

Small Question Marks and the Big Schabowski*

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I. Gratitude and Advice

Thank you so much for that lovely introduction. To be honest, it's kind of a relief. I thought maybe – instead of voting for “Dan Ho” – you were voting for “Don Ho,” the Hawaiian ukulele virtuoso.

I'm told that a commencement speech should dole out some advice. So my entire speech contains only one piece of advice, and here it is: “Work Hard. Save your money. And someday, you'll be able to afford a room in the Munger Graduate Residence.”

In all seriousness, it's impossible to express how much this award means to me. It is an honor of the highest degree for a teacher to speak to you, gathered as the class of 2010 one last time.

II. Family and Misunderstandings

When I found out about the Hurlbut award, I immediately wrote to my sister. Shortly after, followed a concerned message by my parents, who live abroad: “Dan, your sister said you won some sort of a hurling award. Shouldn't you be focusing on your academic work?”

Of course, with a family name like “Ho,” we sympathize with the Hurlbuts. I for one have a beef with the QWERTY keyboard, because it places the letters “m” and “n” next to each other. When typing fast, the result has been an email of the following form:

“Dear Jeannie,
It was lovely to meet you.
Damn Ho”

Jeannie no longer contributes to the Law School Fund. [Sorry, Larry.]

III. Class and Community

Over the past three years, you've faced the largest number of structural changes of any class in recent memory: from semesters to quarters, to the new grading system, to self-

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scheduled exams. Last month, our Dean Larry Kramer was pushing for yet one more quintessential reform that will undoubtedly set the Stanford Law School apart from any of its peer institutions: adding a sixth bathroom to the four-bedroom Munger suite.

One of greatest strengths of the community is of course the collegiality, openness, and supportiveness of the faculty and staff. Just the other day, I was talking to Joe Bankman, who delivered a marvelous commencement address a few years ago, and he provided some advice on how to write this speech: “Dan, you should bring the same humanity to your speech as you do to your writing.” That sounded like great advice. Then, I reminded him that my most cited article is called: “Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference.” Joe replied, and I’m not making this up: “You’re so screwed.”

And really, Joe’s right.

IV. The Daunting Task

Speaking to you is a daunting task. First, how could anyone possibly interpret, summarize, and encapsulate the entirety of your law school experience . . . without slides and interactive clickers? (Believe me, I tried, but apparently our commencement budget doesn’t cover 2000 clickers and a JumboTron.)

Second, you’re far too smart to buy into conventional commencement clichés. You’ve all heard these. Clichés like:

“Commencement isn’t the end, it’s just the beginning . . . of putting off your loan payments,” or

“Never lose sight of your dreams . . . of sporting six-pack abs like Norm Spaulding,” or

“Your generation faces a world that is more complex and challenging than any previous . . . World of Warcraft MMORPG.”

Third, past speeches have been extraordinary, reciting, for example, classics of Western literature and poetry. Pam Karlan interpreted Dante’s *Inferno* . . . some of it in the original Italian. Barbara Fried quoted Shakespeare, Frost, Larkin. And Barbara Babcock gave a moving rendition of Yeats’s *Second Coming*.

So I would like to share with you one of the high watermarks of my culture: in Chinese, they know it as 南方公园 [nanfang gongyuan] . . . you might know it as the television show South Park, episode 217. For those of you who don’t speak South Park, the episode involves a bunch of gnomes trying to make a lot of money. Their business plan is three lines:

Phase 1: Collect Underpants

Phase 2: Question Mark
Phase 3: Profit

These so-called “underpant gnomes” work tirelessly, sneaking into bedrooms at 3am to steal and collect all the underpants in the world. That’s the business plan: collect underpants, question mark, profit.

What law school teaches you is to question that question mark. Why collect the underpants? How do they help profit? And why at 3am? And couldn’t Mitch Polinsky help us do this much more efficiently?

V. Question Marks

As you realize, there’s a lot of space between underpants and profit. And it’s that space, metaphorically speaking, I’d like to talk about today: the law’s question marks.

The law’s question marks arise most frequently in the day-to-day administration of the law, which you are about to embark on in the broadest sense. While we have taught you general legal principles that raise rather big questions, what I would like to suggest to you today is that the life of the law depends just as critically on the compassionate and wise exercise of your discretion in small question marks.

Put differently, law may be reason free from passion, but discretion sans compassion leaves law lifeless.

So let me tell you two stories – stories of how, but for the exercise of individual discretion in the seemingly minor administration of the law, I might not be speaking to you today.

VI. Story One: Schabowski’s Travel Regulation

Story number one involves the tumultuous changes of Europe in 1989. As some of you know, I was born in then-West Germany, speaking German for the first 11 years of my life. (Many of you probably guessed this from my classic Aryan features.) When I was 11, my family moved to a small nickel-mining town in Northern Canada. Now middle school is tough enough. But imagine what happens when you’re Chinese in Northern Canada . . . and speak like the Governator. One of my friends still claims that I turned around to him, flexed my biceps, and said (in thick German accent): “Look at how big my bodies are.”

But this isn’t a story about being lost in translation. It is a story about imprecision in the administration of the law.

On November 9, 1989, while my family was still in Germany, the East German Government issued regulations that incrementally liberalized travel restrictions to the West. The party press secretary, Schabowski, was responsible for announcing these

regulations and at the press conference, one journalist asked a seemingly innocuous question about *when* they would take effect.

Timing, as you know, is an important feature of justice: does the law apply “effective immediately”, “with all deliberate speed”, or “with no speed whatsoever”? The big Schabowski, slightly befuddled, examined his piece of paper, and concluded: “effective immediately.”

