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INTRODUCTION

First, I want to thank you for inviting me to address your class as you embark upon the great adventure, or as some have labeled it, “the big chill.” I feel a bit like a time traveler since my own law school graduation occurred over sixty years ago. You might have assumed that I learned something worth passing on in the process of watching ten presidents come and go; innumerable wars and “interventions” (hot and cold); real and rhetorical wars on poverty, drugs, and terror—not to mention McCarthyism; the Civil Rights; Women’s, Disabled, and Environmental Movements; Watergate and Whitewater; 9/11; the Arab Spring; the Wall Street debacle; a major recession; and the Occupiers. Nothing in my law school education prepared me for coping with those crises, and it is unlikely that anything in yours will help prepare you for the unpredictables in your future.

This is all by way of suggesting that lawyers of all ages have to maintain a realistic humility, not always the hallmark of our profession, about their place in the larger scheme of things. Professor Lawrence Friedman wrote the following passage a while back:

Every major legal change begins or is accompanied by revolution in the realm of public opinion. Conventional legal scholarship, for all its preachy, moralistic bent, all but ignored the ideas and behavior of real people; and never came to grips with social context. . . . The higher legal culture was, in the end, a whisper in the storm. It was the general culture that mattered. The great judges and scholars—the pictures hanging on courtroom and law school walls—taken together, probably did not equal in influence the power of some few half-baked ideas, and some concrete social demands, spread out among the millions in this country.¹

The law provides a process for dealing with disputes, but the values it imposes on the disputants come from a deeper societal spring, and those values change

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1. Lawrence M. Friedman, *Two Faces of Law*, 1984 WIS. L. REV. 13, 34-35.

quickly. Torts, contracts, labor law, antitrust, family law, civil rights law, and international law all bear little resemblance to what I learned sixty years ago, and they will change over and over again in your lifetime.

If there is a lesson, it may be this: become a player in the world around you; make another life outside the law in your community, in local, regional, or national politics, and recycle that experience back into your legal career. Justice Oliver Wendell Holmes said, “The life of the law has not been logic; it has been experience.”² Judge Wyzanski put it even more succinctly, “He who is nothing but, is not even.”³

For you do have a basic choice: whether to be an initiator of legal and social change in your lifetime, win or lose, or merely a receptor—applying and reflecting other people’s values and choices. Some lawyers do very well at the latter; they are legal exemplars of T.S. Eliot’s “hollow men”⁴ waiting to be filled. I hope you will be more than that. The crucial thing is to play your lawyer role on as big a stage as you can; against as broad a backdrop as you dare; prepared to move in and out of different parts in different scenes; content to be a supporting player on occasion; never underrating the bit parts, especially while you’re learning, but to be ever-alert to move into a major role when your time comes and not let yourself be typecast.

I. SOCIETAL ISSUES

This is neither the time nor place for a list of the great-unsolved problems facing our country, which my generation has handed over to yours. You will be happy to know that I have allotted myself only the Andy Warhol fifteen minutes for this speech.⁵ If I cannot be funny, I can at least be short. So let me allude to only a few of the most intractable that will affect the way you live your life inside and outside the law.

A. Prison Reform

First, there is America’s love affair with prisons. We incarcerate more people—2.4 million, most of them young minority men—than any other country in the world.⁶ We hold one quarter of the world’s prisoners.⁷ Hundreds of

2. See OLIVER WENDELL HOMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1923) (1881) (internal ellipsis omitted).

3. Stephen Breyer, *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV. L. REV. 707, 708 (1987) (ellipsis omitted).

4. T.S. ELIOT, *THE HOLLOW MEN*, in *COLLECTED POEMS 1909-1962*, 79-82 (1963).

5. The influential American artist, Andy Warhol, was quoted as saying, “In the future everybody will be famous for fifteen minutes.” See Matt Wrban, *Andy Warhol: A Documentary Film*, PBS (Sept. 20, 2006), <http://www.pbs.org/wnet/americanmasters/episodes/andy-warhol/a-documentary-film/44/>.

6. Martha Teichner, *The Cost of a Nation of Incarceration*, CBS NEWS (Apr. 22, 2012, 9:23 AM), http://www.cbsnews.com/8301-3445_162-57418495/the-cost-of-a-nation-of-incarceration/.

7. *Id.*

thousands are jailed for minor offenses like loitering, vagrancy, and marijuana possession.⁸ “Even in the South Bronx, one of the poorest and most crime-ridden communities in New York, only 3 percent of convictions are for felonies;”⁹ maybe it is the same here in the heartland. One study showed one half of all extended black and Hispanic families in the United States have had a member in prison, now or recently.¹⁰ Even a minor “criminal record virtually guarantees a lifetime of discrimination in employment, housing, education and public benefits.”¹¹ Pushed out of the mainstream, these individuals turn too often to “more serious crimes.”¹² Apart from concerns about public safety, and the devastating economic loss in human capital, further deterioration of the situation will inevitably intrude on your own lives.

