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The Preconditions of Professionalism: Legal Education for the Twenty-First Century

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THE PRECONDITIONS OF PROFESSIONALISM: LEGAL EDUCATION FOR THE TWENTY-FIRST CENTURY

The Twelfth Blankenbaker Lecture

John E. Sexton*

I am honored to appear before you today to deliver this twelfth lecture in the Blankenbaker Lecture series.[1] I am doubly honored because the sixth lecture was delivered by Robert McKay, one of NYU's great Deans and one of my role models. I am happy to report that Bob continues to grace our faculty.[2] I met with him on Sunday just before I left New York; he sends his regards. I should add that he volunteered his view that your Law School is one of the best places in America to study law.

Though my very heavy Brooklyn accent underscores that I come to Montana from the distant (and very different) land of New York City, there is much that unites us. Martin Burke, a good friend, received his LL.M. in Taxation from NYU in 1982, my first year at the Law School. Then, he contributed his wonderful talent as a classroom teacher to our Graduate Tax Program for a year. You are lucky to have him here; we still miss him at Washington Square.

More generally, both your school and mine are attempting to define a curriculum and teaching methodology that goes beyond the old "case method," and which meets the needs of today and tomorrow. Your faculty and mine have set in place the first elements of what each of us believes is a twenty-first century curriculum. I am struck that as we have generated our new curricula, we each have emphasized the special role of lawyers in society.

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1. Joseph N. Blankenbaker founded the Blankenbaker Foundation in 1975. The Blankenbaker Foundation provides an annual endowment to the University of Montana School of Law for educational programs in professional responsibility, including the Blankenbaker Lecture series.

2. Bob McKay died suddenly on July 13, 1990. Sexton, *Robert B. McKay*, 65 N.Y.U. L. REV. 891 (1990). Shortly before his death, he delivered the 1990 Tyrrell Williams Memorial Lecture at Washington University School of Law. This lecture, recently published as McKay, *The Rise of the Justice Industry and the Decline of Legal Ethics*, 68 WASH. U.L.Q. 829 (1990), is a fitting valedictory to a distinguished career, as well as a moving and challenging last message from one of the giants of our profession.

My talk will address this common enterprise of ours. Specifically, I will discuss what I call the preconditions of professionalism—preconditions that are set, for the most part, in the law schools of this nation.

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From the beginning, America has been a society founded by lawyers and based on law. We sometimes forget the special role of lawyers and law in our nation's birth. The man who drafted the Declaration of Independence, Thomas Jefferson, was, first of all, a practicing lawyer. The struggle between the American colonists and Great Britain was a struggle over the meaning of the English constitution and English legal rights. And, in that struggle, the major lawyers of British North America (including John Adams, John Dickinson, John Jay, James Otis, and George Wythe) played key parts.

Throughout our history, the law has been the great arbiter, the principal means by which we have been able to knit one nation out of a people whose principal characteristic always has been diversity. The American struggle has been and will be to show that the ideals we enshrined in law in our founding period remain relevant in a society more and more complex, and for a population more and more diverse. The law continues to be the principal weapon we have used in that struggle.

And, just as the law has been a principal means for founding, defining, preserving, reforming, and democratizing a united American society, the legal profession has rendered preeminent service in those endeavors. In many ways, lawyers have been responsible for setting our nation's values—whether in their public persona as legislators, judges, and scholars or in their private capacity as practitioners. For example, in the early part of this century, two of Montana's greatest lawyers and senators, Tom Walsh and Burton Wheeler, chaired Senate inquiries into the Teapot Dome scandals. They stood for integrity at all levels of government when it was not popular to do so—and they did it at a time when government seemed up for sale to the highest bidder.

But, lawyers do not set our society's values only in "great cases" or in the major reform movements. Lawyers perform this role in the course of their day-to-day dealings with clients. Even while advising a client about what might seem a minor legal difficulty, the lawyer conveys the values of society to the client. Lawyers are and must be the conscience of both the client and the legal system—for if they are not, no officer of the civil realm will

be.

