

YALE LAW SCHOOL COMMENCEMENT

Remarks by Justice Goodwin Liu

May 21, 2018

Dean Gerken, thank you so much. Your introduction made me feel like the smart kid in my law school class. But I assure you that wasn't the case. You know what they say: The A students end up being scholars. The B students become judges. And the C students become millionaires.

Distinguished faculty members, former teachers and mentors, honored guests, parents, family, and friends of the graduates: This is the happiest day of the academic year, and I am so honored to share it with you.

To the Yale Law School class of 2018: Congratulations on all that you have learned and accomplished here. And it is truly amazing that it took you three years to qualify for Barbri. You may think it's funny that you are only now ready to learn some real law. But I assure you, your parents do not.

Please remember one thing this summer: Meta is not "bettuh" on the bar exam. When an essay question asks who's liable for a slip-and-fall on a banana peel, don't write about the banana peel as a metaphor for environmental injustice. And when the fact pattern asks whether a certain negotiation has resulted in a contract, do not apply the Coase Theorem. I don't care what Dan Markovits taught you. *Don't do it.*

If you are at all nervous about the bar exam, let me tell you a story. Twenty years ago this week, I graduated from law school. Then, as now, Yale did not have a big reputation for teaching black letter law. So when it was time for me to take the California bar, I did Barbri.

At first, I thought things were going well. I actually enjoyed Barbri because it made the law so simple and clear. Then, just before July 4, Barbri gave a practice multistate exam. The practice test is given nationwide, and your score for each subject is reported as a percentile rank, so you know where you stand compared to everyone else.

I took the practice exam, had a nice July 4, then got my scores. In con law, a Yale specialty, I scored above the 70th percentile. Not bad. But in the common law subjects—you know, the stuff that state supreme court justices are supposed to know—I didn't make the 70th percentile. I didn't make the 50th percentile. I didn't make the 25th percentile.

No, ladies and gentlemen, in contracts—I will never forget this—my score card said: 3. Yes, 3. As you will recall, 3 is an unimpressive score on the 5-point scale for high school AP exams. My 3 meant that 97 percent of test-takers knew more contracts than I did. You have to try hard to get a score that low.

My scores for evidence, torts, and property were also in the teens and low twenties. That July was very painful, but I did get my act together and pass the bar exam. So what's the lesson here? The lesson is: If you graduate from Yale Law School knowing almost no black letter law, not only can you pass the bar exam—you too can become a justice of the California Supreme Court!

In all seriousness, your education has prepared you to be not only *members* of the legal profession but its *leaders*. And with leadership comes responsibility for public service. Your track record here is impressive, whether it's expanding benefits for our veterans, aiding refugees who are seeking asylum, or suing government officials for exceeding their authority—and winning. For some of you, this stuff will be your life's work. For all of you, it is certain you will be called to public service many times in your life, and today I would like to mention two matters of special concern to our profession.

I.

First, no matter what you do in your career, I hope all of you will find time to engage with our criminal justice system. When I went to work at a D.C. law firm as a young associate, one of the best things I did was sign up for pro bono cases referred by the Montgomery County, Maryland Public Defender. One of my clients, Mona, was accused of throwing a knife at her husband. Mona was charged with assault and faced up to 10 years. When I met with her, she didn't deny the knife incident. But she had no criminal history, she had a full-time job, and over a few conversations, it became clear she was in an abusive relationship that included at least one sexual assault. I brought this information to the DA, who agreed to drop the charge so long as Mona went to counseling.

No amazing brief, no Perry Mason moment—just listening and asking questions were enough to keep Mona from becoming another black inmate among Maryland's 70 percent black prison population. My fancy education had taught me to believe no work was above my pay grade. But I then learned that no work was *beneath* my pay grade when it comes to making a difference in someone's life.

Some of you will do this work as prosecutors, public defenders, and judges. Most of you won't, but you can still contribute. One of the best lawyers I've been lucky to know is Seth Waxman, a Yale law graduate and former Solicitor General. Another is Ken Frazier, a graduate of that other law school and former general counsel and now CEO of Merck, the pharmaceutical company. Another is Rich

Parker, a senior partner at the D.C. firm where I worked and one of the top antitrust lawyers in the country. What do these lawyers have in common besides big clients and big incomes? All of them have successfully represented one or more defendants facing the death penalty during their careers—at trial, on appeal, or in post-conviction proceedings. And all of them mention those cases as ones that make them most proud.

