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Winner of the 2003 John Bingham Hurlbut Award for Excellence in Teaching

Graduation Address

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Thank you, Brian, for that very nice introduction. And thank you all for inviting me to speak here today. It is really a terrific honor.

It is also a tremendous challenge. Graduation speeches are a tricky genre. There is first of all the problem of length. I asked our colleague Michael Wald for some advice about my talk. He answered my first question patiently. But when I pressed him with another question, he said: “George, *nobody* will be listening *to you*. The only two words those people want to hear are the first and last names of their child walking across the stage.”

So I’ll be brief.

There is also the matter of topic. Now I suspect you would all like me to say something new. Brief—but new. But let me assure you: In the genre of graduation speeches, there is nothing *new*. There really are only four graduation speeches, and you’ve heard them all before. In fact, I’ve brought them all with me, and I’m happy to deliver whichever one you would like to hear. So please vote with your applause.

Okay, here we go—standard graduation speech number 1: “Be All You Can Be.” Well—actually—the Army won’t let me deliver that one.

Standard graduation speech number 2: “Be Like Me.” You can laugh—but *I* think this one has promise. The difficulty is, it’s probably too long.

Standard graduation speech number 3: “We Call It Commencement Because It’s Not an End, It’s a Beginning.” Hah! You’re all thinking, “This had better damned well be the end.”

And finally, the perennial favorite, standard graduation speech number 4: “Someday You’ll Know What I Know Now.”

But here's the problem with this last speech: If I tried to tell you something I know that you haven't learned yet, you'd scoff at me. Because what I know now may very well have no relevance to you in your future. In just the short time since we met, the world has changed enough for you to doubt anyone's claim to know now what will be important to you in your future.

I first met most of you in evidence class early in September 2001. Can we even remember today what the problems of our world were when that semester began? To help jog our memories, I dug out the newspapers from Tuesday, September 11. These were the papers that were printed and delivered early that morning—the last papers printed before our world changed.

And what were our concerns back then? In the *New York Times*, on page 1, the most prominent story carries the headline, "School Dress Codes vs a Sea of Bare Flesh." A New Jersey high school principal is quoted as telling a passing student, "Lose those flip-flops."

Inside the *Times*, the problems of the day grew somewhat more pressing. In the Science section, on page 3, the headline reads, "Marauding Fire Ants." Scientists reported that red South American fire ants had invaded coastal and border states from Florida to California, killing birds, alligators, and small cows. The ants had "spread over the area like a tank invasion," the *Times* wrote. Whatever happened to those ants? No doubt they thought better of invading with Rumsfeld in the Pentagon. But who knew they were so well informed?

But the problems of the day, back in those days before our world changed, were not all so frivolous. True, we were not then focused on defending our society against attack. Rather, the luxury of our make-believe world of physical security let us focus not on defending our society, but on making it better—cleaner, safer, more just, and more humane. And in this task of bettering our world, lawyers played a critical part.

So at the bottom of page 1 of the *Times* for September 11, a small item notes that the EEOC had just filed suit against Morgan Stanley, the investment house, for discriminating against its female brokers. The chairwoman of the EEOC was quoted as saying that her agency would "not allow—in any form, at any level or in any industry—the existence of workplace barriers that operate to exclude on the basis of gender." On page 20, under the heading, "Arsenic Standard for Water Is Too Lax," the *Times* considered how the Environmental Protection Agency would respond to a study finding that even tiny

concentrations of arsenic in drinking water could cause cancer. And on the opinion page, a law professor debated the best ways to reduce crime in the nation's big cities without triggering illegal and discriminatory police practices.

These are some of the things lawyers were doing as of the morning of September 11 to help better our world. But what happened that day to the role of lawyers?

I spent September 11 at home behind my desk with one eye on the TV and one eye on the computer screen, planning our evidence class for the next day and wondering how I could persuade you that evidence law remained somehow relevant even as our world came undone. Our topic for the next day, as some of you may remember, was conditional relevance. Now, the whole point of the lesson on conditional relevance was that the entire doctrine was a blunder—that there really *is* no separate problem of conditional relevance. So there I was in class on the morning of September 12 trying to explain to you why this entirely superfluous doctrine remained somehow worth studying even as our very security seemed suddenly an illusion. As we fought through that lesson, I worried that law could never again claim its central role in guiding and shaping our culture.

