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Yale Law School Commencement Remarks

May 22, 2006 (Amended 5/25/06)

Dan M. Kahan, Deputy Dean and Elizabeth K. Dollard Professor of Law

I'm sure we are all moved by the profound and unique signification of commencement exercises at Yale Law School. At other, lesser law schools, commencement marks the successful completion of a program in legal education. But at Yale, *commencement* means just that – a start, a beginning. Having earned your *Juris Doctorate* from Yale, the time has come for you finally to commence learning real law.

Well, today I'd like to offer you an apology for the distinctive brand of legal education you received here. Of course I mean *apology* not as in a contrite acknowledgment of fault, but apology as in a justification of a position of political and moral dispute.

Now in truth, I think our pedagogy at Yale Law School is not nearly so alienated from the practice of law as it is sometimes, comically depicted. But it is, I concede, emphatically opposed to the conventional view that learning law means learning a body of formal rules. So I want to explain why, to my mind at least, a conventional legal education of that sort would almost certainly have made you a *bad* lawyer –in multiple senses – and why the approach we use instead will, at least hopefully, make you a good one.

Do you know what this is? Yes, it's a baby chick. But do you know its gender? Of course, not. But you would if you were a professional chick sexer.

In the poultry industry, it is very important to separate out male and female chicks almost immediately after birth: the males are less valuable – they can't lay eggs and their meat isn't nearly so tender – and they end up competing with the female chicks for food. So you need to pick the males out

and get rid of them. This job falls to the professionally trained chick sexer, who turning the chicks over gently in his or her hand is able to sort out male from female at a rate of 1,000 per hour and at an accuracy rate of 99%.

What makes this feat so astonishing, though, is that there just isn't any readily discernable, or at least articulable, difference in the anatomy of newborn chicks. All zoologists agree that this is so. If you ask a professionally trained chick sexer what he is looking for, don't expect a satisfying answer. Either he'll confabulate, telling you some fantastic and silly story about the inability of the male chick to look him straight in the eye. Or more candidly, he'll just shrug his shoulders.

But while the nature of the chicksexer's skill may be inexplicable, how he acquired it isn't. To become chicksexers, individuals go off for an extended period of study with a chick sexing grandmaster. He doesn't give lectures or assign texts. Instead he exposes his pupils to slides- "male," "female," "male," "male," "female," "female," "male" - continuing on in this way until the students acquire the same special power to intuitively perceive the gender of a newborn chick, even without being able to cogently explain how.

What in the world does this have to do with law, you are asking yourself of a professor's lecture, once again. Well, what I want to suggest is that what's going on in the chick-sexing profession is the very same thing that goes on in the legal profession. The formal doctrines and rules that make up the law - unconscionability, proximate causation, character propensity, unreasonable restraints of trade - are just as fuzzy and indeterminate as the genitalia of day-old chicks. And yet just as the trained chick sexer can accurately distinguish female from male, so the trained lawyer can accurately distinguish good decision from bad, persuasive argument from weak. Ask the lawyer for an explanation, and in his case too you'll get nothing but confabulation - "plain meaning," "congressional intent," "efficiency" - or what have you.

In addition, the lawyer attains her skill – to recognize what she can't cogently explain – in much the same way that the chick sexer does: through exposure to a professional slideshow, this one conducted by law grandmasters, including law professors but also other socialized lawyers, who authoritatively certify what count as good and bad decisions, sound and unsound arguments, thereby inculcating in students and young practitioners the power of intuitive perception distinctive of the legal craft.

Now, by this point in my argument, you'll likely recognize that my analogy between legal reasoning with chick sexing is just a colorful rehearsing of legal realism. As developed at Yale Law School in the 1920s and 1930s, legal realism was less interested to demonstrate that legal rules are formally indeterminate than to explain how lawyers nonetheless form such uniform and predictable understandings of what those rules entail. Llewellyn attributed this ability to what he called "situation sense," an intuitive perceptive faculty born of immersion in professional and cultural norms – the slide show of law. Contemporary social psychologists use the concepts of pattern recognition and prototypical reasoning to describe the same cognitive processes – which are pervasive in all fields and facets of life, not just law and the poultry industry.

Well, if you accept this central insight of legal realism, as I do, then you will readily understand that effective legal training has very little to do with learning the mass and detail of formal legal rules. Instead, it has everything to do with acquiring situation sense.

You'll also see that being an effective advocate requires an ability to arouse the situation sense of other lawyers, including judges. Those who believe that making convincing arguments consists in knowing formal rules are professionally autistic. They can't make arguments that engage the emotional motivations of those they are trying to persuade. Only those who understand the role of situation sense, who are acquainted with the norms that construct

it, are poised to explain, to predict, and through strategic framing and advocacy, to *influence* legal decisionmakers.

So to make you *good* lawyers we at Yale impart not “rule knowledge” but situation sense. This is part of my apology for our distinctive pedagogy.

