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Professor G. Robert Blakey, Diploma Ceremony Address

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Blakey
Remarks at Graduation
May 19, 2012

Thank You.

Dean, Faculty, Graduates, and Families:

I speak today as a surrogate for Professor Jay Tidmarsh, who is at his son's graduation back East.

If my remarks please you, give me credit for them.

If my remarks displease you, give Jay credit for them.

What was it that Dickens said at the beginning of "A Tale of Two Cities"?

It was the best of times, it was the worst of times

I feel much like that ... though I hasten to add that, unlike Sydney Carton, I do not look forward to the guillotine today.

I

We are leaving Notre Dame. You now for somewhere; I, at the end of next semester, for the sunny skies of Arizona, not entirely to retire, but to do other things.

You are the last graduating class I shall ever see.

I am glad to be among the first to congratulate you on your signal accomplishments here at the law school. You have worked hard, stayed up late—and for those that had me in 1L criminal law, got up early—, and now you have achieved your objective.

I congratulate you!

II

For my part, I will miss this place.

I shall miss the Dean.

I shall miss the faculty, most of whom I had a hand in bringing to Notre Dame. You leave a lasting legacy at a place, not by imposing your own vision on it, but by getting good people to come after you who will impose their own vision on it.

But most of all I will miss you. Many of you I consider not only students, but also friends ... who owe me in Arizona an occasional report of what you are doing with your lives ... in the law and among your loved ones. Along with grandparents and parents, I accept baby pictures.

I remind you, too, that nowhere is it written that anyone on his or her deathbed said, "I wish I had spent more time at the office." [Thanks to Professor Tex Datile.]

The only reason that I stayed around here for so long sits now before me dressed in silly hats and medieval gowns.

[I still remember where many of you sat in 1L criminal law.

On the left,

Katy, Catherine, and Megan.

On the right,

Kerry, Catherine, Kelly, Shawn, Windy, and Sana.

And in the center,

Bryan, Ryan, Carter, Kate, and Brian.

Others, too, but I won't go on.]

But you didn't come here today to watch an old man become maudlin.

III

You wanted some words of wisdom. Sadly, you came to the wrong person, as you well know.

With that caveat, I have two subjects on my mind to share with you and your families: one about how theory is important, the other about its application to a subject that personally matters to you, especially in your search for jobs.

First, I am going to tell you why you are "lawyers of a different kind."

The history of jurisprudence reflects a series of wrong turns. I talk here of two.

John Locke (1623-1704)

We rightly remember John Locke as the person who best articulated the ideas behind the Glorious Revolution in England of 1688. [“Men being ... by nature all free, equal, and independent” *A Second Essay Concerning Civil Government*, ch. VIII, para. 95 (1690).]

We rightly remember him, too, as having influenced Thomas Jefferson in his writing of the Declaration of Independence of 1776 (“We hold these truths to be self-evident, that all men are created equal”).

Of course, we must comment here, “men” meant in 1776: “White male, Protestants, who were freeholders.”

Women? We married them off, where they became “one” with their husbands who were *the* “one.”

Black People? As Chief Justice Taney (a Catholic), said in *Dred Scott*, they had “no rights which the white man was bound to respect.” [*Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).]

[In addition, for good measure, we only counted them as 3/5 of a “person” in the Constitution. U.S. Const. art. I, § 2, cl. 3.]

As you can see, the United States Constitution has always been a work in progress.

Indeed, it took a Civil War that cost us—North and South—roughly 205,000 battlefield deaths [more than two times as many died from wounds and disease, because we had no antibiotics or modern hygiene] over changing “are” to “is” and redefining a word, “men.” [Alan Barker, *The Civil War in America* 112 (1961).]

A lot of people died over a question of grammar and an entry in a dictionary!

This loss of military life was roughly 15 percent of those who served.

A staggering number in a population of roughly 31 million.

The turning point of the War came in the Battle of Gettysburg in 1863, and in the dedication of the Soldiers’ National Cemetery [that buried the Northern casualties: 3,155 killed, 14,531 wounded, 5,369 captured or missing; the South, not at first separately buried in the Cemetery: 4,708 killed, 12,693 wounded and 5,830 captured or missing] by Lincoln’s Gettysburg Address that—along with the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—overruled *Dred Scott*, but not, sadly, the misguided originalist philosophy that animated his opinion. [“Fourscore and seven years ago our fathers brought forth on this

continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. . . . that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth.”]