B. School Reform

Our schools are in desperate need of reform. Our country’s future will severely be compromised if we cannot provide the mass of students who do not reach college with the training and attitudes necessary to enable the successful gainful employment and a stable family life, filled with dignity and respect, once those students reach the age of maturity. We, and especially you, will spend too much of what I hope will be your generous salaries on the often futile, last resort defensive measures of police, jails, hospitals, and courts. The future workplace, we are told, will have room for only those with finely honed skills in marketing, computer sciences, personnel training, and highly sophisticated manufacturing.¹³ What will happen to other young people then? Public schools are the most visible reminder of the “growing inequality in government services” between children in divergent socio-economic classes.¹⁴ How much longer can we stand

8. Michelle Alexander, *Review: ‘A Plague of Prisons’ and ‘The Collapse of American Criminal Justice,’* WASH. POST, Oct. 14, 2011, http://www.washingtonpost.com/entertainment/books/review-a-plague-of-prisons-and-the-collapse-of-american-criminal-justice/2011/09/06/gIQAmtUkL_story.html (reviewing ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* 63-64, 95 (2011)).

9. *Id.*; see DRUCKER, *supra* note 8, at 63.

10. Alexander, *supra* note 8; see DRUCKER, *supra* note 8, at 44-45.

11. Alexander, *supra* note 8; see DRUCKER, *supra* note 8, at 113.

12. Alexander, *supra* note 8.

13. See James Manyika et al., *Help Wanted: The Future of Work in Advanced Economies*, MCKINSEY GLOBAL INST. (Mar. 2012), http://www.mckinsey.com/insights/mgi/research/labor_markets/future_of_work_in_advanced_economies; see also *Occupational Outlook Handbook, 2012-13 Edition*, BUREAU OF LAB. STAT., U.S. DEP’T OF LAB. (Mar. 29, 2012), <http://www.bls.gov/ooh/About/Projections-Overview.htm> (predicting “overall employment in [manufacturing] to decline by 1 percent” and “[e]mployment in computer systems design and related services . . . to increase by 47 percent” through 2020).

14. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991 (Magazine), <http://www.nytimes.com/1991/01/20/magazine/secession-of-the-successful.html?pagewanted=all&src=pm> (adapted from ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR*

on the brink of that eroding precipice before we all fall down?

C. Conclusion

What can lawyers do? Get involved at whatever level you can. Lawyers are the dealmakers, the negotiators, the spokespersons, the intellectual property advisers, the prospectus writers, the board of education chairs, the city council members, the campaign strategists, and they vote. They may not always originate the big changes in our society, but those changes rarely happen without the presence and participation of lawyers.

II. ADVICE TO GRADUATING LAW STUDENTS

I am going to switch gears to focus on some of the immediate choices you will all face in the next few years after graduating, aside from getting a job. I cannot in good faith echo the rallying cry so familiar on this occasion: "You can be anything you want to be in the law if you work hard enough and persevere." I do not think that is actually true. These are tough economic times for law graduates and many of you might have limited options in the beginning. Even so, there are important decisions you will be making that will affect the rest of your careers. Do not make them by default.

A. Identifying a Career Path

First, figure out the kind of lawyer that you eventually want to be. The law is a mansion of many rooms. Legal careers are very different: the teaching/writing kind; the private client counseling kind; the courtroom litigation kind; the political/legislator kind; the public interest/legal services kind; the government lawyer; and, for some of you—my favorite—the judging kind. Each "kind" of career requires different skills, and if you drift into the wrong kind, you can be miserable, as well as ineffectual.

But there are two caveats for whatever career you choose. The first caveat is to get some litigating experience early on. The courts are the final venue for so much of lawmaking that your decisions on the other parts will benefit from knowing first-hand the practicalities of that process. I was over forty when I first went to court, and I think my earlier efforts at writing and policy-making suffered from my unawareness of what happens there. The second caveat is, whatever you do, learn to write well—succinctly, clearly, and persuasively. Words will become your greatest ally and most devious foe. Lawyers write the words that compose the laws that flood our courts with issues of interpretation and proper construction. We are told to hold with the "plain meaning" or "plain language" of the statutes, but in too many cases the meaning and the language are far from plain; the syntax is convoluted, surplusage and redundancy abound, participles dangle, and pronouns twist aimlessly in windy speech. The purpose of language is not yet, thank God, to convey ideas from machine to machine, but from person

to person. The best language conveys ideas clearly and completely. The road to legal limbo is paved with good intentions, sloppily articulated.

