

Stanford Law School Graduation, June 15, 2013

Remarks to the Class by Robert Weisberg, Edwin E. Huddleson, Jr. Professor of Law and Faculty Co-Director of the Stanford Criminal Justice Center, Recipient of the John Bingham Hurlbut Award for Excellence in Teaching at Stanford Law School 1985, 2005, and 2013

Good morning.

It's flattering to be rewarded for teaching such fabulous students. But—and here I'm betraying my colleagues by blowing any negotiating leverage with the Dean—the opportunity has been its own reward. And I've had the opportunity for a long time. People keep reminding me that I've been here a very long time—at the law school I attended and the only one I've ever taught at. Now this is somewhat exaggerated. It doesn't seem that way. It seems like just yesterday that I was in Room 190 and a student surfing on her Marconi radio shouted that the Cardozo nomination had come through, or the day I was in the law lounge when the law school telegraph machines were buzzing with blog posts about the chances of the Sherman Act passing. OK, I've gotten things a bit mixed up.

Now no literary form is so vulnerable to cliché mongering as the commencement speech. And since, as a teacher once told me, we should avoid clichés like the plague, let's turn a critical eye on them. There's the obligatory reminder that commencement means not an end but a beginning. Here we have what logicians call the semantic fallacy. What kind of beginning is so drenched in tearful farewells? I'm also supposed to say that this event occurs at the precipice of a unique historical threshold, or maybe the threshold of a unique brink—a time of unmatched peril and promise, and that you are a unique generation. I don't feel competent to offer such historical declarations. The world is troubled, but I'm not sure the peril of 2013 is what it was in, say 1943. As for promise, that remains to be seen. And as for your generation, I have a hard enough time remembering the distinction between the oughts and the millennials, and in any event I am wary of any categorical description when we the subset we admitted to Stanford was picked precisely to defy generalization.

So I'll keep my focus somewhat narrower. And I'll return to the subject of commencement clichés shortly. Though I should warn you that there's a cute one I like and will use—the takeaway.

Law students here have become ever more wide-ranging and interesting. My own perch in criminal law has been especially gratifying. Of course crime is special—the place where the rubber of law meets the road of life, where one can wallow in the day's tabloid news and pop celebrity culture and claim to be doing research. But it is not unique. The range of our students' intellectual, professional, cultural, and personal backgrounds has widened—the study of law has become more interdisciplinary and our students are better at it. But it's also because our great clinical program has brought our theorizing into contact with the ground level of law and the demands of professional practice. I find myself learning from students how the esoterica of computer technology and philosophical concepts might inform how we devise rules of privacy,

and other students update me on just how they devised a strategy to win a 1538 suppression argument then a 995 dismissal in an 11350 case in a high-volume local court. I know that just saying those statute numbers with a knowing edginess is itself a joy to you.

And you have done much of your work as teams with each other and with faculty. As noted in the recent *Stanford Lawyer* magazine, the Stanford Criminal Justice Center has undertaken a comprehensive assessment of the new California law called realignment—the most dramatic reconfiguration of any American criminal justice system in half a century. I have been lucky to be on this team in this endeavor with my very special colleagues, Joan Petersilia, and Debbie Mukamal, with whom I share the directorship of our center.

But the key is our team of student researchers. They've done empirical data collection, case studies, statutory analysis, policy evaluation—and a few months ago the governor of California, Jerry Brown, came here to receive a briefing from our students. He was so impressed that he had declared he had to take our students' reports back to Sacramento to discuss with his administration and the Legislature, and that he wanted to steal some of the students from our office as interns. Joan, Debbie, and I view this as an it-doesn't-get-any-better-than-this moment at the law school. Except we're going to stay at it, because it may indeed get better.

By the way, you can accuse me of being defensive about the been-here-so-long thing, but as I told the students, how long can it have been when Jerry Brown, the governor in their law school years, was the governor when I was a student here as well?