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In our country, the role of the lawyer in society and the shape of legal education always have been closely linked—and our vision of each has evolved not merely on parallel lines but as two intertwined strands. The history of American legal education shows how it both shapes and reflects the changing role of lawyers in our society.

In the first great era of American law, lawyers were trained by an "apprenticeship" method derived from the "inns of court" system that prevailed in Great Britain. This system ensured that uneducated and unprofessional practitioners known as "pettifoggers" would be excluded from court—a result much desired by John Adams and others who repeatedly denounced pettifoggers as unworthy of the profession.

The "apprenticeship" system also encouraged experienced practitioners to retain a continuing interest in the development of their profession. A practitioner took on an aspiring lawyer as a student for a modest fee. The student was expected to conduct the day-to-day clerical business of the office—copying out writs, contracts, and deeds. Not only was this labor partial payment for legal education—it actually *was* legal education because the student absorbed the writ system, the technicalities of legal draftsmanship, and other skills of the trade. The student also attended court, taking notes of the arguments he heard and the decisions the judges reached. From time to time, the lawyer would discuss his cases or the doings at court or in the legislature with his apprentice, again imparting—so the theory ran—wisdom and experience.

When the practitioner judged his apprentice ready, he brought him to court and spoke for his candidacy before the judges. The judges asked the applicant a few questions to determine the quality of his understanding of the law; and, if they were satisfied that he met the standard, the court would admit him to the bar.

George Wythe of Virginia, the mentor of Thomas Jefferson and John Marshall, was hailed widely as embodying the standard to which lawyers of the time aspired. Not only did he master all areas of legal practice; he also became versed in all the humanities. Indeed, in 1779, in tribute to his professional standing, Wythe was named the first professor of law at an American school. Ironically, Wythe's appointment at William and Mary foretold the rise of a newer model of legal education that ultimately supplanted the "apprenticeship" model: the law school.

The law school coexisted uneasily with the apprenticeship model for most of the nineteenth century. In fact, until the first years of this century, the organized bar regarded law schools with great suspicion. Thus, for example, no Justice of the United States Supreme Court appointed before the twentieth century had a law school degree. Oliver Wendell Holmes, Jr., appointed in 1902, was the first Justice to have one. And, in case you are interested, the last Justice never to attend law school was James Byrnes, who read law in South Carolina and was appointed to the Supreme Court in 1941.

In the first years of the first law schools, the faculty (who usually were sitting judges) delivered lectures that were little more than lengthy monologues to students. The students, for their part, took copious and detailed notes in preparation for examinations.

In the decades following the Civil War, however, Dean Christopher Columbus Langdell of the Harvard Law School pioneered the development of a new form of legal instruction, which we know as the casebook method. The focus of Langdell's pedagogy was the "scientific" study of legal doctrine; the raw materials of the study were appellate decisions; and the method of study entailed a close reading of the text by the students, followed by an even closer grilling of the students by the instructor. The notion was that the students would learn simultaneously the substantive doctrines in the casebook, the habits of analytical thought, and the practical skills of public speaking.

Langdell's model of legal education reflected perfectly changes in the legal profession that began after the Civil War. Law practice—especially by the leaders of the bar—became more specialized, more focused on serving large entities like corporations, and less focused on serving the needs of individual clients. As the elite practice became less involved with "little people," the concept of law as science became more attractive. Soon, the curricula at most leading law schools were patterned on Langdell's model.

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The twentieth century has witnessed the further growth, at a dizzying rate, of complexity in our society. Naturally, there has been a corresponding specialization in the practice of law. No one lawyer can hope to master the full range of legal problems and challenges confronting lawyers today. Thus, for the modern lawyer, specialization is a necessity.

The rise of specialization in the legal profession has come close to eliminating whatever sense of community remained among law-

yers. The growth of the "megafirm" may be the unavoidable result of society's need for a vastly wider range of services to clients, but the rise of this form of legal organization produces a large and unwieldy organization whose members have less and less in common. Things may be somewhat different in Montana, but I suspect that, even here, any partner in a large urban law firm who is past the age of fifty would agree that collegiality is not what it was twenty-five years ago.