B. Habits, Attitude, and Ethics

Second, in the next few years you will consciously or unconsciously develop the work habits, attitude, and ethical code that will likely follow you through the rest of your career. Bad habits make grooves in our brains that are hard to erase.¹⁵ Maybe it is already too late after three years of all-nighters, last minute cramming, reliance on someone else's notes, and hiding in the back row to avoid being called on. But the workplace presents a brand new set of stresses, such as time pressures, that can contribute to sloppy research and inattention to the niceties of attribution that can skirt the edges of plagiarism.

Attitudes may need a second look as well. How did you feel about law school? Did you feel overwhelmed, unappreciated, or bored? Watch those feelings as they too easily convert into an attitude of disengagement that will not serve you well, whatever your job.

Legal ethics in law school may have been just a course, but do not assume that it kicks in only at the higher levels of the profession. It is pervasive in every facet of the legal profession. As a legal services lawyer, I once had to decide whether to voluntarily dismiss a class action on behalf of hundreds of needy welfare recipients. After the class action had been filed, we discovered that the class leader was earning a small pittance on the side, thus making that individual ineligible for the benefits involved in the action. Probably no one would have discovered this if we let it go, and many would have been helped, but we followed the rules, albeit with a heavy heart. Ethics is like a nagging conscience, but it is the core of our individual and professional integrity, and its practice begins the day you pass the bar.

C. Technology

A third point is to not let technology take over your life. In the end, all of that information flooding out of your laptop, iPod, etc. will have to filter into the same basic human brain cells our species has now had for a million years. Unless it is harnessed, that new technology can control you, and not you it. The vast quantities of information that will become available on any subject, no matter how discrete, can overwhelm you. If you do not have confidence, intuitive skills, energy, and fortitude, you simply will not know what to do with it, or when to stop. Some experts, psychologists, sociologists, and political scientists studying the profound changes these approaches have already made in our lives conclude that by storing all of our professional and personal data in these machines, "We've outsourced our memories to external devices. The result

15. See Timothy D. Wilson, *Can't Help Myself*, N.Y. TIMES, Mar. 9, 2012, at BR15, available at <http://www.nytimes.com/2012/03/11/books/review/the-power-of-habit-by-charles-duhigg.html?pagewanted=all> (reviewing CHARLES DUHIGG, *THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS* (2012)).

is that we no longer trust our memories.”¹⁶ “As we store more and more of what makes us *us* outside of ourselves, . . . ‘we’ve forgotten how to remember.’”¹⁷ Another author writes that “because of the brain’s neuroplasticity, Web surfing rewires people to be more adept at perfunctory multitasking, but diminishes the ability to sustain focus and think interpretatively.”¹⁸ A bit scary for a lawyer?

Blaise Pascal has been cited as remarking that “all of humanity’s problems stem from man’s inability to sit quietly in a room alone.”¹⁹ The average American spends eight hours each day in front of some kind of screen.²⁰ Does it all help us make better decisions? Hank Steuver, for the *Washington Post*, reviewing the HBO movie “Game Change”²¹ on the disastrous McCain/Palin campaign does not think so:

[T]he film’s most scathing indictment is a symbolic one: It attacks our mutual inability to communicate. How on Earth, in a nation so technologically gifted and an age so flush with instant information, can we remain so woefully uninformed, willfully dissonant and bad at knowing one another? How could everyone in a presidential campaign manage to believe that somebody *else* had vetted the Alaska governor for the GOP presidential ticket? . . .

Much of what goes on in “Game Change” may in fact echo your workplace, where memos go unread and e-mails unresponded to; where the flashiest talkers get promoted too soon; where difficult questions are merely unwelcome interruptions to the PowerPoint presentation; where no one has a clue but everyone is engaged in operatic levels of self-preservation while constantly monitoring their BlackBerrys.²²

The iPods are here to stay, but lawyers need to keep the whole technology thing in perspective. Face-to-face encounters may still be the best way to assess witnesses or even to negotiate agreements. Many times, e-mails and texting cannot convey the nuances and possibilities of a tricky legal problem as

16. Carina Chocano, *The Dilemma of Being of a Cyborg*, N.Y. TIMES, Jan. 27, 2012, <http://www.nytimes.com/2012/01/29/magazine/what-happens-when-data-disappears.html?pagewanted=all>.