Doing this work will give you more than satisfaction. It will give you insight into important questions—like why so many cases like Mona’s go without investigation, why the incarceration rate for blacks is five times the rate for whites,¹ and why the United States, with less than 5 percent of the world’s population, has more than 20 percent of the world’s prisoners.²

I’ve now sat on hundreds of criminal cases, including more than 100 death penalty appeals. I have seen how crime can disfigure the lives of victims and their communities. I have also seen that the system is fallible. Twice in the past two years, my court has overturned a murder conviction based on false evidence. Bill Richards was convicted based on bite mark evidence that the prosecution expert later recanted.³ And Vicente Benavides was sent to death row based on testimony about the victim’s injuries later found to be “anatomically impossible.”⁴ Both men walked out of prison after serving more than 20 years, joining over 2,200 other exonerees in America since 1989.⁵

I have seen how crime is linked to drug abuse, mental illness, and poverty. Although the majority of people in the bottom fifth of income do not end up behind bars, the majority of people behind bars are from the bottom fifth of income.⁶ And the majority are black or brown.⁷

James Forman on this faculty has said ending mass incarceration is “the unfinished work of the civil rights movement.”⁸ Whether or not you agree, one thing is clear: our current approach is not cheap. Over the past three decades, spending on prisons has increased three times faster than spending on K-12 education,⁹ even though we know people with more education are less likely to commit crimes.¹⁰

For several years, I’ve taken my law clerks to visit San Quentin, a prison with 3,700 inmates, including 740 on death row. Last year, we met lifers like Curtis Carroll, who grew up homeless with a single mom who sold her blood to buy food. At 17, he murdered a young man named Gilberto Gil. He went to prison illiterate, and he would ask his cellmate to read the newspaper to him. One day, he accidentally grabbed the business section instead of the sports page. His cellmate asked, “Do you play stocks?” Carroll said, “What’s that?” And his cellmate said, “It’s where white people keep their money.” Carroll got motivated, and at 20 years old, he did one of the hardest things in his life: he learned to read. He also learned

the art of investing and became so knowledgeable that his friends call him Wall Street. Prison staff seek his advice, and he started a financial literacy program for fellow inmates. He even has a Ted talk with over 2.7 million views.¹¹

We also met Earlonne Woods, who is doing 31 years to life for attempted robbery. Together with inmate Antwan Williams and artist Nigel Poor, Woods created an award-winning podcast about prison life called Ear Hustle, which has been downloaded over seven million times.¹²

Then there are the eight lifers who volunteered for eight months of hospice training so they could help aging inmates with what they fear most: not dying, but dying alone. One of them, named Lenny, said: “Before my cellmate of five years passed, he begged me to take care of him. So I did. I fed him. I cleaned him up. When he had to go to the hospital he fought them. He wanted to come back. His dying made me start to change. The person who took care of him, that was a good part of me.”¹³

As Steve Bright says, all of us—including these inmates—are more than the worst thing we’ve ever done. There are nearly 40,000 inmates in California who may never see freedom,¹⁴ but it doesn’t have to be this way.¹⁵ Please stay engaged with these issues. Whether you become a professor, a GC, or a law firm partner, please apply some of your considerable talents to improving the efficacy and fairness of our criminal justice system.

II.

My second concern is the other half of the justice system—the civil side—and the urgent need for our profession to help people who need legal services but can’t afford it.

A memorable moment of my Supreme Court clerkship was a lunch with Dean Gerken’s former boss, Justice Souter, a man of great decency and familiar habits, including eating a cup of yogurt and an apple for lunch every day. Before Justice Souter became a judge or attorney general, he was a small-town lawyer in New Hampshire, and he said, “It was unthinkable in my community that anyone who needed a lawyer couldn’t get a lawyer. If someone needed help with probate, a divorce, or a small business dispute, a lawyer would help—sometimes for free or whatever the person could pay. That’s just the way it was.”

