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COMMENCEMENT ADDRESS*

GERHARD CASPER**

Graduates, Ladies and Gentlemen,

The seventeenth century dramatist Corneille is the author of a comedy, an immense success in its time, entitled *The Liar—Le menteur*. Its hero is a young man, Dorante, whom we first encounter after he has arrived in Paris following graduation from law school. To succeed with Parisian women, he quickly recognizes, it is no good to say to a lady: "I have just graduated from law school. If you are in need of legal assistance, I know all about the law." Instead, he finds it more effective to lie about his background and thus goes about his amorous pursuits pretending to have been a soldier in the wars with Germany. His lies form the beginning of a plot, the rest of which is of no conceivable interest. I mention it here to stress the obvious—how much more fortunate you are.

It is highly unlikely that those among you who are still searching will find it an impediment on the road to romantic success if you confess to being a lawyer. Quite the contrary, both male and female graduates will probably discover that their dates' interest in them rises appreciably when, in addition to love, they offer legal assistance rather than talk about war. Also, parents or spouses who made sacrifices as you undertook the challenge of studying law need not fear being let down the way Dorante's father was when he realized that no sooner had his son finished law school than he betrayed his new learning, which then, as now, had to be paid for dearly.

As distinguished from Dorante, you will not need to be persuaded that attending law school was well worth the time and effort. However, in an age which prefers its views to be confirmed by opinion polls, you may be reassured to learn that, according to a recent survey conducted among the Chicago Bar, ninety percent of John Marshall's alumni perceive it to be a major goal of this law school to provide its students with a basis for the practice of law.¹ This is an appreciably higher proportion

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1. Frances Zemans and Victor Rosenblum, *The Making of a Public Profession* (Chicago: American Bar Foundation, 1981), p. 62.

than for any other law school attended by Chicago lawyers—including, as I have noticed to my bemusement, one at which a substantial number of your faculty received their legal education and where I have the privilege of serving as dean.

The practice of law, to a considerable extent, has to do with asking questions about facts and questions about law. The answer to a question depends largely on the formulation of the question and the context in which it is being asked. This is a truism which I am certain I do not have to stress at a law school bearing the name of a great master in the art of putting questions. You recall the influence Chief Justice Marshall had on the debate over judicial power to review the constitutionality of legislation when he asked in *Marbury v. Madison*:² Is the Constitution law? While Marshall's contemporary opponents, as well as his modern critics, never failed to point out that an affirmative answer does not necessarily entail the power of judicial review, it remains true that what Marshall called a "deeply interesting" but "not so intricate"³ question structured the discussion in ways favorable to the outcome he desired.

I am reminded of a debate between a Jesuit and a Benedictine monk as to whether one is permitted to smoke while praying. The Jesuit thought it was permissible to smoke while praying. The Benedictine took the opposite position. They referred the matter to their respective superiors. When they got together again, each had been confirmed in his views. The Jesuit simply could not understand the stubbornness of the order of St. Benedict. "What question did you ask," he interrogated his brother. "Are you permitted to smoke while praying?" "No wonder," the Jesuit responded. "I asked whether you may pray while smoking."

Let us take the joke seriously for a moment. Is either of the two questions more appropriate than the other? Appropriate for what? I assume you and I can quickly agree that for the purpose of furthering the interests of smokers, the Jesuit of the story formulated an effective question. It turned a dispute over the propriety of smoking into one over the propriety of praying. By doing so, he made the issue "not so intricate." Similarly, Chief Justice Marshall turned the dispute over the propriety of courts overruling the legislature into one concerning the propriety of viewing the Constitution as anything other than law (which, of course, the courts are charged to interpret). By doing so, he made *his* issue less intricate. Marshall's formulation furthered the cause of judicial power.

2. 5 U.S. 137 (1803).

3. *Id.* at 176.

