

What Does it Mean to be a Lawyer in Troubled Times?
Address to the Yale Law School Graduating Class of 2017
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I am delighted and honored to be with you on this day of transformation. Today, you're no longer a law student but a lawyer. (Technically, I suppose, you'll have to take the bar exam, but in true Yale fashion, let's assume that you'll pass it. And you will.) As of today, you no longer need to meet academic expectations. Your classes are behind you, and so are your SAW and Substantial (I hope). As of today, though, you begin a much harder project— to figure out what you can contribute to the world and then to meet your own expectations.

For the faculty too, this is a day of transformation. No longer are we your teachers. Instead, we are your colleagues. No longer can we compel your attention – unless we say something worth listening to. We are delighted to be sending you into the world. We cannot wait to see what you will do.

Having said that, I hope you'll indulge me as I say just one last teachery thing. I – and we – are so very proud of you. This class is special to me, because I've had the chance to get to know so many of you. And, to use a technical expression, you rock. Already, you have litigated important cases. You have represented the interests of the disadvantaged in politics and in policy circles. You have written papers that advance the world's knowledge. And you have learned how the law can advance justice – and can impede it.

We are also grateful to the families and friends whose work and sacrifice have helped you reach this moment. With their help, you have weathered the setbacks and failures – yes, failures! -- that inevitably attend success.

This is a joyous day! And yet, even as we celebrate your success, we should reflect on the privilege that our education confers on us. Every human being has equal moral worth. But not everyone has an equal capacity to shape our society. Today, more than ever, an elite legal education gives us access to the halls of power.

How should we use that access?

How can we ensure that the law aids the cause of social justice – instead of blocking it?

These questions feel especially urgent because we live in troubled times, and I do not say this lightly. Domestically and internationally, we see deepening inequality. Some people succeed in the global economy, while others fall behind. Many people find themselves anxious and angry about their own life chances and their children's.

These troubled times might motivate productive social change. We can and should address economic inequality and its impact on social and political equality. But growing inequality and growing anger also pose a very real danger. Here, and abroad, we see a polarized electorate. We hear political discourse that sets rhetoric above truth. And we witness political leaders who seek to acquire power for themselves by scapegoating the vulnerable.

Today, I want to argue that we, as lawyers, have a central role to play in these troubled times. We have the ability and, I would say, the duty, to use the law to hold power accountable to all the people – and to the cause of justice.

I want to begin with a story. This is a story I first heard as a law student, and it's become quite meaningful to me. I hope it will be meaningful to you.

When I was at Yale in the mid-1980s, we had a class on English legal history taught by Toby Milsom, a celebrated professor from Oxford. Professor Milsom taught us, among other subjects, about the curious world of medieval English law. Those of you who are "Game of Thrones" fans would have enjoyed this – we learned about trials by ordeal and by oath and by battle. All of these were real things in England in the Middle Ages and for some time afterward.

The particular story that has stuck with me comes from the 12th and 13th century. By the 12th century, English courts had extensive procedural rules, and these required ordinary people to navigate some daunting formalities. Anyone who wanted to bring a case had to plead their cause in exactly the right words. There were, generally speaking, no written pleadings, and that made sense because most English people of the time were illiterate. People who wanted to petition for justice or to defend against a charge had to show up in person and speak their claims. Those who chose the wrong form of words or who made a mistake in the words they uttered could have their cases thrown out – or, worse, could find themselves unnecessarily facing trial by ordeal or by battle.¹

Adding to the pressure, these complicated legal formulas had to be spoken, not in English, but in French. As you might remember, a little event called the Norman Conquest had taken place in 1066. And for quite a long time afterward, French was the language of politics and power in England. (Court records, such as they were, were typically written in Latin, but relatively few people were capable of conversing in Latin, and so law-French was born.)²

Now, there were no professional lawyers, as such, in 12th-century England. There was no bar, no legal profession, no system of solicitors and barristers. All that came later.

But what happened in this period is that people began to bring friends to court to help speak the right words. We can speculate that these friends might originally have been kinsmen or neighbors who spoke French. We do know that, very gradually, some of these helpers became repeat players in the courts.³

And so, over time, there came to be a class of professional pleaders, called *conturs* (in old French, or *conteurs* in modern French). *Conter* means “to tell” in French, and the *conteurs* did just that. Their job was to stand beside the litigants and to recount their stories – to speak for them, in French, using the proper forms, and without a mistake.⁴

Now, when I first heard this story in Toby Milsom’s class, I thought it was comical and maybe a little insulting to lawyers. You can imagine what Monty Python could do with material like this. We knew it! Lawyers are trained showmen – mouthpieces who are paid to spout empty formalities.

But as I’ve thought about this story over time, it has come to have a more hopeful and touching meaning. Because what it the *conteur* offered the client was to tell their story in a language that could and would be heard by the powerful. Put another way, the *conteurs* translated pleas for justice not just into French but into the language of law.

Today, we share with our 12th century counterparts the power to use the language of law to hold power accountable. In the modern world, *law* is the language of power – not only in the courtroom but in the halls of Congress, in state capitals, and in the offices of government agencies.

Just think of the vocabulary you now use that would have been entirely foreign to you three years ago. Tort and fee simple; statutory construction and federal pre-emption. Some of you, I know from personal experience, can even command the terrible words of the Internal Revenue Code – words like depreciation and basis and capital gains. In our time, these words compel the attention of the powerful – from judges to Senators, from bureaucrats to arbitrators.

