

Charge to the Class

We're almost done. Only one thing more before we finish, which (as your program indicates) is our final charge to you. Happily, we are "charging" you here in a different sense than we've charged you for the past three years. Those charges are ended—to your relief, I am sure, not to mention that of your families. (Okay: I stole that line from Bob Weisberg, and I use it every year.)

Today's charge, in any event, has a different meaning and a different purpose. For as we confer your degree, we entrust you with a task and assign you a responsibility. The task and the responsibility are straightforward and can be simply stated: We want and expect you to go out there and make a difference. To use your training for good, and to make the world a better place.

Humanity faces some truly terrible challenges today. But if history teaches anything, it is that great challenges bring great opportunities. And, indeed, you leave here with opportunities to make a difference that are indeed rare. So take advantage of them. Be ambitious. Make a difference for the better.

Now before you dismiss that as just so much pablum, the kind of thing graduation speakers always say, let me add this: making a difference for the better isn't easy. I just observed that we face some terrible challenges, and the last year truly has been a remarkable one. We watched and participated in a dramatic political sea change, a kind of shift that occurs no more than once every generation or two. And we witnessed and experienced the kind of economic upheaval that (fortunately) occurs no more than once a century. We're still in the midst of both events, moreover, watching them unfold with no sense yet of exactly how or when or where things will settle. And one result is that the professional world you are entering is more uncertain than has been the case for Stanford law graduates for quite some time.

Some of this uncertainty has to do with career prospects: Is the profession about to change? Will there be jobs? What will happen to salaries? I understand that uncertainty, and the anxiety it engenders. But I don't want to make it the subject of a speech. Because I know, too, that it's temporary. It may take a year or two, or even three, but the economy will recover. The profession will remain strong, even if it does change. And people with your abilities, drive, ambition, and education will do just fine. Your takeoff may be bumpier than has been true for new lawyers in the past decade, but, still, you'll do wonderfully. And when the crisis passes, I fully expect you to flourish as Stanford law graduates have always flourished, in good times and bad.

So with that confidence I won't dwell on the challenges of a bad economy, as large as these may loom at the moment. I want instead to focus on a different challenge that has thrust itself into public consciousness—namely, the challenge of knowing when to stand up and say no.

That challenge has been illustrated most recently and most obviously by the so-called torture memos. But in referring to these, I am not thinking just about their authors, and neither should you. For the lawyers who produced the memos had, by the time they wrote, undoubtedly

persuaded themselves that they were right. It is conventional wisdom that the first person an advocate must persuade is him or herself. And the subtle process by which the task of representing a client can itself change one's beliefs is an important and complicated topic, well worth pondering and keeping in mind as you grow into the profession.

This is not to let the authors of those memos off the hook. But I am thinking here of other lawyers as well: the ones who saw the memos, who believed they were wrong, and who nevertheless did nothing. Or did nothing more than lodge a weak protest before going along. Nor, in thinking about this challenge, can we stop with the government lawyers involved in the war on terror. They, at least, had the excuse of being caught in extraordinary circumstances called forth by an extraordinary situation. But what are we to make of the literally thousands of lawyers who sat by and said or did nothing while corporate frauds were committed or, worse, while risks these lawyers knew to be unconscionable were taken with the resources and livelihoods of millions of people?

Don't deceive yourselves into believing that the problem of when to say no arises only in uncommon circumstances. It is, rather, part and parcel of the job. Remember, lawyers act as advisors as often and as much as advocates. People come to us for advice about what they can and cannot do. Advice they can get nowhere else. Advice they can seek while revealing their worst intentions and their ugliest actions, because the system permits, indeed encourages, them to explore those limits with their lawyers. There is a reason "counselor" is a synonym for lawyer. Your counsel will be sought: sought by people hoping to be told that it is okay to do what they want, people who are, in fact, willing to pay a lot of money to be told that.

This is no small problem. No one wants a lawyer who can only identify risks and counsel against acting. To be helpful, lawyers must, as the phrase goes, know how to "get to yes." But to say that we want lawyers who "get to yes," is not to say that we want lawyers who simply surrender their will and their conscience to that of their clients. You must, as a lawyer, straddle a tenuous, uncertain line: a line that gets blurry because (as they say in the tech world) you have to get so close you can see the pixels. You must be, simultaneously, an agent and an inspector, your clients' alter ego and their superego.

It is, moreover, more important than ever that you not confine your professional advice to a narrow conception of what the law permits or forbids. We live in a time (and it hasn't always been like this) when questions of what is right are increasingly and all too easily merged into questions of what is legal. A friend in the military recently told me of being in Iraq and observing an ongoing combat operation. Military commanders on the scene were connected by phone to lawyers, calling before each shot to ask whether they could fire at fighters on the roof of an occupied apartment building; being told by these lawyers—who were, apparently, in a situation room on an army base in Texas—to fire first over their heads before shooting to kill. The soldiers did not act without approval from the lawyers, but that approval was decisive. This sort of thing is not unusual, and the lawyerization of American society has proceeded apace, with the accompanying tendency to turn questions about what we should do into questions about what we can (legally) do.

Put aside for the moment whether this is a good thing (it is not). But that it's so places a responsibility on the shoulders of our profession: that is, on your shoulders. It is why, as lawyers, you must be prepared to speak with your clients about what's right as well as what's legal. Because if lawyers don't do so, there may be no one else who can or will. If clients can seek our advice confidentially, and leave armed with the belief that they can do what they want so long as it is legal, it becomes part of our responsibility to be sure that the question whether something is right remains at least part of the equation.