We usually think of our National State Papers as the Declaration of Independence, the Constitution, the Bill of Rights [and, for some, Civil War amendments], and the Federalist Papers.

I would add at least the Gettysburg Address . . .

Dr. Martin Luther King’s 1963 “I Have a Dream” speech, and

Franklin Delano Roosevelt’s State of the Union remarks in 1944, in which he articulated a “second Bill of Rights,”—not “political freedom from,” but “economic freedom to,” including a right to a job, to adequate food and clothing, to a living wage for farmers, for businessmen, large and small, to compete in a free market, to a decent home, to adequate medical care, to freedom from the economic fears of old age sickness, accident, and unemployment, and to a good education—that rightly recognized that when the free market leaves people out, the people that created it—and benefit from it—ought to intervene, through their government, to right the injustices.

We are, after all, one people.

Locke had a dark side.

Rejecting the traditional philosophies of Plato, Aristotle, and Aquinas, Locke fell in his *Essay Concerning Human Understanding* (1683-89) into the error of an empiricism that was materialistic, deterministic, and atheistic, though inconsistently, as a good Puritan, with an ample measure of British “common sense,” Locke believed in God and the Holy Scriptures, though for the rest, he thought they were a matter of probabilities.

One wrong turn.

David Hume (1711-1776)

Coming after Locke, David Hume, a Scotsman, took the “common sense” out of Locke. And his empiricism—significantly—did not include a God or Holy Scripture.

Famously, he distinguished—it’s called Hume’s fork—between “fact,” which, based solely on sense impressions, he considered objective, and “values,” which, based solely on individual sympathies, he considered subjective. [*An Enquiry Concerning Human Understanding*, sec. IV, pt. I, para. 20 (“[T]he objects of human reason . . . [are of] two kinds . . . *Relations of Ideas*, and *Matters of Fact*.”); *id.* sec. XII, pt. III, para. 132 (“Morals . . . are not so properly objects of the understanding as of . . . sentiment.”).]

Today, Hume's empiricism is the common person's philosophy. So, now, in arguments in a bar, we say, "That is just your values, and my values are as good as yours."

No matter that Hume's fork has been thoroughly deconstructed among careful thinkers, it reigns—without serious challenge—in our unthinking common thought.

The second wrong turn.

Not often noticed, Locke and Hume recognized a glaring defect in their empiricism: they could not account for our sense of "self," that is, our sense of "identity." Locke left it up to the "goodness" of God. [*An Essay Concerning Human Understanding*, bk. II, ch. XXVII, para. 13.] Having left out God and Holy Scripture, Hume was not able to resolve the "difficult" issue of "self" or "identity" satisfactorily. [2 *A Treatise of Human Nature*, app. 319 (1748, 1778 ed.) ("For my part, I must plead the privilege of a skeptic, and confess, that this difficulty is too hard for my understanding.").]

Holmes thought that the first requirement of a theory was that it fit the facts. [Oliver W. Holmes, *The Common Law* 167 (1963 ed.) ("The first call of a theory of law is that it should fit the facts.").]

Let's conduct an experiment here and now.

How many of you think that you are a "person"?

Can *you* remember Pearl Harbor?

I can. I suppose your grandparents can.

Can *you* remember where *you* were when you heard that an assassin had shot Kennedy in Dallas in November of 1963?

I can. Your parents can remember it.

Can you remember where *you* were when *you* heard (or saw) in 2001 that the airplanes had crashed into the Twin Towers?

I can. And so can most of you.

Are "*you*" today the same "person" who remembers these events?

Sure, you have changed. Maybe not your grandparents or parents, but you now "think like a lawyer." That is a big change. We are giving you a degree that certifies it. Nevertheless, it is still *you*, right?

When *you* take into consideration all of the changes in your life to this point in time, it is still *you*, isn't it?

In sum, materialism—we ought to call it, “promissory materialism”—cannot account for our sense of “self” or “identity” ... or, for that matter, mathematics, or music, or love ... or hate.

It is a poverty-stricken theory.

It is a theory that does not fit the facts.

Better yet, if these facts—self or identity, math, music or love and hate—falsify materialism, they also falsify—and in the same degree—any other theory that is fundamentally rooted in materialism, as so many of our modern theories are.

IV

Those of you here who are also Christian also know that God made you in his image and likeness. [*Genesis* 1:27 (“male and female,” “in his image”).] You can understand God’s world, not perfectly, but at least adequately. And you are free to love Him and others in His creation. That is what made “in his image” means.