I was reminded of Justice Souter’s admonition a few years ago when I flew to LA for an event. I landed around midnight and struck up a conversation with my cab driver, a hardworking immigrant with a young family. He was having problems with an inattentive landlord, who would not address complaints or free him from the lease. He asked how he could get a lawyer to help. At the end of that

trip, I took another cab back to the airport. I asked the driver how long he had been driving, and he said a few months. I asked him what he was doing before, and he said he owned a marijuana dispensary. I said, “Oh, really? Tell me about that.” So he told me about the dispensary, who his growers were, what types of marijuana he sold. I said, “That’s interesting. So what happened?” And he said, “The feds raided my store.” I said, “Oh, really?” He said, “Yeah. They took all my plants.” I said, “Sorry to hear that.” And then there was a pause, and he said, “What do you do?” I said, “I’m a judge.” And the conversation petered out from there.

The fact is there are millions of ordinary people like these cab drivers with unmet legal needs. They have problems with landlords, immigration issues, child support, employment issues, and access to benefits. Even the owner of a marijuana dispensary should know his risks and liabilities in that uncertain area of the law.

Again, some of you will do this work full-time in your careers. Most of you won’t, but you can still contribute. There is less than one legal aid lawyer in the United States for every 20,000 indigent people.¹⁶ If you were to fill Fenway Park to capacity with low-income people, there would be just two lawyers to serve them all. (Or, if you prefer Yankee Stadium, there would be just three.) At \$200 an hour, we would need to spend \$40 billion to provide just one hour of legal help each year to every American household.¹⁷ The amount we actually spend on legal aid is less than \$1.5 billion a year.¹⁸

We must expand legal aid and pro bono services. But we have to do even more. To address the justice gap, we have to ask fundamental questions about how the delivery of legal services is structured. For at least a century, our profession has consisted of only one category of providers—lawyers—who typically work with clients in full-service relationships housed in brick-and-mortar enterprises. This model is expensive, and it is a result of how our profession is regulated, including prohibitions on fee-sharing and the unauthorized practice of law.

Compare this with medicine, where there has been intensive differentiation of function in service delivery. Our modern health care industry has proliferated categories of providers: doctors, nurse practitioners, physician’s assistants, nurses and technicians of all kinds. This allows the industry to triage needs to the lowest-cost provider and thereby expand access. Far be it from me to say our health care system is a paragon of efficiency. But just imagine if the health care profession had only one category of provider: doctors. Millions more people would be priced out of health care, and public subsidies could not possibly serve the numbers being served today. Yet that is how our profession provides services that are no less crucial to people’s lives and well-being.

We need to lower the cost of doing law, and to do so, we have to think outside the four corners of the legal profession as it exists today. It is starting to

happen with unbundled legal services, innovations like Rocket Lawyer and LegalZoom, and support programs like the Court Navigators in New York. These efforts are trying to put legal services within reach for ordinary people. Not all have been a success. But we must be willing to rethink our business model, and your generation, with its affinity for technology and disruptive innovation, must play a role.

This is not a matter of *noblesse oblige*; it is more urgent than that. If ordinary people are to have decent, stable lives, they must be protected against unlawful eviction, wage theft, abusive debt collection, sexual harassment, unlawful deportation, toxic exposure, and arbitrary denial of benefits. People without access to justice are at risk of abuse and exploitation. They must have remedies when they are wronged.

And I do not mean just the 13 percent of Americans who are officially poor. A very large segment of our working population does not earn enough to cover basic expenses, plan for college, or save for emergencies, much less afford a lawyer. Forty-five percent of Americans meet that definition of economic insecurity, including 66 percent of Hispanics households, 62 percent of black households, and 55 percent of children of all races.¹⁹ They are the hotel workers who make our beds in the morning and the custodians who will clean this building tonight. They are cab drivers, restaurant workers, small farmers, home health aides, day care providers, security guards, even teachers in our public schools. In the words of *Sesame Street*, “they’re the people that you meet each day,” and they work hard every day. For many, their next paycheck is all that stands between them and debt, poverty, or homelessness. They need a legal system that protects their rights to their homes, their livelihoods, and their incomes.

III.

During your careers, there will be many causes that vie for your time and talent. Give generously. And please don’t forget the issues I mentioned today. As lawyers, we have a special responsibility to make the justice system work for everyone—as Learned Hand said, to make an America where “the least shall be heard and considered side-by-side with the greatest.”²⁰

I will end with a quote from a United States President, spoken in an age before Twitter. In January of 1961, John F. Kennedy said farewell to his home state of Massachusetts in an address before the state legislature. In those remarks, he said this:

“[O]f those to whom much is given, much is required. And when at some future date the high court of history sits in judgment on each one of us ... our

success or failure, in whatever office we may hold, will be measured by the answers to four questions:

“First, were we truly men [and women] of courage — with the courage to stand up to one’s enemies — and the courage to stand up, when necessary, to one’s own associates — the courage to resist public pressure, as well as private greed?