17. *Id.*

18. Teddy Wayne, *A Smartphone Future? But Not Yet*, N.Y. TIMES, Mar. 23, 2012, <http://www.nytimes.com/2012/03/25/fashion/a-hardy-group-holds-out-on-smartphones.html?pagewanted=all> (citing NICHOLAS CARR, *THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS* 139-40 (2010)).

19. BLAISE PASCAL, *PENSÉES* 48 (W.F. Trotter & Thomas M’Crie trans., 1941) (1651).

20. Pico Iyer, Op-Ed., *The Joy of Quiet*, N.Y. TIMES, Jan. 1, 2012, at SR1, *available at* <http://www.nytimes.com/2012/01/01/opinion/sunday/the-joy-of-quiet.html?pagewanted=print>.

21. *Game Change* (HBO television broadcast Mar. 10, 2012).

22. Hank Stuever, *HBO’s ‘Game Change’: Sarah Palin and the Toxic Political Environment*, WASH. POST, Mar. 7, 2012, http://www.washingtonpost.com/entertainment/tv/hbos-game-change-sarah-palin-and-the-toxic-political-environment/2012/03/01/gIQAtPuRxR_story.html.

effectively as a one-on-one conversation. I found in over twenty years of judging that oral arguments did make a difference in many cases by drawing out weaknesses in an argument that looked quite polished on paper. In sum, keep your wits about you, not stored in your back pocket.

D. The Millennial Generation

Fourth, cynics have labeled your generation as “The Go-Nowhere Generation”²³—risk adverse, and sedentary. A recent study finds that persons in your generation are 40% less likely to move outside of their communities than any generation since 1980.²⁴ No longer a nation of “movers and shakers” like your forbearers: the Pilgrims; the nineteenth century immigrants; the “greatest” generation fighting to save the world for democracy; and the idealistic peace corps recruits of the 1960s.²⁵ You spend more time with the Internet than on physical highways.²⁶ You are less interested in the environment and conservation than the baby boomers and less civic-minded overall,²⁷ you trust authority less and spend less time worrying about the problems of society.²⁸ It is said you think luck, not merit or grit, plays the greatest role in success.²⁹

Well, if true, you are partially right—at least about luck. It does play a preeminent role in our lives, good and bad, and it is just as well to acknowledge that early on. Over a career and a lifetime, you play many hands, and most talented players become more adept at the game as they go along. But if the cards do not come up right, you still lose. At law school, no one tells you very often that you may lose, which is close to a sin in our national culture. Vince Lombardi used to say, “Winning isn’t everything; it’s the only thing,”³⁰ and certainly that is true in our legal culture, which is patterned closely after medieval jousting tournaments.

23. See Todd G. Buchholz & Victoria Buchholz, Op-Ed., *The Go-Nowhere Generation*, N.Y. TIMES, Mar. 11, 2012, at SR4, available at <http://www.nytimes.com/2012/03/11/opinion/sunday/the-go-nowhere-generation.html>.

24. *Id.*

25. *Id.*

26. *Id.*

27. See Martha Irvine, *Young Americans Less Interested in the Environment Than Previous Generation*, WASH. POST, Mar. 15, 2012, http://www.washingtonpost.com/national/health-science/young-americans-less-interested-in-the-environment-than-previous-generations/2012/03/15/gIQAGio1ES_story.html (discussing the findings from national surveys of high school seniors and college freshmen). See generally JEAN M. TWENGE ET AL., *Generational Differences in Young Adults’ Life Goals, Concern for Others, and Civic Orientation, 1966-2009*, 102 J. PERSONALITY & SOC. PSYCHOL. 1045 (2012).

28. Irvine, *supra* note 27.

29. See Buchholz & Buchholz, *supra* note 23.

30. See Steven J. Overman, ‘Winning Isn’t Everything. It’s The Only Thing’: The Origin, Attributions and Influence of a Famous Football Quote, 2 FOOTBALL STUD. 77, 84 (1999), available at <http://www.aafra.org/SportsLibrary/FootballStudies/1999/FS0202h.pdf>.

In playing the game, life or law, skill counts for something, of course, but sheer dumb luck often counts for more. Does your health hold out or crumble? Which partner are you assigned to? Which panel of judges comes up on the wheel when your case is called? Which political party is in power when it is time to take your deserved place on the bench or in the policymaking echelons of the State Department? Are you the right age, gender, race, or ethnic group to fit the profile for the job? Is it the year in which smoking a joint is tantamount to murder or just the easily forgiven mistake of a high-spirited youth? Is this the year in which unpaid social security creates a national crisis or is simply remedied and forgotten? If war comes—I have seen six in my lifetime—are you called up for duty? Those chance circumstances are the stuff of which brilliant careers are made or die aborning.