You are also uniquely valuable. Had you alone of us sinned, Christ would have still died on the cross solely for you.

You are also equal in the eyes of God. As a member of Christ’s Body, you are neither Greek nor Jew, slave nor master, male nor female. [*Galatians* 3:28 (“All” baptized in Christ, “neither Jew nor Greek, there is neither slave nor free, there is neither male nor female,” one in Jesus Christ).]

This view that you hold as Christians—significantly—roots, in your religious faith, your commitment to the highest traditions of our country that justly celebrates the unique “value of the individual” and of “equality among people” without regard to special characteristic of any kind ... of wealth, of intelligence, of sex, of race [and, for some, orientation].

And—crucially—a notion of social justice, that extends to the poor, the sick, the infirm, the unborn, and those that are generally left out of our world of the privileged.

That is the sense in which, in a world significantly populated by skeptics, materialists, and atheists, you are a “different kind of lawyer.”

V

So, I now turn to my second point, an application of my first.

Shakespeare in *The Winter’s Tale* comments “[T]his is the time that the unjust man doth thrive.” [Autolycus, *The Winter’s Tale*, act 4, sc. 4.]

The facts of the Great Recession beginning in 2007 and 2008, and its ongoing aftermath, are sobering to exam in light of Shakespeare’s comment. In 2011, the Financial Crisis Commission began its *Final Report* by sadly observing,

More than two years after the worst of the financial crisis, our economy, as well as communities and families across the country, continues to experience the aftershocks. Millions of Americans have lost their jobs and their homes, and the economy is still struggling to rebound.

Look around you today, little has changed.

How hard has it been to find a job of your choice?

As the Commission described the profound events of 2007 and 2008, they were neither the usual bumps in the road nor an accentuated dip in the financial and business cycles, which we have come to expect in the free market. It was a fundamental disruption—a financial upheaval, if you will—that wreaked havoc in communities and neighborhoods across this country.

The Commission reached nine, black-letter, sobering conclusions, reflecting the major chapters of its *Final Report* that anyone thinking about the issues needs to study in detail:

- (1) The financial crisis was avoidable.
- (2) Widespread failures in the financial regulation and supervision proved devastating to the stability of the nation’s financial markets.
- (3) Dramatic failures of corporate governance and risk management in much systematically important financial institutions were a key cause of this crisis.
- (4) A combination of excessive borrowing, risky investments, and lack of transparency put the financial system on a collision course with crisis.
- (5) The government was ill prepared for the crisis, and its inconsistent responses added to the uncertainty and panic in the financial markets.
- (6) There was a systemic breakdown in accountability and ethics.
- (7) Collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis.
- (8) Over-the-counter derivatives contributed significantly to this crisis.
- (9) The failures of credit rating agencies were essential cogs in the wheel of financial destruction.

Private, book-length studies are also proliferating. The best is *New York Times* reporter Andrew Ross Sorkin's 2009 *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—and Themselves*.

For Sorkin, we planted the “seeds” of the disaster years earlier with such measures as:

- (1) The deregulation of the banks in the late 1990s;
- (2) The push to increase home ownership, which encouraged lax mortgage standards;
- (3) Historically low interest rates, which created a liquidity bubble;
- (4) The system of Wall Street compensation that rewarded short-term risking.

Bethany McLean and Joe Nocera's 2010 *All the Devils Are Here* aptly bookends Sorkin's piece; it covers much of the same ground, but adds more perspective and commentary. They, too, could report that on July 21, 2010, President Barack Obama signed the “Dodd-Frank Wall Street Reform and Consumer Protection Act” which, they conclude, “marked, unquestionably, the biggest change in the regulation of the financial industry since the aftermath of the Great Depression.” Moreover, they rightly note that despite the Wall Street shenanigans, few sanctions, civil or criminal, were in store for the malefactors.

You know how the crisis affected you, as, I assume, you are members of the 99 percent. What about its impact on the 1 percent? Recent financial filings indicate the crisis made the elite vastly richer, leaving it with little financial accountability for the crisis's consequences. In fact, today, the richest 1 percent of adults controls 43 percent of the world's assets; the wealthiest 12 percent has 83 percent; the bottom 50 percent has only 2 percent. While the financial crisis caused the wealth of the wealthiest to tumble by 20 percent, by the end of 2011, it had risen 19 percent, that is, its wealth has bounced back, as it has not with the general run of society. [*See generally The Few: A Special Report on Global Leaders*, *The Economist*, Jan. 22, 2011.]