But it is only part. There’s another, which is more complicated and which is concerned with making you *good* rather than *bad* lawyers in a somewhat different sense.

I’m sure you will all have immediately recognize one difference between the situation sense of chicksexers and situation sense of lawyers. The quality of intuitive perceptions of any individual chicksexer can be externally validated: ultimately we can test whether he is able accurately to distinguish male and female. But we can’t externally validate the situation sense of lawyers. The only test of whether some lawyer *has* reliable situation sense is to see whether other lawyers (including decisionmakers) agree with her perceptions of how society’s rules should be applied.

Now understand, the lack of external validation doesn’t mean that good lawyering, as a psychological matter, can’t be said to involve the same faculty of tacit reasoning, or intuitive perception, that good chick-sexing does. But it does mean that the content of the lawyers situation sense will be inevitably be more contingent and dynamic: our professional norms – and in turn the law itself – will evolve in response to the evaluations we ourselves make of the decisions and actions of one another.

As a result, there is an element of moral agency in good lawyering that has no analog in good chick sexing. When I as a lawyer exercise professional judgment, when I perform my professional responsibilities, *I* affirm the authority and extend the vitality of the norms that construct our professional situation sense. Now granted, it would be absurd to assert that every decision a lawyer makes meaningfully influences professional understandings, much

less that any individual lawyer always has the power to point those understandings in either a just or an unjust direction. But it would be equally naïve to deny that the decisions of certain individual lawyers, on certain critical occasions, can have that effect.

A little over a decade ago, a brilliant 25 year-old was standing where you are. Less than a decade later, after serving as a Supreme Court Law Clerk and as professor at an elite law school, he found himself serving as Deputy Assistant Attorney General in the Office of Legal Counsel. At the behest of White House lawyers who were battling internal opposition from career military officers and lawyers, he wrote a legal memorandum which construed the law to permit the use of interrogation techniques that the U.S. had for decades understood to be banned by the Geneva Convention. Because of the institutional stature and formal authority of the OLC within the Executive Branch; because of the function the memo was intended to play in resolving a debate among other governmental officials of immense authority; and because of the impact of 9-11 in provoking societal reconsideration of the relationship between civil liberties and national security, this Yale-trained lawyer *did* have every reason to believe that his memo, all on its own, would have a profound and shaping impact on the professional and cultural understandings that *are* our law. Yet he pretended this wasn't so. When asked by an appalled career military intelligence officer whether the memo meant the President could order torture, he answered, "Yes, but I'm not talking policy. I'm talking law here."

The analysis reflected in the so-called Torture Memo did not, in fact, become part of our professional and cultural understandings, our situation sense. But I think a large part of the credit for that belongs to another individual lawyer, who as a 20-something also stood where you now are about a decade and a half ago. He too clerked for a Supreme Court Justice and then served on the faculty of a major U.S. law school. In 2003 he took over as head of the Office of Legal Counsel. And to the shock of his patrons, he immediately

issued a directive advising the military intelligence services that they couldn't rely on the so-called Torture Memo. This was well before the Abu Ghraib prisoner abuse scandal came to light, at a time when high-ranking political appointees in the Justice Department and Pentagon were continuing to place decisive reliance on the Torture Memo. As a result, this lawyer had every reason to believe the Memo's understanding of the law would persist, and that it *would* pervade and shape the shared professional and cultural understandings of lawyers, unless *he* as a lawyer took responsibility for repudiating it. So he did.

This lawyer, Jack Goldsmith, was ultimately pushed out of OLC and is now languishing at an obscure law school in Cambridge, Massachusetts. When he got there, by the way, a portion of that institution's faculty, unaware of the role he had played in overturning the Torture Memo, and later in temporarily suspending the then still-secret NSA warrantless domestic surveillance policy, refused to even acknowledge him in the halls. Well, some of the lawyers trained at that school also played a sad role in the Torture Memo. Now that Goldsmith is there, I suspect it's much less likely that any of its future graduates will try, in cowardly fashion, to evade moral responsibility for their actions by insisting that law is nothing but a set of formally binding rules. And I have hope that as a result of his actions, it's much less likely any of you ever will either.

This was my last chance to teach you some law, Yale style. These were my final two slides: one bad lawyer, one good. What made the bad one bad wasn't that he knew "less law." It was that he, unlike the good lawyer, refused to take *moral* responsibility when he found himself in a position where his individual actions as a lawyer were likely to have a decisive role in shaping our profession's situation sense, and thus in shaping the law itself.

Because you today are standing where these two lawyers stood, because you are standing where number members of Congress, Justices of the Supreme Court, and Presidents of the United States have all stood too, I feel petty

certain that a number of you too will be in that position some day. If you are, how good a lawyer you are won't be determined by how many rules you've learned; it will turn on how good a person you are. My apology for not teaching you more "law" is that I thought it was much more urgent to try to teach you that.