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Law School

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Yale Law School Commencement Remarks

May 26, 2008

Jonathan R. Macey

Deputy Dean, Yale Law School

Distinguished Guests, Faculty Colleagues, Families, Friends, and Members of the Graduating Class:

Welcome, all of you, to the Yale Law School's 2008 Commencement Exercises.

Addressing the Yale Law School graduating class has always been an honor. But it is even more of an honor now than ever before. And we have technology to thank for this. Graduation day is now the only occasion I can think of at which an ordinary member of the faculty such as myself can address our students who are temporarily unarmed and unencumbered by your laptop computers. In fact, to my surprise and delight I don't even see too many PDAs, Blackberrys, ipods or other essential paraphernalia as I gaze out on the class of 2008. In fact, in light of my experience with your class over the past three years, it seems highly appropriate that the top half of your heads is covered by your caps during this ceremony because that's the part of your heads with which I am already familiar. It is the bottom half that has been hidden from view over the past three years, obscured by your laptop computers which you have deployed in class in a variety of ways, sometimes to send or receive email or to attend to other essential business on the Internet, sometimes simply as a physical barrier to shield from unwanted attempts at Socratic dialogue, and sometimes I am told these devices are even used to take notes about what the professor is saying.

So, in light of the undivided attention I am receiving today, it goes without saying that I left no stone unturned when doing my research for this important occasion. I began by googling the phrase “inspirational quotations about lawyers.” Surprisingly, I didn’t get a single hit. Undaunted, I turned to the website “speechwriters.com,” where I found what was advertised as a “top quality” law school graduation speech on sale for only \$19.97, on sale from the \$39.00 list price. I was told that “these speeches ... speak of the hours of study undertaken and the friendships made over the years. They mention the gratitude that is owed to staff and parents. They refer to the complexities of law itself and what it means to society. Above all, they speak of the future with its challenges and opportunities. The speeches end with a good luck toast or blessing. This pack also includes general graduation speeches suitable for any graduation. Previous customers please note these new speeches have been newly added for 2008.” In the end I learned a valuable lesson from my research: the job of graduation speaker is a lonely one. Luckily, as you’ll see in a few minutes, after my speech was two-thirds written, I got some help from a very powerful source to bring my talk to its conclusion.

[Some of you are undoubtedly saying to yourselves, “yes, of course, we know that it is an honor to speak to the Yale Law School class of 2008 at its commencement, but what have you, Jonathan Macey, done to deserve this honor?” After all, Kenji Yoshino, who I will be introducing in a few minutes, was chosen by the graduating class as its legally designated faculty speaker in a free, fair and open election with no allegations of election improprieties, and no hanging chads or other irregularities. And the Dean of the Law School, Harold Koh, spoke to you in his authorized capacity as Dean, selected by the President of the University and confirmed

in his position by the University's trustees. And, of course, our honorary degree recipient Carla Hills was chosen by the University on the basis of a lifetime of professional achievement and public service. So what is my claim to legitimate possession of this podium? I want to assure you that my claim to this podium and the attendant microphone is in the finest tradition of the legal profession, which is to say that I am here on account of a loophole in the time-honored procedures that govern the Yale Law School graduation ceremony. The little-known codicil in our procedures that empowers the Deputy Dean to commandeer the graduation podium when the graduation of a son or daughter from Yale College requires the presence of the legitimate Dean elsewhere on campus for another joyous event. So, two years ago when Harold asked if I would accept the job of Deputy Dean with its strange job title and peculiar responsibilities, I looked to the future and saw that Emily Koh, Harold and Christy's daughter, was in the Yale College class of 2008. And I knew that Emily Koh's graduation in 2008 would provide me with what will certainly be my only quasi-legitimate opportunity to address a Yale Law School graduating class. So here I am, and I'm delighted to be here.]

In addition to the sheer joy of having the last word, speaking at graduation is a special treat for a faculty member because it gives me a great opportunity to pontificate in a highly unconstrained way, un-tethered by such constraints as subject matter, relevance to law, and other inconvenient practicalities, and because it permits somebody like me to indulge myself for a few moments about three of the most critical things every lawyer should have: gratitude, courage, and an understanding of the world we live in today.

THE GRATEFUL PART

[Turning to the part about being grateful, there is no better or more appropriate day to discuss this topic than Memorial Day. During our country's short history, more than one million

Americans have died in various armed conflicts. Memorial Day is a chance to reflect on those who have fallen and to offer gratitude for those whose sacrifice enables us to live the life of the mind here in New Haven. On Memorial Day we should acknowledge the fact that, without the sacrifice of the U.S. military and its success in preserving freedom, none of us would be able to live a rich and fulfilling life in the law in a country that strives to live under the rule of law.]

