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LAW SCHOOLS, THE JUSTICE MISSION, AND BOB MCKAY

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I am privileged to be a linear descendant of Bob McKay and Norman Redlich. They are part of a line of great NYU Law School deans committed to the "justice mission." I am emboldened to speak today only because I represent the tradition they established and nurtured. Let me begin with a few general observations.

The first concerns the basic pedagogical theory which drives the way we conduct legal education. From the moment George Wythe began to teach law, we who are in legal academe were condemned to a kind of institutional schizophrenia which still exists and which confounds us as we try to understand and define our mission: law schools are professional schools in research universities; and thus have two masters. We must produce people prepared to practice at the very highest levels; and we must produce the kind of detached thinking that one associates with a great research institution.

Most of us were educated in the system created by Christopher Columbus Langdell: the casebook method. In creating the casebook method, Langdell took scientific inquiry as his model and applied the notion of scientific inquiry to legal analysis. He took the decisions of appellate judges as his raw material; and he assumed that if a young scholar studied closely a given corpus juris, he or she could master the "body of law." Langdell's notion was a version of Charles Eliot's "five-foot shelf," which Eliot captured in Harvard Classics. Culture, Eliot thought, could be captured in a given canon; so also legal culture, Langdell thought, could be captioned in a given canon.

Traditional legal education very well achieves a certain rigor of analysis. Regardless of the legitimate criticisms that can be made of the inadequacies of legal education, we should not underestimate the reality that the traditional casebook method of instruction stands with the close study of philosophical and scriptural texts in rigor of analysis. In many ways, scholars of the law are the envy of other disciplines because a legal education imparts such a rigorous and focused methodology. As we pursue other goals, we must not forfeit the special and positive attributes of what we already have.

Having said this, it is still startling that Langdell's method enjoys the pervasive dominance of legal education that it does. For many institutions, it is virtually the single mode of instruction; and even where inroads have been made, the casebook method maintains a dominant position. This state of affairs is particularly startling because in some ways the intellectual justification and underpinnings of Langdell's method have collapsed. First, as an empirical

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matter the corpus juris is now so vast that it is uncontrollable, surely it cannot be captured in a five foot shelf. And, second, even if one could achieve a mastery of the entire corpus juris at a particular moment, one's knowledge would be irrelevant in only a few years. In short, the notion of a static corpus juris which provided the foundation upon which Langdell built his model is impossible to maintain.

Let me move to another general observation. Just as the pedagogical theory which drives legal education has been changing, so also the demographics of our students are changing. We must be mindful that, for better or for worse, law schools are now drawing a disproportionately high share of the best students in the country. The top students are not going to medical school, they are not going to business school and they certainly are not pursuing Ph.D.'s – at least not in the numbers in which our society needs. We therefore are being entrusted with a great many of society's brightest people. First, this simple fact affects pedagogy. These bright people master the legal analysis taught by the casebook method quickly, certainly by the end of the first year (or, if they are a bit off the pace by the end of a year and a half). They also learn rapidly that the law is not revealed truth, and that there are complex factors which create a rule of law. They know that law ultimately is a derivative discipline. They learn that ultimately traditional doctrine breaks through the doctrinal boundaries into a vacuum, and that there must be some external referent point by which to anchor doctrine. That referent point may be religion, philosophy, economics, anthropology, sociology, or some other discipline. The referent point must be there to justify legal rules.

Our law students also learn very quickly that the cases they study are not about real people while the practice of law is about real people. To the extent that a career in the law is attractive to most of them, it is because they feel that as a discipline, law might make a positive difference. To the extent we rely on the Langdellian model, however, we present them with reified sets of facts in unemotional, filtered terms. We also teach them almost exclusively from the pathological cases. Thus their learning is disconnected from the reality of what most lawyers do most of the time.

In response to this shortcoming we have begun to develop other modes of education. We are developing multidisciplinary studies with the goal of teaching our students how to find and use the referent disciplines even if they are not trained in those disciplines, and to do so in a way that connects them to the principles, insights and methods of those referent disciplines.

At the same time, and from a different direction, we have begun to use what I call, "situational education," most readily seen in clinical courses. In situational education, we start the student not in an appellate court but in a human situation. We therefore force the student to respond right at the threshold to the question: "What is it that I as a lawyer should do in this situation?"

These two supplements (not replacements, but supplements) to the casebook method are essential parts of the legal education of the future that must come to our law schools. Indeed, in my view, *only* if we supplement the casebook method with these tools can we justify asking our students to spend three years with us.

One final general observation: Even the way we use the casebook method must change. Specifically, to the extent we rely on the casebook method, we should insist that students go deeply into general subject areas over their three years of study. For example, instead of taking several basic statutory courses (or common law courses, or procedural courses), the student should attack a given statute (or a given common law area, and so on) more and more deeply over three years. It does not matter whether the statute is tax or labor law or environmental law; the essential thing is learning fundamentally and deeply how to deal with a statute, a skill which later will be transportable to other statutes.

The general points I have made link to the justice mission of law schools. That mission demands that students be exposed to what lawyers do in the lives of people on the one hand and to the need for reference to normative disciplines on the other. And the justice mission requires that they be steeped deeply in the law. Lawyers are empowered within our society at a time when our institutions either have crumbled or are in the process of crumbling. The role of the lawyer as civil priest is extremely important. We must inculcate in our students, especially these special students who are entrusted to us these days, their vital role as civil priest. They must be made to understand the empowerment granted by a law degree. They have to be made to understand that whether they choose to toil in the largest of the large firms or in a single lawyer office for migrants in the smallest town in Texas, they must use for the good their training and knowledge of this special domain of our society, and they must anchor their practice in values. When we move away from the exclusive reliance on the depersonalized, pseudo-scientific method of the casebook, and move into situational learning and multidisciplinary work, we will fulfill this justice function better.

Bob McKay not only personified the ideal to which we should aspire for each of our students, but also understood the general points I have made and nurtured each of the developments I have suggested; indeed, many of these developments were first seen at NYU during his tenure as Dean. By dedicating this conference to him, you signal not only that he was a special person and a great public servant, but also that he understood the connections I have described. And, theory aside, you have captured aptly the justice mission of American law schools: produce more persons like Bob McKay.