So far, so good. But, in truth, so far I haven't really said much. So far, I've said only that you should make sure your clients understand that just because something is legal does not make it right and that you should, where appropriate, engage in a conversation that includes both. Of course, even this can be harder than you think. Some of the people you'll work for won't want to hear what you think about the rightness of their actions: won't want to hear from you anything beyond whether those actions are, in fact, legally permitted. This is a tricky problem, but it's mainly one of learning how to tailor the way you present advice to ensure that everything that needs to be heard is heard. The point is not to demonstrate your moral rectitude but to help your clients see the full picture.

More difficult is seeing the full picture yourself: being able to stand apart from the role you are, as an attorney, asked to play, so you can think about the consequences of what your client is contemplating independent of that client's desires and expectations. Most of you have probably heard of Philip Zimbardo's famous prison experiment, in which a group of Stanford undergraduates were randomly divided into guards and prisoners in a mock prison in the basement of the psychology department. The experiment had to be called off after only a few days because of how quickly the students adapted to their roles, with suddenly sadistic guards putting suddenly passive prisoners into situations that were physically and psychologically dangerous and damaging.

Much as we might like to believe otherwise, actions are determined by setting more than by individual personality. It's not as if the students chosen to be guards were "worse" people than those chosen to be prisoners. On the contrary, had the groups been flipped the results would almost certainly have been the same. People (including smart, moral, upstanding people like yourselves) tend overwhelmingly to conform their actions to whatever social expectations are created by the situations in which they find themselves. It takes discipline, introspection, and self-honesty to pull yourself out of the setting you are in and put aside the expectations it creates for behavior.

And lawyers are especially at risk of falling into this kind of situational conformity, because our whole training is about being an advocate for somebody else's interests. Anyone who has ever represented someone as a lawyer has experienced this feeling of identification with the client and the client's goals, and the resulting loss of objectivity it entails.

Of course, most of the time this is a good thing. Most of the time we should be helping our clients, without hesitation or reservation, and being swept along, with the understanding that this is what a good lawyer does, makes us more effective.

But not always. Come back to that lawyer in the Office of Legal Counsel who sees a memo justifying waterboarding come across his or her desk, or the in-house lawyer at an investment bank who sees an instrument that puts the wealth of thousands of unknowing investors at risk because it rests on preposterous assumptions. These are just the sorts of situations in which going along often turns out to be easiest: when you find yourself surrounded by others seemingly untroubled by what troubles you, others who would be surprised or angry to learn that one of their own questions what is (to them) so obviously right.

Ask yourself: when you're in this situation, will you pay attention to that little voice nagging in the back of your mind? Will you follow its urging to be the spoilsport? Will you stand up and object? And after your friends and colleagues (because that's who you'll be dealing with) have dismissed or overridden your concerns, will you act? Will you resign in protest or blow the whistle or take some other step to prevent a bad thing from happening?

All I can say for sure is: don't kid yourself into thinking this is easy. As events of the past few years have shown, not many lawyers (or anyone else for that matter) have been willing to do so.

The ability to act in such circumstances is, of course, partly a matter of courage, of individual fortitude and nerve. George Fisher gave a beautiful speech at graduation two years ago in which he spoke about just this point: "Not long from now," he said, "you'll face choices that test your nerve. And you will learn that one option you never will have is not to decide. You can confer with colleagues and superiors, you can ask their advice, but in the end you will have to decide. And when you face those decisions that test your nerve, take the time to walk a few steps down the road and look back at yourselves. Don't leave yourselves wishing that your nerve had held."

But there's more to it than that, because rarely will you be sure that you are right and that everyone else is wrong. Rarely will you not wonder whether, if everyone else thinks something is okay, then maybe it is. Maybe it's you who's missing the point or making mountains out of molehills. And, sad to say, most of the time your doubts will be warranted. Most of the time you won't know better than everyone else. Most of the time, perhaps you should go along.

So how do you know when it's time to put things on the line? The most oft-quoted advice for this situation comes, as so much advice comes, from Shakespeare: "to thine own self be true." But, then, maybe it's precisely because this fine sounding piece of wisdom is, in fact, useless as a practical matter that Shakespeare (speaking through Hamlet) derides Polonius, as "a tedious old fool" and "a foolish prating knave."

So forgive this foolish prating knave if he cannot do much better. Because I'm not sure what more one can say, other than this: Life is filled with choices and some of them are hard. And you'll need to make them by yourself and for yourself. You can consult with others, you can ask for advice. But in the end, your choices will be your own, and the most you can do—indeed, something you must do—is to take a moment, check your gut, and be sure you are being honest with yourself.

And remember George's sage advice to walk a few steps down the road and look back at yourself.

I don't know how many of you know this, but three of the students who played guards in Zimbardo's prison study went on to become prison psychologists. So traumatized were they by what they had done in those couple of days that making up for it changed the course of their whole lives. We should, of course, respect that choice. After all, repentance is surely better than denial or concealment or guilt. Better still, however, not to do something you'll spend the rest of your life making up for.

Seek to maintain a sense of balance in the midst of life's messiness, to preserve your center—your sense of who you are and who you want to be—so you can judge which compromises are worth making and which sacrifices go too far. Be honest with yourself about what you are doing and why you are doing it, and in this way you will at least retain control of your ethical core. Keep your balance and you can do truly great things. We, at least, are confident that you will.

And so, again, congratulations, have wonderful futures, and keep in touch.