But just who are you, you graduates? Some years ago I suggested to some 3Ls that they ought to look back at their law school application statements to remind themselves, in times of doubt or uncertainty, of what they anticipated they would bring to law school and what law school would offer them. So this year I asked a bunch of 3Ls I know pretty well for permission for Faye Deal to give me their statements. I wanted to see how some of you described your path *to* here and conceived the path *from* here, and I thought I could offer some observations on these essays.

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Our applicants don't need to reassure us of the easy stuff—that they can become competent practicing lawyers. The essays tend to reflect wider interests that might lead people to law. Most have a charmingly random quality—a soft epiphany where a challenge, a job task, an encounter with an unfamiliar culture, has told you things about yourself or given you a sense of where you want to go. We rarely see, nor would we want to see, essays that describe a linear premeditated path to law school—the kind where the applicants says that at the age of 5 she was winning dinner table arguments and was planning her law practice in her teens and is confident of outgunning everyone in the law school classroom and then destroying rivals in the courtroom. No, the best essays are short-story-like snapshots, moments of change and revelation where some experience or a task that might seem irrelevant to law piques interest in how law might be connected.

You wrote of medical challenges, potholes in the road that prevented you from the artistic career you planned for but led you to redirect to a legal career that might offer parallel satisfaction. Or

health challenges that, once overcome, were a step toward the confidence you needed to take on some previously inconceivable educational goal. You wrote of how an immersion in the esoteric mechanics of finance led you to appreciate how societies in economic meltdown can find a way to recover. You wrote of a political encounter over a moral dispute at college, where you came to appreciate the much-maligned art of lobbying as the way good things get done. You wrote that time spent in politics first tempted you towards cynicism, until you realized that law is not the cure for politics, nor is politics the corruption of law, but rather that law is what helps make bad politics better politics. You told us of coming to appreciate that growing up in a place actually identified as the poorest town in America could offer riches of a different, subtler sort. You wrote of idealism in urban school teaching but intriguingly observed that idealism is often the easy part when you're young, that the trick is to learn and respect the mundane pragmatics. You wrote of a return to an ancestral home in Africa or a government assignment in Afghanistan where you realized, as one of you put it, that the challenge is to “rescue choice from circumstance.” You argued that international trade is a step towards speeding democratic values, and you told of learning how a deep Christian commitment matched with a fluency in languages could lead to diverse opportunities for public service.

So here's a takeaway—If your paths *to* law school were so indirect, even circuitous, why should your paths *from* law school be fixed and linear? Remain open to change, and be prepared to be buffeted a bit; be in the moment when job or personal change happens, but also step back and watch it happen. Sometimes we look back and things that had looked accidental appear to have had some destiny about them. But the reverse is also perhaps more telling: sometimes we look back to the nature and consequences of choices, and appreciate how accidental the occasion or the consequence of those choices have been.

On that score, back to clichés for a moment. The commencement speech often admonishes you that when it comes to a difficult decision about how you conduct yourself in your profession, or whether to redirect your profession, always be true to yourself. The bad opposite alternative is to acquiescence in the expectations of the marketplace or worry about the opinions of others, so you try to be something you're not. I don't mean to denigrate authenticity, but I think we need to think this through a bit. In *Hamlet*, when Polonius gives the advice about to thine own self being true, it's not so clear he was offering a high moral lesson—the speech is more about social strategy. Where does this supposedly fixed authentic self come from if not, to some extent, from interactions with others and imaginings about what you might become? Look back to those application statements. As stories of change, they are also stories of how you imagined yourself to be different from and better than the way you viewed yourself at the time of the writing.

Think of all the moments in law school where you considered whether principles that were often characterized as Platonic universals turned out to be social constructions. Your “self” is not a pre-given Platonic essence.