For those of us, on the other hand, who have no prior commitment "to get from here to there," who instead want to know whether we may or should go in a certain direction, the questions seem—shall I say—somewhat slanted. Does devoutness permit smoking while praying? Does the Constitution appoint the courts as its supreme guardians? These are "deeply interesting" and "intricate" questions, indeed. The truth of the matter cannot be determined by the rhetorical transformation of the issues. While the Jesuit and the Chief Justice may have found an answer we would agree with, their mode of inquiry was somewhat less than complete.

Why raise these matters on the day you graduate from law school? They are at the core of a contemporary debate concerning the nature and purposes of legal research and the practice of law. The debate has to do with the manner in which we pursue legal questions in the classroom, in scholarship, and in practice. The issues in the debate are not academic issues but issues concerning the conduct of lawyers.

Let me give you a few illustrations. According to the *New York Times*,⁴ a prominent law professor recently gave a lecture at New York University in which he offered a primer on how to deal with a Supreme Court viewed as hostile to civil liberties. I quote from the *Times*:

The Supreme Court's decision to hear cases, or grant certiorari, is largely discretionary, he noted. As a result, he said, civil-liberties lawyers long accustomed to seeking Supreme Court review must now combat it. This can be done, he said, either by disparaging the significance of the case at hand or by building the kind of "muddy" record—with peculiar facts and questions of state law—that the Court will not want to consider.

"It is desirable today to frame litigation from the beginning so that it is as complex and confusing, frankly, as you can make it," he said.⁵

The adverb "frankly" in this last sentence is revealing. It suggests that it is appropriate to throw sand in the eyes of the justices rather than merely to state one's position on Supreme Court review in an effective manner.

While the talk reported in the *New York Times* dealt only with what you might call tactics for furthering a good cause, another law teacher, in an article published in the *Harvard Law School Bulletin*, concerns himself with long-term institutional strategies for undermining what he characterizes as "the struc-

4. David Margolick, "On Liberal Law in the Reagan Era," *N.Y. Times*, 10 Dec. 1981, p. 18, col. 2.

5. Margolick, p. 18.

ture of illegitimate hierarchy and alienation."⁶ He calls on law graduates like you to politicize their work situations, especially in corporate law firms. I quote: "Let me say . . . that I am not advocating self-immolation—more like sly, collective tactics within the institution where you work, to confront, outflank, sabotage or manipulate the bad guys and build the possibility of something better."⁷ The author views teaching as "training the Hessians who we will then condemn for using their skills to dismember the body of the Republic."⁸ Needless to say, in this metaphor, you—today's graduates—play the role of the "Hessians."

My final illustration is drawn from a recent symposium on legal scholarship in the *Yale Law Journal*.⁹ One of the participants in the symposium addresses what he views as the tension between a scholar's devotion to the discovery of truth and the law teacher's task to impart the skill of advocacy. I quote: "[T]he habitual indifference to truth that the advocate must cultivate in his professional life is likely to promote what is perhaps best understood, in a literal sense, as a kind of carelessness about the truth."¹⁰

What these three statements have in common is that they deal with law and lying (using euphemisms, however, to describe lying) and that they perceive the practice of law as highly manipulative. One of the authors deplors what he believes to be the case, while the others seem to embrace it. Their views are, of course, hardly new. They represent substantial popular opinion about lawyers and reflect certain elements of the legal realist tradition. In recent years, various tendencies have combined to strengthen further the notion that law is essentially an empty vessel into which we pour and may pour almost anything. The indisputable ambiguity of law seems to make the laborious task of immersing ourselves in legal institutions and their historical background a futile and, therefore, dispensable undertaking. As Ernst Gombrich put it recently in talking about the humanities: "The claim rests on the false assumption that understanding is an all or nothing affair."¹¹

6. Duncan Kennedy, "Rebels from Principles: Changing the Corporation Law Firm from Within," *Harv. L. Sch. Bull.* 33 (Fall 1981), 36.