As the legal profession moves toward the next century, this trend will continue—and, if it has not engulfed Montana by now, it soon will. Experts report a startling picture. By the year 2000, our nation will have over one million attorneys (thirty percent more than we have today); twenty to fifty law firms will dominate the legal profession; the largest firms will employ 3,000 lawyers or more (Robert Cox, chairman of Baker & McKenzie's executive committee, sees his firm growing to more than 5,000 lawyers by 2010); and the midsize firms that will exist will be highly specialized.[3]

Moreover, as the law becomes more specialized and the "megafirms" grow, more and more lawyers will become business technicians with no particular desire to preserve a special civic role for lawyers. Indeed, today many lawyers regard the notion of the lawyer as society's conscience as a foolish remnant of earlier times, unconnected to the real world of today.

In the face of such cataclysmic societal changes, it is striking that the essential nature of legal education has remained unchanged. As it turns out, however, Langdell's casebook method, which was developed in the cauldron of the early stages of depersonalized law, is, in a perverse way, quite suited for the later, more exaggerated stages of today. Thus, the casebook method remains the dominant model in legal education.

Notwithstanding the present hegemony of the Langdellian model, however, we are long since past the time in which it deserves its dominant position. Let me offer just a few observations about legal education today that, taken together, reveal the essential disutility of the casebook method.

—First, for better or for worse, most of the brightest students in America are turning to law school after college. They are not pursuing doctorates, and they no longer are going to medical school or business school. Right now, law school is the graduate education of choice.

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3. Gibbons, *Law Practice in 2001*, 76 A.B.A. J. 69, 72 (1990).

—Second, the exceptional students whom we attract today are able to master legal reasoning and the close analysis of cases and doctrine in two (or at most three) semesters of study. These are the essential lessons that the casebook method seeks to convey. Thus, after roughly a year at law school, the casebook method has little to offer, other than the application of skills already learned to new doctrinal areas.

—Third, the modern student quickly realizes that law is a derivative discipline, that complex factors (not immutable truths) shape what our law is and will be, and, therefore, that the rules of the year 1990 are likely to be radically different from the rules of 1995 and that (even in 1990) the rules of one jurisdiction may be radically different from the rules of another jurisdiction. This sharply reduces the student's interest in learning multiple sets of specific doctrinal rules.

—And, fourth, the focus of the Langdellian model on the scientific study of law through cases (read that: the study of law as a reified and abstract discipline) only exacerbates the tendency of lawyers to lose contact with each other and with their responsibility to act as society's conscience.

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For these reasons and others, an increasing number of those involved in legal education believe that the time for a new model of legal education has come. Around the country (and here at your law school), a growing number of us are searching for a new blueprint. Nobody has found it just yet; and I do not claim to have it. I will offer, however, some modest suggestions about its form—suggestions that flow in part from a notion that we must include in the preconditions of legal professionalism a sense that each lawyer belongs to a professional community which bears a special responsibility to act as society's conscience.

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Elements of the blueprint can be seen in the emergence of two forms of legal instruction that the casebook method never envisioned. The first is what I will call the "situation method" of instruction; the second is interdisciplinary instruction. Let me talk a bit about each.

The best known form of the "situation method" of instruction is clinical instruction. Your law school, for example, places great emphasis in its curriculum on performance; and your upper division clinical training program is similar to clinical programs which

have been established at many law schools.[4]

Traditional clinics are only part of the picture, however. I am impressed that in your First Year law firm program and in your First and Second Year Legal Practice course, you also place students in concrete lawyering situations. Programs of that sort never were envisioned in the casebook method.

The contrast reveals a flaw in the casebook method. Langdell and his followers either missed or did not care about a simple point: real people do not find themselves in cases; they find themselves in situations. Lawyers do not encounter their clients in cases; they encounter them in situations. What I call the "situation method" of instruction places the student in role as a lawyer in a simulated or (in the case of a clinic) actual situation. This forces the student to grapple with the problem on the ground.

