

GRADUATION, JUNE 11, 2011

Thank you, Sarah, for that very generous introduction. And thank you all for inviting me to speak with you today. It is a teacher's highest privilege to address a class as you stand at the world's doorstep.

Among the great pleasures of graduation is the chance to see you through your parents' eyes. They often can see most clearly how law school has changed you. One year a proud mother told me of her gratitude to Stanford. "When my son started law school," she said, "he had no table manners. Now his manners are perfect."

I didn't dare reply. I didn't dare suggest that with a bit of discipline at the family dinner table they might have saved \$200,000. I didn't dare confess that we offered no course on table etiquette. If anyone taught her son how to butter his dinner buns, it was the partners who took him to those fancy law firm dinners. *We* couldn't offer a table etiquette course. We had no competent instructor.

But starting this spring we *do* teach table manners. A rich donor was so appalled by what he saw during dinner with students that he urged a remedial program. The readings resolve common quandaries. How to butter that bun? Break it first, then butter. We even teach a friendly mnemonic: To remember your bread goes on the left and your water on the right, make a circle with the

thumb and forefinger of each hand. See?—your left hand looks like a “b” for *bread* and your right hand like a “d” for *drink*!

It turns out this *is* worth \$200,000. The *New York Times* reported in April about a scientific finding that good table manners predict longer lives. That’s good news for us lawyers. We *love* those finicky etiquette rules and all their provisos. Which fork? Choose the fork farthest from the plate first *except* leave the fork above the plate for last *unless* the table is improperly set, *in which case* use your discretion. Lawyers love that sort of thing. We should live forever.

Sadly, though, the *Times* magnified the role of table manners. An eighty-year study sought the childhood trait that best predicts longer lives. The answer is not exactly table manners, but something related—what the researchers call *conscientiousness*. Conscientious people may have good table manners. But they live longer because they wear seat belts, never smoke or get drunk, and take their medicines.

In law as in life, conscientiousness is a measure of merit. Conscientious lawyering means in part *competent* lawyering—returning calls before dinner, proofreading briefs before bed. These tasks are a slog, but they are the easy part of conscientious lawyering.

The hard part is showing the *courage* of conscience—the courage to do right as you see the right. I know you to be women and men of sound conscience. You are as decent, as honest, and as honestly self-critical as any group we could

assemble. But do you have the courage of conscience—the courage to resist pressures, however great or subtle, to ignore the inconvenient commands of your conscience?

When I look back at my early years as a Massachusetts prosecutor, I see with regret and pain that I sometimes lacked the courage of conscience. I sometimes yielded to the contrary commands of my superiors, my pride, or my ambitions.

I regret one case, my first homicide case, most of all. A prosecutor's first homicide marks a coming of age—the prosecutor's transition from petty-case punk to superior court somebody. That first homicide isn't typically a chainsaw massacre. Typically it's an unintentional homicide, often involving a car. The charge in my case was negligent motor vehicle homicide. That charge meant exactly what it said. All I had to prove was negligent driving that caused death. I didn't have to prove intent or even recklessness or even gross negligence—simple negligence would do. Still, a man had died. And conviction carried serious costs for the defendant—the risk of imprisonment and the certainty of a ten-year loss of driver's license.

The facts were desperately sad. The victim had lived and died unnoticed. He had no job, no known family, no apparent friends. He had only a name and an apartment in an aging Soviet-style high-rise public housing project. He was sickly and gray, walked with a limp and a cane, and lived behind gray concrete walls. Even to his neighbors he seemed a stranger.

Maybe he ventured out only at night. At all events he died at night. Limping across the busy street that ran along the projects, he fell in the middle of the crosswalk. It seems no one saw him fall or knew why he fell. But he was conscious, and he knew he was about to die.

That much we know because the defendant told police at the scene what happened. She was driving at a normal speed, she said, with normal care, but never saw the man until an instant before she hit him. Even then all she saw was his arm waving his cane over his head to warn cars he was there. By the time she saw the man's cane, it was far too late to stop. All this she told the police when they arrived at the scene. Then, having answered their questions, she walked to the side of the road, doubled over, and vomited. Her teenaged son, who had been riding next to her, looked on.

