spend semesters studying tort law and criminal law, even though we do not expect each of our graduates to go into a tort litigation practice, to become a prosecutor, or to become a criminal defense lawyer. We require these courses—as well as other core elements of the doctrinal curriculum such as contracts, property, civil procedure, and even constitutional law—not because they will prove essential to every student’s eventual career path, but because we have made a professional and academic judgment that no one can claim to be learned in the law without understanding these core subjects and appreciating how they relate to each other.

If legal educators, in consultation with the bench and bar, legitimately can make such a judgment about core learning experiences in legal doctrine, they also can make a legitimate judgment about core learning experiences in fundamental values of the legal profession. Because the legal profession is (or should be), as Roscoe Pound stated, “a learned art [pursued] as a common calling in the spirit of public service,”¹² and because public service is expected of all lawyers, public service can—and should—be adjudged essential to each law student’s education. Our willingness to make this judgment is a litmus test of how

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In truth, requiring a public service learning experience for all students should not be a "hard sell." Students readily appreciate the reinforcement of values, the professional networking, and the skills development that public service projects provide. Faculty often find that the doctrinal curriculum is strengthened by the combination of values instruction, skill-building opportunities, and substantive knowledge imparted by public service projects. Moreover, universal public service enriches the law school culture. It communicates to all students a shared sense of belonging to a professional community, and it demonstrates to every student that his or her law degree represents more than a mercantile "ticket to earn."

Law schools may provide public service experiences in a variety of ways, but even small law schools with limited resources can create successful public service programs. The Brandeis School of Law at the University of Louisville, with a total enrollment of only about 385 students, is an example. In 1990 the Brandeis School became one of the first five law schools in the United States to incorporate public service into the required curriculum. The program, which became fully operational in 1992, gives every student a service experience under professional supervision. All students perform at least 30 hours of approved, law-related service at some point during their upperclass studies. (Students usually choose to perform far more hours, and some have compiled several hundred hours of pro bono service.) On-site supervision is provided by carefully selected lawyer volunteers. The program, administered by a part-time lawyer/staff person and an administrative assistant, is overseen by a faculty committee. Funding has come from private individuals who were enthused about the public service concept and would have been unlikely to support other law school initiatives.

Students in the Brandeis program are able to take advantage of placements throughout Kentucky and many other states, or they may submit their own proposed placements for approval by the faculty committee. Service opportunities range from assisting courts in cases involving children to helping prosecutors obtain restitution for victims of crime. Other typical placements include legal aid offices, public defender offices, HIV/Aids legal assistance projects, and refugee assistance offices. In appropriate circumstances, pro bono projects at private law firms also may be approved as placements.

Public service requirements of various forms have been adopted at other law schools as diverse as Valparaiso, Tulane, Columbia and the University of Pennsylvania. At the Brandeis School, the public service program has become part of our institutional "signature." In 1994, upon learning of the Brandeis program, the late Barbara Jordan, a revered public figure and former Congresswoman, traveled from Texas to Louisville—despite great difficulties caused by her final illness—to commend the law school for its "ethic of responsibility." Responsibility is "a universal value and virtue," she declared. "No one escapes it."¹³ When Justice Sandra Day O'Connor visited the Brandeis School, she praised public service programs in which "law students are awakened to the sense of personal satisfaction that comes from helping people, a feeling they are not likely to experience in their other classes."¹⁴

The Brandeis program, now a decade old, has evolved into a strong partnership between the legal profession and the academy, enhancing the public reputations of both. Although such programs are not a panacea for all of the legal profession's ills, they have proven to be an educationally sound and cost-effective way to promote a sustainable culture of public responsibility. They demonstrate, as Brandeis himself might say, how much can be accomplished with an aim high and a vision broad.



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based in part on keynote remarks he delivered in Boise, on January 18, 2002, at the Section's continuing legal education program on "Professionalism and the Successful Lawyer."

Endnotes

- 1 See generally Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981).
- 2 Bernard Flexner, *Mr. Justice Brandeis and the University of Louisville* 65 (1938) (quoting Ernest Poole, Brandeis, *Am. Mag.*, Feb. 1911).
- 3 Urofsky, *supra* n.1, at 16.
- 4 Nelson Lloyd Dawson, *Louis D. Brandeis, Felix Frankfurter and the New Deal* 3-4 (1980).
- 5 Philippa Strum, *Louis D. Brandeis: Justice for the People* 72-73 (1984).
- 6 Letter from Louis D. Brandeis to Alfred Brandeis (Feb. 18, 1925), in 2 *Letters of Louis D. Brandeis* (Melvin I. Urofsky & David W. Levy, eds., 1991).
- 7 Jerome Shestack, "President's Message," 83 *A.B.A.J.* 8 (Sep. 1997).
- 8 Hon. Linda Copple Trout, "Responsibilities Met and Services Rendered ..." 41 *The Advocate* 12 (Idaho State Bar, Oct. 1998).
- 9 American Bar Association, "Task Force on Legal Education and the Profession: Narrowing the Gap," *Legal Education and Professional Development: An Educational Continuum* (1992).
- 10 See "President's Messages" of Deborah Rhode and John Sexton, respectively, in *AALS Newsletter* (Apr. 1997 and Apr. 1998).
- 11 See Maureen E. Laffin, "University of Idaho College of Law Clinical Program," 43 *The Advocate* 18 (Idaho State Bar, May, 2000).
- 12 Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 95 (1953).
- 13 Hon. Barbara Jordan, 1994 Law School Convocation Address, University of Louisville, transcript on file at Brandeis School of Law, at p. 1.
- 14 Hon. Sandra Day O'Connor, 1992 Brandeis Lecture, University of Louisville, synopsis in *The Brandeis Brief* (inside front cover, 1992).

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