The casebook method does not convey what it means to practice law on a daily basis. An abstract discussion of the principle of a case cannot capture either the concrete activities of the lawyer in a situation or the dilemmas she faces. Reading a case does not reveal the special problems involved in conferring with clients, investigating factual allegations, planning a litigation strategy, drafting pleadings, conducting discovery, drafting motions, negotiating a settlement, or conducting a trial. Understanding doctrine is one thing; understanding these facets of the lawyer's work is another.

Or, at another level, even the closest reading of an appellate opinion misses the human element of the lawyer's job. In appellate decisions, the parties must be faceless actors seen through a cold, settled factual record. The student gets no sense of the human drama of the situation. How, for example, does a lawyer interact with a client? How does a lawyer provide guidance, both legal and moral? When and how should a lawyer say "No" to a client? How does a lawyer confront the possibility of taking action that does not violate any law, but that does offend the underlying spirit of the law—for example, using discovery to exhaust an adversary?

The "situation method" of instruction potentially addresses both of these shortcomings in the "case method." I suspect, however, that we have not come close to exhausting the potential of this instructional form. For example, I suspect that today clinics or internships too often simply teach legal skills. Too often, they run

4. For information about instruction at the University of Montana School of Law, see Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, and Monroe, *Integrating Theory and Practice in a Competency-Based Curriculum: Academic Planning at the University of Montana School of Law, infra* this issue.

on the maxim: "Now that you know some doctrine and have been exposed to legal reasoning, we will provide you with direct experience handling cases." This revival of the old apprentice method of legal education can be useful, but it does not serve the larger interests I have in mind.

The "situation method" should not be used simply for skills training. It should be used to teach that a lawyer is counsellor, investigator, negotiator, advocate, and even moral authority; that her conduct depends upon the person with whom she is dealing and the context in which she finds herself; and, most of all, that in real life a lawyer constantly finds herself in circumstances where she must serve as society's conscience.

In my utopian law school, the "situation method" would be used in traditional courses (like Contracts, Property, and Torts) to supplement the reading of cases; and it would be used as the dominant model of instruction in wholly new courses.

It is easy enough to see how the "situation method" can be used in traditional courses. Putting the student in a simulated situation makes concrete the legal concepts present in the cases. The student will see how the law involves real people with real problems, making real choices; the student will see that decisions by lawyers affect people with names, faces, and voices.

And, just as important, by experiencing how a dispute or transaction unfolds, the student sees the respective roles that legal knowledge and moral reasoning play in the legal profession. The principles and rules are no longer abstract; instead they are tools that must be used in a concrete situation to advise a human being on a course of action. Thus, by supplementing the casebook method with the "situation method" in traditional classes, the student confronts the role of the lawyer as society's conscience in the heartland of the Langdellian model.

But there is more. If the "situation method" is a valuable adjunct to the casebook method in traditional classes, it is an even more effective antidote to the shortcomings of the casebook method in courses where it is the dominant mode of instruction.

At NYU, we have been fortunate to host the development of such a program by Professor Anthony Amsterdam, one of our nation's great lawyers and teachers. Professor Amsterdam calls his course "Lawyering," and we are so excited about it that our faculty has made it mandatory for all First Year students. The core of the Lawyering course is a series of exercises based on fact patterns that simulate traditional lawyer's work: conferring with clients, negotiating with adversaries, preparing informal advocacy, and exam-

ining a witness at trial. Many of the exercises involve doctrinal material the students are covering simultaneously in their traditional classes; thus, the students see from the outset how legal doctrine actually works in practice, and how it affects lives.

I believe that you will see the multidimensional power of this course if I describe just one of the exercises. In the first exercise of the year, the student is placed in role as a First Year law student, an intake worker at a campus legal services office, and is given no further instruction, except to report at the end of the day to the supervising attorney (the faculty person). When the door to the "office" opens, another student enters in role as a client. The student "client" is a graduate student in history who has rented an off-campus two-bedroom furnished apartment with a graduate student in philosophy with whom he was matched through Campus Housing. The history student's complaint is that every Friday night the philosophy student invites three friends to the apartment for a party. They drink beer, some of which they have spilled, staining the landlord's rug. They smoke cigarettes, some of which have caused burns in the landlord's table. The history student is concerned that he might be evicted or lose his security deposit, and he asks for the law student's advice.