In many ways, the worst of my fears that morning have come true. In the twenty months since, we have passed through an era in which law and lawyers have withdrawn to the sidelines, and our military and security institutions have taken center field. This has been an era of war, and as Cicero said, in times of war, the laws fall silent.

And so in our quest for physical security in the days since September 11, we have changed or evaded the law and have pushed lawyers to one side. The litany of changes is both familiar and disheartening: The USA Patriot Act with its weakened protections against detention of immigrants, home searches, and government surveillance; military tribunals that permit nonpublic trials without juries or rules of evidence; new regulations that allow prison authorities to monitor certain lawyer-client conversations; new procedures that isolate citizens designated as suspected combatants even from their lawyers; and a war in Iraq that, whatever its wisdom as an instrument of national policy or security, strained and perhaps violated traditional principles of international law.

I recite this list not to indict our leaders, who perhaps have acted under the press of necessity as they saw it. Many have argued in Justice Jackson's words that our Bill of Rights is not a suicide pact. Rather, I recite this list to lament our loss. Over the last twenty months, we all have learned that the prominence of lawyers in our culture and the primacy of law may be luxuries of physical security and casualties of war. We have learned that when our very survival is at stake, the legal terms of that survival become negotiable.

But in many other ways, my fears as I walked into class on the morning of September 12 have proved too great. Because I also worried that lawyers would lose sight of the law's central mission to work, little by little, toward a more just and humane society. Yet even while law has retreated from the central events of our day, it has worked on the sidelines, quietly but tenaciously achieving change.

I could cite many examples of the law's persistent efforts toward greater justice during the last twenty months, from the fight against racial profiling and discriminatory lending practices to a ban on executions of the mentally retarded to new laws combating corporate fraud. I could focus on the many ways in which lawyers have challenged, sometimes successfully, each of the new security measures put in place since September 11. A few spirited courts have ruled against government policies denying access to counsel, closing certain immigration hearings, and using the material witness law as a means to detain suspects.

But one example of lawyers' persistent efforts to gain justice means the most to me, because it brings me back to my own law school graduation seventeen years ago. That spring the Supreme Court had heard argument in the case of *Bowers v. Hardwick*—a case I had just studied under a young law professor, Kathleen Sullivan, then in her second year of teaching—and a case the Court said required it to consider the constitutionality of laws criminalizing private homosexual acts. That case was the *Plessy v. Ferguson* of our day. The Supreme Court held history in its hand. It could condemn perhaps the most pervasive form of official discrimination still considered lawful under the Constitution. Or the Court could shrink from this challenge, affirm the status quo, and slink into history until a better age could cure its mistake.

As my classmates and I sat at graduation that spring, we hoped the Supreme Court would launch our legal careers with a celebration of law's power to repair society's injustices. As you know, we were disappointed, and we have been waiting seventeen years for a better age to fix the Court's mistake. Today, as you sit here, I feel that better age may have arrived. Again this spring, the Supreme Court heard argument about whether a state could lawfully under the Constitution criminalize private homosexual acts. Again the justices hold history in their hands. This time I am confident—I am almost certain—that the Court will launch your legal careers with what to me will be a resounding affirmation of the law's power to work little by little toward a more just society.

We all are far wiser today for the lessons of the last two years. You and I have been learning alongside one another. It has never been less true that a teacher could stand before his students and say, “Let me tell you what *I* know that *you* will know someday.” So I won’t give that speech. I will simply say this: The rule of law cannot cure all the world’s evils. But it can cure some. When you leave here today, I hope you will go out there resolved to cure those evils that are within the law’s power to cure. We will be here, waiting while the world decides whether the rule of law retakes its place as the arbiter of social progress. You will be out there, working to regain the day in which law, and not fear—law, and not force—will shape our world.

Thank you.