In our profession's relentless obsession with winning, and its demeaning of losers, we shy away from an obvious truth: terrific lawyers with lousy cases cannot and should not win, and lousy lawyers have to work hard to gum up a natural winner. No one disputes that persistence, endurance, talent, and hard work can make a difference in getting where you want to go, if you get a decent amount of breaks. But I think it is wise to learn early that most people cannot in fact attain everything they want, and in the course of life we all lose a lot of hands—cases, clients, comrades, relationships, opportunities, elections, and appointments—not always through our own fault. This is only a humble acknowledgement that, smart as you are, and smart as we thought we were sixty years ago, we do not control as much of our own lives or careers, or even the so-called “living growth” of the law, as we might think or wish. Nevertheless, that is not a reason not to aim high. In the words of Justice Holmes, “[a]im at the infinite and when our arrow falls to earth it is in flames.”³¹

So, if your arrow falls, do not consign yourself to a life of passivity or wistful “what ifs” and “if onlys” thereafter. When Brandeis was asked why he did not give up when he lost cases 8-1 persistently, he replied that the only important thing was to “keep fighting.”³² And a chronicler of the Civil Rights movement, whose identity I have not been able to retrieve despite repeated efforts, had the following advice:

Small acts of protest are not wasted. Silent individuals sometimes begin to speak, and feeble organizations may grow formidable. Invisible connections happen; the resources are already there. And, at certain times in history, exactly when we cannot know, great movements for justice burst forth and the world changes. Up to now, only modestly, erratically. But the future may hold surprises. The past did.

31. Letter from Oliver Wendell Holmes to the Federal Bar Association (Feb. 29, 1932), *reprinted in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 20 (Richard A. Posner ed., 1992).

32. DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA 25 (2012).

E. Life Outside of the Law

Finally, the most important decision of your life will have nothing to do with the law; it will be picking the person you want to share it with. Your generation waits longer than mine to marry, have children, or enter into long-term relationships. For women there are added complications: we have made significant gains in getting to the top tier in some parts of our profession—courts and academia, but we have not made big enough cracks in the glass ceiling yet in private firm hierarchies or corporate leadership. Overall, we still make less pay than men.³³ Our legal institutions still have not quite adjusted to women's biological clocks, something that is hard for me to understand. Women law graduates have typically 40-50 productive years ahead. What is the big deal about letting them take time off in the optimal years of child-raising if they so choose? And why must we keep refighting the same issues like control over our bodies over and over again? But, I can tell you from my vantage point, your relationships, not your job title or even your scrapbook of clippings, will determine the fullness of your life.

CONCLUSION

So do not turn your personal life into a courtroom. Lawyers are very good at dissecting others' arguments, spotting their weaknesses, making the sharp retort, conducting the incisive probe, and striking at the jugular. That is fine in the courtroom, not always so fine in the office, and hardly ever fine at home with our spouses, children, and loved ones. For those women among you who will play dual roles as mothers and counselors, for the fathers as well, it is wise to remember that there is a time and place for turning the other cheek, not demanding perfection, overlooking a mistake or two, not having the last word, and resisting the instinct to file a reply brief. Trained as we are in the fine points of the adversarial process, we sometimes do not know when to back off. Do not let your professional life corrode your capacity for love, humor, enjoyment, and compassion. Lawyers deal in words, which are the tools of our trade. But occasionally the words we do not say, the telling points we do not make, can be even more important. My children, now grown, have sometimes commented, "You have no idea what it was like growing up with two lawyers for parents." They are joking, I'm sure. Except I am *not* so sure. Lawyers are aggressive, assertive, and competitive people. We sometimes need to restrain in our private lives the very talents that serve us so well in our professional lives. In sum, and in short, keep the law in its place as you make your place in the law.

33. See Patricia Reaney, *Women Still Confront Yawning Gender Wage Gap—Study*, REUTERS (Apr. 17, 2012, 3:21 PM), <http://www.reuters.com/article/2012/04/17/wages-gender-gap-idUSL2E8FH9IC20120417>.

And that, I think, is quite enough sermonizing for this day. A hundred years ago, Justice Holmes said, "Through our great good fortune, in our youth our hearts were touched with fire."³⁴ It is not so easy today, but I hope some part of your lives, too, will be touched with fire. I wish you great success and great times. To all of you, good luck.

34. Justice Oliver Wendell Holmes, Jr., Mass. Supreme Judicial Court, Address Before John Sedgwick Post No. 4, Grand Army of the Republic, Keene, N.H. (May 30, 1884), *available at* <http://people.virginia.edu/~mmd5f/memorial.htm>.