“Secondly, were we truly men [and women] of judgment — with perceptive judgment of the future as well as the past — of our own mistakes as well as the mistakes of others — with enough wisdom to know what we did not know, and enough candor to admit it?

“Third, were we truly men [and women] of integrity — men [and women] who never ran out on either the principles in which they believed or the people who believed in them ... — men [and women] whom neither financial gain nor political ambition could ever divert from the fulfillment of our sacred trust?

“Finally, were we truly men [and women] of dedication — with an honor mortgaged to no single individual or group, and compromised by no private obligation or aim, but devoted solely to serving the public good and the national interest.”²¹

Each one of you has the courage, each one of you has the judgment, each one of you has the integrity, and each one of you has the dedication to make a difference in this world. This law school has prepared you well. The rest is up to you.

Congratulations, and good luck.

Notes

- ¹ Ashley Nellis, The Sentencing Project, [The Color of Justice: Racial and Ethnic Disparity in State Prisons](#) (2016).
- ² Roy Walmsley, International Centre for Prison Studies, [World Prison Population List](#) (10th ed. 2013).
- ³ In re Richards, 371 P.3d 195 (Cal. 2016); In re Richards, 289 P.3d 860, 876 (Cal. 2012) (Liu, J., dissenting).
- ⁴ In re Figueroa, 412 P.3d 356, 361 (Cal. 2018).
- ⁵ University of Michigan Law School, [National Registry of Exonerations](#). According to the [Death Penalty Information Center](#), there have been 162 death row exonerations since 1973.
- ⁶ Bernadette Rabuy & Daniel Kopf, [Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned](#) (2015); U.S. Census Bureau, [Historical Income Tables: Households, Table H-1 \(Income Limits for Each Fifth and Top 5 Percent\)](#).
- ⁷ E. Ann Carson, Bureau of Justice Statistics, U.S. Department of Justice, [Prisoners in 2016](#) (2018).
- ⁸ James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* (2017).
- ⁹ U.S. Department of Education, [State and Local Expenditures on Corrections and Education](#) (2016).
- ¹⁰ E.g., Lance Lochner & Enrico Moretti, The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports, 94 *American Economic Review* 155 (2004).
- ¹¹ Curtis Carroll, [How I Learned to Read—and Trade Stocks—in Prison](#), TEDxSanQuentin (Jan. 2016); Laurie Segall, [Robin Williams' Son and San Quentin Inmate Teach Finance Behind Bars](#), CNNMoney (Aug. 5, 2015); Emily Green, [Investment Guru Teaches Financial Literacy While Serving Life Sentence](#), NPR (Mar. 21, 2015).
- ¹² Ear Hustle, <https://www.earhustlesq.com/>.
- ¹³ Wendy MacNaughton, [Meanwhile in San Quentin](#), California Sunday Magazine (2018).
- ¹⁴ Ashley Nellis, The Sentencing Project, [Still Life: America's Increasing Use of Life and Long-Term Sentences](#) (2017).
- ¹⁵ For example, California in recent years has enacted a variety of reforms, including mandatory parole hearings for youth offenders (Cal. Pen. Code § 3051), elderly parole for inmates age 60 or older (*id.* § 3055), and resentencing opportunities for offenders convicted under the Three Strikes Law (*id.* § 1170.126).
- ¹⁶ Data on legal aid lawyers are available from the [Justice Index](#) created by Fordham Law School's National Center for Access to Justice.
- ¹⁷ Gillian Hadfield & Deborah Rhode, How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering, 67 *Hastings Law Journal* 1191 (2016).
- ¹⁸ The figure is from Meredith McBurney, Resource Development Consultant at the American Bar Association Resource Center for Access to Justice Initiatives.
- ¹⁹ Mokoto Rich, Economic Insecurity, N.Y. Times, Nov. 22, 2011 (Economix blog) (reporting on study by the nonprofit group Wider Opportunities for Women).
- ²⁰ Learned Hand, *The Spirit of Liberty* (1944).
- ²¹ The address is available at the [John F. Kennedy Presidential Library and Museum](#) website.