Self-invention is very American and it is not inauthenticity. The notion of the self-made man, always stereotyped as a man, has a long but degraded history in the U.S.—someone who did not inherit money but became rich is always “self-made.” But there's a nobler version of self-invention. To venture outside law for a moment, one of the people I admire most and find most fascinating is Oprah Winfrey. How did a woman who grew up in poverty and suffered horrible

abuse end up in a few decades to be adjudged the most influential woman in the world—and one whose influence, I'd argue, has been very positive. If you look to her story, at some key point she created a concept of herself, as someone who could spin raw speaking and conversation skills into being a worldwide advisor to humanity. She couldn't become what she is until she imagined it. Oprah invented Oprah, and she is no less authentic for the achievement.

Closer to home: a few months ago some of our students met Michael Santos. Michael is one of our leading commentators on sentencing and correctional policy in the U.S. He has written great scholarly articles on criminal justice and will play a major role in criminal law reform in the coming years. But Michael invented his *self* by an act of arduous, muscular imagination when, at the age of 23, he was sitting in a federal prison for drug crimes he has never denied. He imagined a self that he could be at the end of a certain 25 years of federal incarceration, and it was only because he had that new self in mind that he could persevere through the self-education and character rebuilding that made him what he is. Sure, you find inherent talent and raw luck in these people's stories, and some old-fashioned ambition. But they became who they are by imagining being different people from the ones who were doing the imagining.

Which comes to the next takeaway. Maybe the self you imagine will take on a radically different profession, but there are plenty of part-time openings for the self-invented as well. A new way of doing your work, a new specialty. Maybe an amateur form of work, in the old honorific sense of the term. A transactional lawyer might help run a nonprofit and maybe even take on litigation for an indigent client. A public litigator might start a business.

In this regard, here's an old graduation memory. Most of you know the work of the great constitutional thinker John Hart Ely. You may not remember that he was the Dean of this law school in the 1980's. John was a wise and witty man and a wry observer of the world he had grown up in—what he called the American Establishment generation of the complacent 1950s. He spoke at this very event when I was a young faculty member. He had just received the 25th year reunion book from his Princeton class of 1960—what he described as the paragon of the old eastern establishment, all male, almost all white, all buttoned down. The reunion book asked the “if-you-had-it-to-do-all-over-again”—the question designed to provoke some wild whimsy, some let-it-loose could-have-been retrospective self-imagining. John found the book an unexpected sociological treasure, if something of a downer. He did a cross check of the entries and discovered that there were two dominant groups; investment bankers who said they would have been commercial bankers and commercial bankers who said vice-versa.

You can do better than this. Try to make preemptive if-you-had-it-to-do-all-over yourself projections. Or maybe write updated law school application statements every few years.

I want to say something about the legal profession, and now here is another big cliché—or pair of clichés—the notions that the lawyers do the means, the clients have the ends. The positive version is the often reverently solemn view of the lawyer's role—zealous commitment to helping

clients fulfill their interests. The cynical version is that lawyers will do *anything* to advance their client's interests. Obviously the positive version is a good idea, while it's unfortunate the extent that the latter is true or perceived to be true. But this means-ends business misses a lot. Because those interests, whether economic self-interest or moral or political interests, are also not sprung Platonically or rigidly determined by circumstance. Sometimes it is only with lawyers that clients, or the public, can come to recognize what their interests are. This may seem obvious—a client says she wants to make a contract or start a company or get a divorce and the lawyer lays out law-related costs and benefits to help her decide if that's what really wants. But I'm thinking in larger terms. Case in point—as big a set of legal issues as we've seen in many years.

There is now a roiling public debate about national security surveillance over our phone and email records. I find it oddly reassuring that it's happening. It's one of those special moments when people and groups who usually act from ideological predispositions or political loyalties get confused, and conventional alignments get screwed up. By coincidence, this very month the Supreme Court decided an issue about swabbing DNA from all arrestees for a big crime-matching database. Of course it was 5-4 and of course Justice Kennedy wrote the decision, but Justice Breyer sided with the state and Justice Scalia scathingly sided with the defendant. Night is day! Up is down!

It turns out that privacy is very hard. It's a deontological value to some, but its form and degree are a matter of taste and social context, and matching it against other social needs, like crime-solving, makes things even harder. On a bigger scale, with the NSA surveillance, there is strange liberal-conservative bedfellowship on both or all sides of the debate. Is Edward Snowden a whistle-blowing hero or a traitor? Hard to predict opinions on this by the usual ideological variables.