On the gratitude front, let me echo Harold's sentiments about the men and women in the U.S. military. Today we honor the men and women in the U.S. armed forces both for what they have sacrificed and for what they represent. The U.S. is truly unique in the world, not only for having a military that is singularly powerful, but also for having a military that places civilians at the top of the chain of command and for having a tradition as a defender, rather than a usurper of democratic government and the rule of law.

As we sit here Hillary Clinton, Barack Obama, and John McCain are campaigning for the offices of President of the U.S. and Commander in Chief of the U.S. Armed Forces. And they are campaigning during a time of war. From an international or historical perspective, it is worth pointing out that as usual here in America, the current political campaign is conducted entirely free of political participation by the military. From either an international perspective or an historical perspective, this is quite unusual, particularly in a country with a military as strong as ours. So, while we should, of course, be grateful for the miracle that is the Constitution, we should, in my view, be equally grateful to live in a country with a military tradition that respects the rule of law and accepts without question a chain of command that places civilians at the top, even when the military commanders disapprove of their civilian commanders.

In contrast, outside of the United States, militaries all over the world serve as an agent of repression against their own people. Our own military is not only forbidden by law from any

similar role within our own borders, but they are actively engaged in promoting human rights and the rule of law around the world. In places as varied as the Republic of Georgia. Soldiers once part of the Soviet army being trained to NATO standards by U.S. Marines to obey only lawful orders and to respect basic human rights. The U.S. accepted the Geneva Conventions shortly after they were passed in the late 1940s. We followed them assiduously in Korea and in all of the other conflicts that have followed assiduously. In fact the military police have assumed a central role in protecting prisoners, and to insure the adherence with the Geneva Conventions. So, for example, the U.S. Military Police unit in Haiti filed complaints against U.S. Military Intelligence units about their using abusive forms of interrogation. In Iraq U.S. soldiers and military police are introducing their Iraqi counterparts to the meaning of the rule of law.

In light of this rich military tradition, it is reassuring to know that whoever among the three remaining candidates wins the next presidential election also feels that Abu Ghraib was an aberration and agrees that the events there represent the expression of civilian not military policy. Most members of the U.S. military viewed the events at Abu Ghraib exactly as one commander put it “as reprehensible and unrepresentative of the 150,000 soldiers on duty in Iraq.”

Of course, I know what many of you are thinking. Did my views of the military and the rule of law change on April 28, 2004, when "CBS News" broke the story on the outrageous abuses by American soldiers at Baghdad's Abu Ghraib prison and showed the first stunning photographs of those events? My answer is simple: the reaction of the U.S. Department of Defense was swift and thorough, far swifter and more thorough than the response of the armed forces' civilian commanders. The Department of Defense immediately removed seventeen soldiers and officers from duty, and seven soldiers were charged with dereliction of duty,

maltreatment, aggravated assault and battery. Between May 2004 and September 2005, seven soldiers were convicted in courts martial, sentenced to federal prison time and dishonorably discharged from service. Two soldiers were sentenced to ten years and three years in prison, respectively, in trials ending on January 14, 2005 and September 26, 2005. The commanding officer at the prison who claimed both to have been unaware of what was going on and that the interrogations were performed by subcontractors was demoted to the rank of Colonel. Most significantly, in response to the abuse of detainees at Abu Ghraib the United States Army activated the 201st Military Intelligence Battalion, the first of four highly professional and well-trained joint interrogation battalions established by the Army. These battalions will conduct detainee screening and interrogation missions in support of military operations throughout the world.

COURAGE

One of the sources that I turned to for inspiration in preparing my remarks to you today was the speech that then-Dean now Professor Tony Kronman made to the Yale Law School class of 2004. You will be happy to learn that, as a member of the Law School faculty, I was able to obtain this speech at a substantial discount off the \$19.95 being charged by speechwriters.com.

Tony talked to the graduating class about some of the virtues necessary to be an excellent lawyer, focusing on the importance of judgment and courage. Tony noted that without courage it is impossible for us as lawyers to fulfill the ethical responsibilities that we assume when we enter the legal profession. Courage is a virtue required of lawyers as well as of soldiers.

As Confucius observed “to see what is right and not to do it, is want of courage or of principle.” (Book II, chapter 24 Analectics).