7. Kennedy, p. 39.

8. Kennedy, p. 37.

9. A. Kronman, "Forward: Legal Scholarship and Moral Education," *Yale L. J.* 90 (1980-81), 955.

10. Kronman, p. 965.

11. Ernst Gombrich, "Focus on the Arts and Humanities," *Bull. of Am. Acad. of Arts and Sciences* 35, No. 4 (Jan. 1982), 5.

The manipulative view offers great temptations to lawyers, judges and politicians alike. With one stroke of the the pen, we return schools pursuing policies of racial discrimination to tax-exempt status; with another stroke of the pen, we accomplish our short-term political goals by limiting the jurisdiction of the federal courts; and with many strokes of the pen, we write law review articles and books showing that the Constitution can be made to incorporate our subjective value preferences. The manipulative view receives unwitting support from those who believe that law schools should pay even more attention to skill training than they do already—how to do it is what matters most. In the extreme version of this approach, law is all advocacy and no substance—anything goes.

There can be no question that it is one of the functions of law schools to train advocates. This, however, is not an all-permeating function. The most rigorous standards of professional education are satisfied only when we teach the substance of law and analytical skills as best we can. Analytic skills are indispensable for advocacy, but they are not identical with it. As lawyers, when we deal with the law of the land, we should understand and state it as precisely as we can. This calls for hard work on the part of lawyers as well as on the part of those who profess to teach law. Lawyers should be fair and clear about the point where their own preferences come into play. Neither law nor its history can be infinitely manipulated to suit our own views, or, to quote Gombrich a second time, “subjectivity does not mean that anything goes.”¹² Those who believe otherwise will simply be bad lawyers, in every sense of the word “bad.”

The important contemporary debate about ethical obligations of lawyers as well as the teaching of legal ethics is, I believe, insufficiently mindful of the fact that the teaching of substantive law and modes of analysis is directly concerned with core ethical issues: fidelity to one's materials and the moral uncertainties which should worry a lawyer as he seizes ambiguities in the law to help it develop in what he views as the right direction. In one of his refreshing contributions to the discussion of present day issues, Chief Justice Burger recently wrote:

Too many law teachers remark: '[W]e are teaching students to *think*—we are not running a trade school.' But lawyers who know how to think in legal terms, but have not learned how to behave, are

12. Gombrich, p. 7.

a menace to society and a liability, not an asset, to the administration of justice.¹³

While I am not entirely happy with the manner in which the Chief Justice summarizes complexities of social responsibility by employing the verb "to behave," I do not want to take issue with his conclusions. I am more troubled by the Chief Justice's two uses of the verb "to think" in the first part of the sentence which I just quoted. "To think in legal terms" is not always the same thing as "to think." While we certainly need "to think in legal terms," that is only one part of the complex analytic endeavors which characterize the law school classroom and the practice of law at their best. That enterprise, in and of itself, has to do with professional responsibility.

There is one final word I should like to say to you. While it does not flow directly from what I have spoken about this afternoon, it underlies my remarks about professional responsibility and nothing I said should be interpreted to suggest anything else. As I set out with a reference to French literature, permit me to conclude with one. At the beginning of Proust's novel, *Remembrance of Things Past*,¹⁴ the narrator describes how, as a boy, he was present at occasions when other members of the family maltreated his grandmother by making fun of her. He then tells us about his reaction: "[I]n my cowardice I became at once a man, and did what all we grown men do when face to face with suffering and injustice; I preferred not to see them; I ran up to the top of the house to cry by myself in a little room"¹⁵ Being grown lawyers and aspiring to the level of professionalism which I have talked about does most certainly not entitle us to look the other way when face to face with suffering and injustice. On the contrary, as lawyers, we have a special obligation not to turn aside.

I congratulate you on your great accomplishment and I wish you a challenging and satisfying life as lawyers.

13. Warren Burger, "The Role of Law School in the Teaching of Legal Ethics and Professional Responsibilities," *Clev. St. L. Rev.* 29 (1980) 377, 390.

14. Marcel Proust, *Remembrance of Things Past*, 2 vols., trans. C.K. Scott Moncrieff (New York: Random House, 1934).

15. Proust, p. 10.