As you no doubt see, the exercise forces the law student to address basic questions about the role of a lawyer. Is the law student permitted to admit that she does not know enough to answer the legal questions involved immediately? If she happens to know the answers to the legal questions involved, does that end the matter? Should she say to the "history student" that his real problem is that he is being too sensitive? Or should she suggest that he study in the library on occasional Friday nights or, alternatively, join the party? Is the lawyer simply a legal technician, or a social worker and therapist as well? Are there other potential roles along the spectrum from technician to therapist? Does a lawyer in a campus legal services office have a role that is different from a lawyer in an urban law firm? Is the lawyer's role different where advice is sought about a business deal instead of a roommate situation? The questions go on.

The interviewing exercise responds directly to the failure of the casebook method to inculcate in young lawyers a sense of their duty to act as society's conscience. Interestingly, the exercise does not have a "right" answer. Faculty members do not prescribe particular forms of behavior. The essential message is, however, that young lawyers must define for themselves a moral role.

In my view, the "situation method," developed in a mul-

tidimensional way along the lines of Anthony Amsterdam's Lawyering course, should be employed in all three years of law school. At NYU, Professor Amsterdam has developed a pyramid of "situation method" courses: the base of the pyramid is the First Year Lawyering course; the middle of the pyramid is a set of Second Year simulated courses (such as Advanced Civil Procedure, Criminal Procedure, Evidence and, next year, Corporations); and the apex of the pyramid is a set of Third Year courses (in diverse areas like International Law, Juvenile Rights, and Trusts and Estates) in which students represent actual clients in actual cases. The hallmark of each stage of the pyramid is a deemphasis on skills training (though inevitably, skills training occurs) and a radical emphasis on broad issues of planning and attention to the lawyer's role. To ensure that these remain the dominant themes of the courses, these courses are taught by full-time faculty members (who also supervise the cases), and each full-time faculty member involved is assigned only eight students for the year. I believe that such restrictions, though expensive, are necessary if instruction in the "situation method" is to contribute all that it can to legal education.

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I said earlier that elements of the new model of legal education can be seen in the emergence of two forms of legal instruction that Langdell never envisioned. The first new form of instruction was the "situation method" of instruction; the second was interdisciplinary instruction. Let me now discuss the latter.

More and more of us in legal academe have come to believe that the traditional casebook method of instruction can be made more interesting and effective if we place the discussion of decisions in the context of developments in society. Thus, for just two examples, Constitutional Law should include political and historical developments, and Securities Regulation should include developments in commerce and finance. I am aware that many law professors already attempt to teach their courses in such broader contexts. Simple principles of effective pedagogy demand that the contextual approach become the standard, however, not just the province of the innovative.

My claim goes beyond such relatively modest initiatives, however. Since law is a derivative discipline, courses should draw on other disciplines to explain how rules have developed and should develop. Law is not received dogma, and we should not teach it as such. And, because we are not dealing with received dogma, law

school curricula must include courses that relate the legal system to other aspects of our society and culture, and law schools should invite the participation of members of other sectors of the academic community. Some areas of coverage are obvious—to name just a few, economics, history, philosophy, and science. But there are many more.

Moreover, in 1990, interdisciplinary work is no longer the exclusive province of academic lawyers in ivory towers; it often is indispensable to the practicing lawyer. For example, no serious practitioner would handle a case under the Establishment Clause of the First Amendment without probing the history of religious liberty in the colonies and states and the history of the adoption of that clause. No discussion of Communications Law today can ignore changes in communications technology. And, the mere mention of the word biotechnology conjures cutting edge problems of law and science.