Many of you have already deployed the language of law to serve social justice. Some of you worked with the Worker and Immigrant Rights clinic to halt the travel ban.⁵ Some of you worked with the Mortgage Foreclosure Litigation Clinic to challenge unlawful debt collection practices.⁶ Some of you worked with the Veterans Legal Services Clinic to challenge unconscionable delays in veterans’ benefits.⁷ I could go on – and I hope you’ll forgive me if I don’t mention your project by name. But my point is that all of you translated pleas for social justice into the legal language that commands the attention of the powerful.

And the power of law extends beyond the courtroom. Some of you in the Lowenstein International Human Rights clinic testified in Hartford about limiting solitary confinement.⁸ Some of you in the Environmental Justice Clinic urged the EPA to address environmental harms that affect minority communities, like the notorious water contamination in Flint, Michigan.⁹ You, too, were able to engage political decision makers by using the language and forms of law.

Some of you have used legal scholarship to exercise the power of law. Some of you revealed the unjust origins and shaky legal foundations of marijuana regulation. Some of

you called for the state to provide a decent education to every child, without regard to race, immigration status, sexual orientation, or gender identity. And I could go on.

At the same time, lawyers have a critical role to play in spotting the limitations of law. When we understand the language of law, we can reject pointless legal formalities. Too often, powerful actors retreat behind the forms of law, using law as a barricade against justice. To take a hypothetical: imagine an employer that uses repeated legal appeals as a delaying tactic to avoid bargaining with a certified teachers' union. As lawyers, we need not be daunted by the invocation of legal words and legal power. We can call on that employer to act according to the values and spirit of the law rather than taking advantage of legal technicalities.

This vision of lawyers as speaking the language of power is inherently political, in the sense that lawyers can and should engage with political power. But it does not partake of any particular political ideology. We can – and will – differ in our principled judgments about the use of state power. Some of you may think that the state should do more to address economic inequality, to improve access to health care, and to fight discrimination. Some of you may, by contrast, worry that state power is too often misused. And so you may want to limit state power in realms from reproductive choice to the death penalty to the marketplace.

But, whether we locate ourselves among the social democrats or the libertarians, we share the capacity to deploy the language and forms of law. When we speak the truth on behalf of others, and toward the achievement of principled ends, we invoke the power of law for the best possible reasons.

Instead, the danger that tempts lawyers comes from a different direction. We live in a time of creeping authoritarianism. From Washington to Moscow to Ankara to Manila and beyond, we see political leaders who are more than willing to co-opt the law to gain power for themselves.

As lawyers, we face the same temptation. We can, if we choose, twist the language of law to gain wealth and power for ourselves. We can misrepresent the stories of others for our own ends. And we can use the forms of law to build barriers to justice.

In your time here at Yale, you've seen both the promise and the danger of law. Just choosing randomly, I'll invoke the example of tax law. Even in tax, and you know I will add, *especially* in tax, we see both the use and misuse of the power of law.

Tax law may seem, to the uninitiated, dry and devoid of moral content. But, in fact, the tax law determines the distribution of trillions of dollars. And dollars, in our capitalist society, are not just figures in a ledger. Money, in America today, makes the difference between opportunity and exclusion, between a decent life and a life on the margins of society.

The earned income tax credit, for instance, occupies Section 32 of the Internal Revenue Code. The words of the statute are dry enough: they drone on about “eligible individuals” and “qualifying children.” But, because we speak the language, we can see past the jargon to what is important. Every year, the EITC distributes \$70 billion to nearly 30 million low-income families.¹⁰ The average family receives a payment of \$2,500, and that money makes a real difference in their lives.¹¹

But the tax law also offers a prime example of the misuse of law. The technicalities of the tax law can create financial opportunities for the well-advised and traps for the unsophisticated. And, too often, political leaders are in the know: they create or endorse tax rules that predictably reinforce the advantages of wealth. Put in our terms, these lawyers wield the language of law to *misdirect* state power – to cement social hierarchy and entrench inequality – while gaining advantage for themselves.

So, in the best traditions of the Yale Law School, I have not only told you a story but a meta-story: a story about the power of language and the power of storytelling.

Your legal education confers on you the privilege of speaking the language of power. And that is no small thing. I know you will use your power wisely and for principled ends.

I am so very proud of you, and I am proud to call you my colleagues.

¹ S.F.C. Milsom, *Historical Foundations of the Common Law* 38-39 (1981).

² Pollock and Maitland, *The History of English Law before the Time of Edward I*, 81-87 (1895).

³ Pollock and Maitland, *supra* note 2, at 211-212.

⁴ Milsom, *supra* note 1, at 40-41. The French *conteur* was eventually Anglicized to “counter.”

⁵ <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/worker-and-immigrant-rights-advocacy-clinic/darweesh-et-al-v-trump-et-al>

⁶ <https://law.yale.edu/yls-today/news/clinic-files-amicus-brief-debt-collection>

⁷ <https://law.yale.edu/yls-today/news/appellate-court-rules-veterans-can-pursue-class-actions-over-va-delays>

⁸ <https://law.yale.edu/yls-today/news/clinic-students-testify-confinement>

⁹ <https://law.yale.edu/yls-today/news/five-communities-demand-epa-respond-civil-rights-complaints>

¹⁰ <https://www.eitc.irs.gov/Partner-Toolkit/basicmaterials/ff>

¹¹ For data on EITC recipients’ views of the credit and proposals for reform, see Sara Sternberg Greene, *The Broken Safety Net: A Study of EITC Recipients and a Proposal for Repair*, 88 N.Y.U. L. Rev. 515 (2013), at

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