The defendant didn't vomit because she was drunk. The police saw no sign of heavy drinking and did not charge drunk driving. They did not question her account that she drank a single beer while sharing the evening with friends. She vomited for another reason—because her horror at having killed a man found no expression in words.

These were the facts when the case landed on my desk. It was a homicide, my first, and I knew I could prove the charge. Cars must yield to pedestrians in crosswalks, whether walking or fallen down, whether in broad daylight or pitch darkness. The defendant's own words convicted her. No doubt some jurors

would resist this result. “She’s suffered enough,” they’d say. “And there but for God’s grace goes any of us.” But the judge would instruct jurors they must decide the case on the law and facts alone. The law and facts compelled conviction. In the end, I felt sure, jurors would agree.

And yet I did not want to prosecute her. The first jurors were right—any one of us, distracted for a moment, could have hit that man. A police expert who analyzed the scene confirmed that the defendant was driving at a reasonable speed and the victim was on the ground already when she hit him. And the defendant had shown the courage to stop and wait for the police. Had she simply driven off, sworn her son to silence, and gone home to bed, none would have been the wiser. True, she was careless. She killed a man. But she intended no harm and showed great remorse. She posed no likely danger to others. Yet the consequences of conviction could be severe. A ten-year loss of her driver’s license could trigger loss of her job and land her and her son on the street. With a homicide on her record she might never find another job.

So I approached the head of our homicide unit, my superior on the case, and explained why I thought we should not press for a conviction. Massachusetts law supplied a middle ground: The judge could defer sentence for a year and order the defendant to complete a safe driving program and community service and to drive only for work. At the end of the year, if the defendant complied with the court’s conditions, the judge could dismiss the case. To me this result seemed proportioned to the defendant’s wrongdoing.

But the homicide chief was a hard man to move. He was a prosecutor to his core, brother to one prosecutor, husband to another. He and his wife shared two state salaries and an old station wagon and scrimped to raise their kids. They sacrificed a lot to serve the public, and I admired him for that. But he had a chilling lust to win and a contempt for the accused that I could not admire or share. As the Supreme Court wrote in 1935, an ethical prosecutor's first duty is not to win the case, but to see that justice is done. He told me I should try the case and demand conviction.

Weeks later, as the case neared trial, I met with the homicide chief again. I was prepared for trial, but could not see the justice in pressing for conviction. He never budged. He was either unmoved by my arguments or simply unwilling to show leniency, however well justified leniency might be.

So I had a decision to make. I could live by my conscience and withdraw from the case, or I could cave to his command. There were good reasons to cave. The homicide chief had far more experience. Maybe he knew something I did not or saw through the defendant's remorseful facade. Maybe—but I did not think so. I believed he simply knew no other course but winning.

Yet still I caved—I took that case to trial.

Looking back today, I see the pressures I faced. Had I withdrawn from the case, another prosecutor would have stepped in, angry at being handed my work. The homicide chief would remember my challenge to his authority. He

would resent the suggestion that my ethical standards were higher than his. Worse, he would think me a wimp, lacking the backbone for tough cases. My stature in the office was at risk. I had no desire to spend my career behind a beat-up steel desk in a basement office, trying petty cases in the outlying district court where I began my career. I wanted to be downtown in superior court, trying cases that counted. So I took that case to trial.

To my good fortune I lost. My problem was not the facts or the law, for both were on my side. My problem was the fundamental injustice of conviction on those facts. Others saw that injustice as clearly as I had. Others had the courage to act on it. Decades have passed since that day, yet still I look back at my choice with regret. It was a failure of conscience, a failure of the courage to do right as I saw the right.

Not long after you walk out our doors, you will face pressures like those I faced—pressures to please your boss or client, pressures to succeed or burnish your pride. Sometimes those pressures will accord with your conscience and the governing rules of ethics. When they do not, take pause. Set aside the pressures of the moment. Then walk ten steps down the road and look back at yourselves. Don't leave yourselves wondering, as I did, why your courage went wanting.

Thank you.