Interdisciplinary studies are not mere vehicles for distracting the minds of students from "too much law" or "too many cases." Interdisciplinary studies clarify for law students how we derive our legal rules and how the legal system fits into the world around us. Moreover, interdisciplinary studies potentially provide a useful antidote to specialization in law by pressing law students into new areas of inquiry. Charles Eliot, the President of Harvard who conceived the *Harvard Classics*, believed that every educated person should read the cultural canon which Eliot believed was represented in the *Harvard Classics*. I argue that we must insist that at least lawyers be broad-gauged persons. It may be that we can disagree over the content of the canon every lawyer should know. It may be that we never again will reach the ideal personified in George Wythe of Virginia. Nonetheless, if we view lawyers as society's conscience, we should expect our lawyers to discern and study the connections between law and other great disciplines.

For me, the case is clear. If law schools are to keep faith with the profession and our society, interdisciplinary courses must have an important place in the curriculum of the future. We would ill serve both the practicing bar and our vision of lawyers as society's conscience if we did not strongly encourage more and more such work.

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You may have noted that I have presented both the "situation method" and interdisciplinary courses as complementing rather than as replacing the casebook method. The traditional casebook

method remains an effective way to teach basic legal reasoning and doctrine. It should continue to be a major part of the First Year curriculum and a part (though a much smaller part than at present) of the Second and Third Year curriculum. Even where the casebook method is used, however, emphasis must be placed on making classes (especially advanced classes) smaller than has been the custom in most law schools.

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I concede that a restructuring of legal education along the lines I have proposed will have an impact in an area that has been on my mind constantly since I became a dean: the budget. In particular, both the "situation method" and interdisciplinary studies are expensive. And, smaller classes also are expensive. This problem, however, can be turned into an opportunity, if we encourage greater involvement of practitioners in the academy.

A major source of the additional funds law schools will need must come as contributions from the legal community. Law schools should seek these funds in the spirit of encouraging a growth of community among lawyers. Raising funds for this purpose should take the form of reintegrating practitioners into the educational system, for the benefit of law schools and practitioners alike.

Law schools have much to gain (besides contributions of cash) from the active participation of practicing lawyers. Increased use of the "situation method" of instruction provides opportunities for the assistance of practitioners. But we must never forget that, in law school, practitioners should sit alongside faculty members in the classroom—they should not replace them.

There are also ways that practitioners can help outside the curriculum. It is always valuable for practicing lawyers to discuss their work with law students in a law school setting and show how the practice develops and how it accommodates larger issues. In particular, law schools should encourage fora to bring students and practitioners together to discuss areas to mutual interest. The possible variations on these models are endless.

Students clearly will benefit from being able to talk with practitioners in intimate and informal surroundings. By choosing distinguished practitioners, a law school can show its students that the intellectual, ethical, and moral concerns taught in law school have a major place in the legal system—that they are not irrelevancies to be left behind in the classroom upon graduation.

Moreover, participation by practitioners in legal education will foster a spirit of community among lawyers. I believe that few

things are better calculated to remind lawyers of their special place in society than contact with legal education. A lawyer must be affected positively by going back to the roots of scholarship and analysis and by becoming part of the endless chain of those who uphold the law.

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If we build a legal education system more along the lines of the blueprint I have described, what result can we expect? Generally, we should increase the spirit of professionalism among lawyers. We should produce new lawyers who will have a better understanding of how the legal system functions and of what lawyers actually do. They will have a greater appreciation for legal doctrine, principles, and rules. This appreciation will extend to all of the areas of law, not just the individual specialty of the lawyer, because they will appreciate the importance of the whole system. Finally, and most significantly, they will have a better appreciation for the special role of lawyers as the conscience of our society.

I make no claims for recreating some kind of golden age of the legal community. But, as we move toward the twenty-first century, the preconditions of professionalism must be modified to inculcate in all aspiring lawyers a sense of the special role lawyers have played in American life for two hundred years and a sense of the danger that the lawyer's role might devolve into yet one more way of accumulating material wealth. Legal education should provide a greater opportunity to develop lawyers who will fulfill that special role and who, by their conduct, will justify our profession's existence.