In actuality, the government had intended for these regulations to take effect the next day, because someone needed to inform the border guards how to administer the law. Yet that night tens of thousands of East Berlin residents heard of the press conference, and streamed towards the border gates.

The border guards had not been informed. Soon, a full-fledged protest was under way. The guards tried to disperse the crowds, but not one protester would go. The guards called for clarification, but no one of authority could be reached. The guards could have shot, but no one wanted the blame. After hours of a tense standoff, with bodies pushing against the gates and East Berlin residents ripping apart their passports, to the astonishment of everyone, including themselves, the guards opened the gate. Tens of thousands crossed the border euphorically.

On that fateful night, the formal regulation stood at odds with the law in action. The exercise of discretion to open the gates cracked open the Berlin Wall and set off a rupture in global politics. And all this was hastened by Schabowski’s unreflective interpretation of the law.

There are poignant moments in the development of the law where small differences in language such as “effective immediately” and “with all deliberate speed” matter immensely. Without Schabowski’s unwitting interpretation or the compassionate relenting of the border guards, Germany would not have changed how and when it did.

Timing more generally also affected my family’s decision to move – had the Wall come down earlier, my dad’s job would have led us to West Berlin – and timing is hence one reason I’m here today.

Of course, I’m enough of a political scientist to believe that the Berlin Wall would have fallen eventually.

Schabowski’s misinterpretation didn’t make all the difference in the world, but it made a world of difference to me.

VII. Story Two: Jane’s Citizenship Exam

The second story of discretion in the administration of the law is a more personal one about my application for U.S. citizenship. I was in law school at the time, which inspired hiring an immigration attorney, named Wendell. As it turns out, some immigration

lawyers just give you the application form to fill out by hand; then they type it up and send it in. (These lawyers are perhaps the underpant gnomes of immigration law.)

The application form includes questions called the “Oath Requirements”:

1. “Do you support the Constitution and form of government of the United States?”
2. “Are you willing to take the . . . Oath of Allegiance . . . ?”
3. “[A]re you willing to bear arms on behalf of the United States?”

Obviously, for any citizenship applicant the answer is “yes” to the first two. As for the third, I figured that “bearing arms” on the behalf of the United States would be a good opportunity to “show off my big bodies.”

After sending in the application, it came time for my oral citizenship exam. My examiner was a woman we’ll call Jane.

Now remember I’m a bit of an administrative law geek. One question on the exam was: “Which branch of the government makes the laws?” Eager to display my wisdom: “This is a notoriously difficult question of administrative law. It depends in large part on whether you adopt a functionalist or formalist approach to the separation of powers under the Constitution. Which would you prefer?”

Another part of the oral exam includes re-administering the oath requirements:

- “Do you support the Constitution and form of government . . . ?”
- “Are you willing to take the . . . Oath of Allegiance . . . ?”
- “[A]re you willing to bear arms . . . ?”

After the obligatory “yes,” “yes,” “yes,” we were about to move on, but I noticed the application sitting on Jane’s desk and said: “Wait a minute . . . why do the all answers say ‘no’ on my application?”

By virtue of a “scrivener’s error,” Wendell, my immigration attorney, had switched all of my “yes’s” to “no’s” on the oath requirements. As in: no, I don’t support the Constitution; no, I don’t support government; and no, I’m not willing to bear arms. I was of course horrified. I later sent off an email to Wendell ending in “Damn Ho” . . . but this time the QWERTY keyboard was not to blame.

Jane could have rejected my application then and there. After all, what do you do with an applicant for citizenship from a government that on paper he does not support? How could Jane know that this was but a “scrivener’s error”? As a law student, my mind was already spinning with avenues for judicial review. Not as a law student, my mind was drafting up a list of female friends willing to marry me for a passport.

Thankfully, the error was resolved through a much simpler exercise of discretion. Jane opened her drawer, took out a red felt pen, crossed out those “No’s,” and changed them to “Yes’s.”

Jane drew on compassion and common sense to reject a formal answer on paper. Without that exercise of discretion in the administration of the law – the way law operates in real life – I might not be standing before you today.

Of course, I’m enough of a statistician to think there’s some *probability* I still would have ended up here. Jane’s discretion might not have been dispositive, but it was distinctly positive for me.

VIII. Trust and Resolution

So what do these two stories about the Big Schabowski and the little decisions tell us as you stand on the brink of administering the law?

Put simply, there’s a lot in the law’s question marks. While we have taught you foundational principles as best as we can, the exercise of discretion – be it in a simple phrase, an open gate, or the stroke of a red felt pen – will consume much of your professional lives. Sometimes the decision is big: like opening a border. But much of the time, the decision may seem small. It may be as simple as verifying whether the “m” was meant as an “n” or the “no” was really a “no”, but the decision can make the difference between your client ending up in West Berlin, Northern Canada, or talking to you today.

The degree you are about to receive is a trust. Like Schabowski, you will face situations requiring good judgment, where unreflective or unwise decisions can dramatically affect lives. Like Jane, you will find yourselves in positions with considerable discretion, where no rule tells you what to do.

I would like nothing more than to say that your legal education has given you all the tools you need to decide wisely, or compassionately, in such cases. It has not. From now on, the most we as a faculty can do is trust you.

We do.

We trust you. To exercise good judgment. To wield discretion with compassion. To employ law in advance of justice. To question the question marks. To do the best “Dannnn job” that you can.

Effective immediately.

Thank you.