Tony pointed out that: “The judge who finds herself persuaded by an argument she knows will make her hated by some, needs courage to write it down. When the protections of the law are compromised for the sake of security or solidarity, it is lawyers whose voices must be raised in protest, and this takes more than a discriminating sense of where the limits of liberty lie—it takes courage, for few will ever suggest that the law’s protections are too large or loose except in an emergency, when danger is real and near, and any limits on any instruments of self-defense can easily seem naive or foolish.

....[t]he lawyer who suspects that his client has done something wrong needs courage to confront him.

Continuing the conversation that Tony began, I would like to explore what happens if confrontation doesn’t work. For a variety of reasons, for lawyers the next step generally involves responding to corruption in its various forms by quitting, withdrawing and declining to participate in any way in a client’s wrongful actions.

Now if I were you, here’s what I’d be thinking at this point: Macey, as a card-carrying member of the tenured professoriate class, aren’t you flamboyantly unqualified to advise people about to enter an uncertain job market during an economic downturn about how and when to confront their clients and quit their jobs. Isn’t it just a tad too easy to encourage people to take bold moves with their careers from your cozy spot in a tenured post at a university? The answer to this question, of course, is “yes,” it is easy, but that your position is not as weak as you may think it is.

When you are faced with an ethical dilemma and you are evaluating your options, you are in a much stronger position than you might imagine.

Each of you graduates from Yale Law School with a truly prodigious endowment of your own that precious few lawyers can claim—you graduate with a Yale Law degree and the massive amount of human capital that our degree represents. I implore you to recognize the value of this degree and to recognize the freedom it gives you to take moral stands and to resist corruption and allow it to give you the courage to withdraw from engagements when you are morally required to do so. As Yale lawyers, you are truly unique and powerful even in the early stages of your careers. I promise that you can quit a job for ethical reasons and have no trouble finding another one.

It is necessary to talk about lawyers' professional responsibilities, not because lawyers are corrupt, but because clients sometimes are. After all, at least on occasion that's why they're clients in the first place. This should not be news to any of you. And this news is not entirely bad: the world would not need all of you graduates nearly so much if it were not in such need of fixing. Those of you who have not quit a job or withdrawn from at least one or two professional engagements on ethical grounds by your 25th reunion probably are not getting the full value of the endowment portion of your Yale degree.

THE WORLD WE LIVE IN

The profession that you are about to enter has provided you with some rich entertainment during your three years here. Each and every year of your law school career has been punctuated with some tragedy or comedy starring a mighty legal crusader who claimed to be the champion of the little guy, but was toppled from his prominent place in the profession by unethical conduct. The drama began in your first year when the Duke

University lacrosse case burst into the national news. In this drama, we saw the dramatic rise and fall of Michael Nifong, the now-disgraced Durham, North Carolina prosecutor whose false accusations against three Duke University lacrosse players was initially supported by the Duke faculty and administration and led to a feeding frenzy in the national media. It turned out that the players were innocent and that attorney Nifong had engaged in classically corrupt and unethical prosecutorial tactics in his pursuit of a conviction against a bunch of college students. Ultimately, the Washington Post Writers Group columnist Kathleen Parker coined a neologism, “to Nifong someone,” which is now used to describe situations in which baseless criminal or civil charges are filed against somebody in order to enhance the prosecutor’s political career. This particular drama ended, as we all know, with Nifong’s dismissal, disbarment, incarceration and disgrace. But he had quite a ride there for a few months.

Even before the expression “to Nifong” somebody entered the popular lexicon, the expression “to get Lerached” was well known among lawyers representing U.S. public corporations. To Lerach someone is to file a baseless securities fraud class action lawsuit against a corporation and its directors in order to extort a settlement that features generous attorneys’ fees for the plaintiffs’ class action lawyers bringing the suit. In your second year, a prosecutors began a criminal investigation of Bill Lerach, the dean of the plaintiffs’ class action bar, whose scorched earth litigation tactics inspired the expression. The criminal investigation uncovered a massive kickback scheme that featured millions of dollars in secret payoffs to plaintiffs and numerous instances of perjury in sworn court documents. The investigation culminated on Monday, February 11, 2008, when Lerach was sentenced to two years in federal prison, two years’ probation, fined \$250,000, and

ordered to complete 1,000 hours of community service because of his involvement in the lawsuit kickback scheme.