Everyone wants the so-called “right balance of security and privacy,” but the balance can't be struck in the abstract or by any arithmetic or algebra. In any event, it's only by encountering the hard legal problems that people—including governments—confront how ill-formed their own supposedly preexisting interests sometimes are. I don't want the government having my phone records, but I do want my phone company to have the records because I want it to do things with the records that I want done, and then I've acknowledged that I don't want to fully own them. I want the government or protect us from bad people. I know I'm not a bad person. But I also know that government has to risk some false positives if it is to get the really bad people.

I want my Internet company to protect my privacy but I want it to help me have just as much private information as would please me, and I realize I can't instruct provider on every data point of information. In fact, as some social scientists are proving, even when I seem to be in perfect control of my privacy, I do weird things, such as answering really invasive question just because it is slightly less invasive than the one before it that I refused to answer.

Lawyers will be all over these questions, because whether it's to assist the courts or inform democratic voting, we need them to lay out and help assess the alternative schemes we must choose from. It's a matter of detail and judgment and accommodation. Lawyers help clients and the public figure out what their wants are only by helping them see what law necessarily follows from fulfillment of their wants.

And the good news, he said with arrogant smugness, is that it's OUR lawyers who are in the center of this. Last week's alumni news notes from the library reveals that our graduates are fully in the mix. Our grad David Drummond, chief legal officer of Google, is rethinking the terms of contracts with his customers, clarifying that their privacy is protected in line with the law. But he's also arguing to the government that it needs to allow him to clarify with his customers the terms of those laws, so that trying to tell government that more trust in those contracts will help the government fulfill its interests. Our grad Marc Rotenberg, who runs the nonprofit Electronic Privacy Information Center, is conceding that the NSA surveillance may be consistent with the Fourth Amendment doctrine and even the letter of the relevant statutes, but he's trying to convince Congress that it didn't realize the implications of those statutes. Our grad Susan Illston, federal district judge, has rejected at least one government request of an Internet company as so vague as to be illegal, but she has approved others, because the law requires her to be scrupulous in examining the details. And our grad Peter Bouckaert, the heroic investigator for Human Rights Watch, has been looking at the question of extradition of Snowden from Hong Kong and writing about how Hong Kong's legal integrity may be compromised by its earlier involvement in under-the-radar rendition of terrorist suspects to Middle Eastern countries. And our grad Ronald Noble, the head of Interpol, needs to draw on databases like that of the NSA as he investigates terrorism and human trafficking in Central Asia.

So I hope I've made the case that law is in no way prosaic. But to close this effort I'll make an abrupt shift from prose to poetry.

Here are two takeaways in verse—and they are about my main point anyway, about openness to change.

Here's one by the British poet Sheenagh Pugh.

#### What If This Road

What if this road, that has held no surprises  
these many years, decided not to go  
home after all; what if it could turn  
left or right with no more ado  
than a kite-tail? What if its tarry skin  
were like a long, supple bolt of cloth,  
that is shaken and rolled out, and takes

a new shape from the contours beneath?  
And if it chose to lay itself down  
in a new way; around a blind corner,  
across hills you must climb without knowing  
what's on the other side; who would not hanker  
to be going, at all risks? Who wants to know  
a story's end, or where a road will go?

Here's one by the recently deceased great American poet Robert Creeley. He wrote it in 1973 for this child's elementary school graduation but maybe it works here. The takeaway is that you should stay connected to us.

For The Graduation

The honor  
of being human  
will stay constant.

The earth, earth,  
water wet, sun  
shine.

The world will be  
as ever round, and  
all yourselves

will know it,  
on it, and around  
and around.

No One knows  
what will  
happen. That

is the happiness  
of the circle,  
finding you.

So do circle back. We hope to see you soon. We're pretty sure we will see you later. We'll remember you always.