The date of your graduation was fast approaching, and I only had two examples of tragic falls from grace by once-mighty legal crusaders, and I needed a third to complete my trilogy. I finally got the help I needed to complete my trilogy in March from no less a personage than the governor of the state of New York and former policeman of Wall Street Eliot Spitzer, when he organized a news conference to tell us about his secret life as the valued “client #9” of an international prostitution ring. When the once feared Governor Spitzer resigned two days later, the nightly news and the Internet showed specialists and floor brokers on the floor of the New York Stock Exchange breaking into applause.

Eliot Spitzer fell from grace because he ignored a central lesson of the post-modern age. In today’s world, there aren’t too many secrets. Whether you know it or not, every message you create, whether it is written on a legal pad or in an email or in a fax or voicemail message, begins with the phrase “today the New York Times reported that”...

It appears that the fates are lining up to provide us with a series of object lessons. There are lessons for those who study law and literature about the blurred line between comedy and tragedy in the life and times of the modern legal crusader. But these stories are just as much about the importance of humility as they are about the importance of adhering to the highest standards of ethics in a world in which there is virtually no distinction between our professional lives and our personal lives.

It would not be such a bad thing for all of us, when we think back on the last three halcyon years at Yale Law School, if we occasionally remembered these sordid stories from the great world beyond our walls.

Let me close by reminding you that you are a truly remarkable group. All of you who so choose will move to positions of prestige power and responsibility. In his remarks just now, Dean Koh reminded us not to forget why you came here... I would only add that as you leave us, also keep in mind who you are and never let others turn you into somebody else.

[No graduation ceremony would be complete without somebody pontificating about “the real world.” The modal 3d year was around 7 years old in 1989 when the Berlin Wall fell and the Cold War ended. Neo-con scholar Francis Fukuyama observed in one of the more regrettable remarks of all time: "What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such... That is, the end point of mankind's ideological evolution and the universalisation of Western liberal democracy as the final form of human government."

The phrase the "end of history" was one of those catchy phrases that can make an academic's career despite being completely vacuous and wrong. . As plenty of historians have observed, history is still with us and it is bigger and scarier than ever. As Robert Kagan recently observed, when the Berlin Wall fell, "The world was not witnessing a transformation, however, merely a pause in the endless competition of nations and peoples. Nationalism and autocracy, far from being weakened by globalization, has now returned with a vengeance."

[But though Fukuyama was wrong about history ending, he did make a few good, if tautological points, although many of these were made later, in response to recent questions about why history was taking so long to go away. For one, Fukuyama has argued that, if a society wants to be modern, there is no alternative to a market economy and a democratic political system. But since we define modern societies as those characterized by market economies and democratic

political systems, is not a big surprise that Fukuyama is right in this. But he still has a point: As an empirical matter, it is clear that people, when given the choice, express a strong desire to live in a free society characterized by individual liberty and private ordering. This fact is demonstrated by human migration patterns, the most compelling manifestation of what economists so charmingly refer to as “revealed preferences.” On the other hand, it also is far from clear that most people have expressed a clear preference for living in a western-style political order, i.e. a political order characterized by a sphere of individual rights and the rule of law.

What the last few years have shown us, it seems is that the desire to live in a liberal democracy governed by the rule of law appears to be, at best, an acquired taste. But this, in my view is not a defect. It is worth noting that many of the best things in life, like wine, truffles and children, are acquired tastes. In fact, I would argue that the whole point of law school is to inculcate in our students and reaffirm for ourselves the value of the rule of law. In that, I am supremely confident, the Yale Law School has succeeded completely with the class of 2008, so to each of you I say Congratulations. The legal profession will be better for your involvement in it.

CLOSING

Friends and colleagues: that concludes our commencement exercises. We end the ceremony with some quotations to honor Yale Law School’s rich tradition in legal realism. My favorite is from the American statistician, Edward Deming, who observed, “In God we Trust, all others bring data.” The theoreticians had a response to this, and it was captured

well by Albert Einstein who observed: “Everything that can be counted does not necessarily count; everything that counts cannot necessarily be counted.”

As you face important decisions about your careers in the years to come, I ask that you add one question to whatever analytic framework you employ to make your tough choices. That question is: in light of your Yale degree and everything that you and your friends and family have sacrificed to get you where you are today, how much more resume-building do you really need to do.... In the view of the great assembled minds of Yale University and its Law School faculty, you have arrived... You are already a success. You know a lot, but don't stop learning. And don't lose touch with the Law School! Happy Graduation, Class of '08! Good luck and Godspeed!