Alexis de Tocqueville in his classic *The Old Régime and the French Revolution* made a simple, but profound observation: the French peasant class before the outbreak of the revolution was “[i]nured to hardships ... indifferent to the amenities of life, intrepid in the face of danger, and faced misfortune stoically.” At the same time, it had a “deeply rooted and long-standing ... intense, indomitable hatred of inequality.” Once aroused, it “shatter[ed the] ancient system under which men were divided in classes ..., and their rights were even more unequal than their social situations” [*The Old Regime* 207 *et seq.* (Anchor ed. 1955).]

Politically, how long can we expect 50 percent with 2 percent to permit 12 percent to have 83 percent or 1 percent to have 43 percent—and keep it in untroubled tranquility, without accountability, when its conduct inflicts extended distress on the 50 percent without apparent or real equal justice under the law?

It happened in 1929.

It happened in 2008.

If we do not make appropriate reforms in law and personnel, it will happen again.

A final aspect of the crisis requires more extended comment. In addition to the failure of government, the “free market” itself failed to correct these abuses. Justin Fox in his 2009 *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* ably chronicled the rise and fall of the myth that the “market” is somehow “rational,” a key tenet of the Austrian school of economics, aptly illustrated in the work of Ludwig von Mises, the mentor, and Friedrich von Hayek, the protégé (and an ex-Catholic), who famously gave us in 1944, *The Road to Serfdom*. The most prominent, governmental devotee of the theory was the former Chairman of the Federal Reserve, Alan Greenspan. His memoir, *The Age of Turbulence*, published ironically on the precipice of the crisis, is a paean to the theory, a celebratory run—then apparently successful—around the stadium at the end of his 18-1/2 years as the head of the Federal Reserve.

Ayn Rand’s unqualified, laissez-faire theory of capitalism—but a variation of the Austrian school—captivated Greenspan as a young economist. A telling of a road not taken best shows the pernicious influence of his captivity.

In May 1998, Chairperson Brooksley Born of the Commodities Futures Trading Commission announced that the Commission would reexamine how it regulated the market in derivatives. The Commission requested comments. It got them—all negative—from others, but especially Chairman Greenspan, the burden of his comment, “[R]egulation of derivatives transactions that are privately negotiated by professionals is unnecessary.”

On October 23, 2008, former Chairman Greenspan testified before the House Committee on Oversight and Government Reform. Chairman Henry Waxman summed his testimony up: “In other words, you found that your view of the world, your ideology, was not right.” Greenspan answered, “Precisely.” [See *Frontline Special, The Warning* (PBS television broadcast Oct. 20, 2009), available at <http://video.pbs.org/video/1302794657>.]

Greenspan’s confession of the empirical falsification of his ideology also finds an echo in the academic world of Richard Posner, a federal judge and one of the leading exponents of economic analysis of law, sometimes called the Chicago School, which similar to Greenspan largely eschews governmental intervention in the market. The movement developed partly as a reaction to the work of John Maynard Keynes in his classic 1936 *The General Theory of Employment, Interest and Money*, which advocated government intervention in the market to level out its ups and downs, particularly in the periodic lack of private demand. Members of the rational market theory believed that they had “consigned [Keynes] to history” and called his book completely outdated. [John Cassidy, *After the Blowup*, 85 *The New Yorker*, Jan. 11, 2010, at 28.]

Posner has now rethought his positions, and he today has considerably more nuanced positions, in fact, accepting most Keynesian analysis. [See Richard A. Posner, *How I Became a Keynesian*, 240 *The New Republic*, Sep. 23, 2009, at 34.]

This discussion is the necessary background against which to evaluate current proposals that focus on the role of government in the nation's economy, ignoring the 1944 dreams of F.D.R. Most would unwisely roll back the reforms enacted in 2010 in the Dodd-Frank bill, as unnecessary governmental intervention in the free market.

They go further. An early admirer of Ayn Rand, Congressman Paul Ryan (a Catholic), the House Budget Committee Chairman, proposed a 2013 budget—now fortunately rejected in the Senate—aimed at lowering the national deficit and circumscribing the size of government, mainly through major spending cuts to social programs, including \$5.3 trillion in non-defense cuts over the next decade, with 62 percent of cuts coming from programs that assist people on low incomes. [*See generally* Brian Roewe & Michael Sean Winters, *Ryan Budget Faces Catholic Pushback*, National Catholic Reporter, May 11-24, 2012, at 5.]

Famously, Hayek argued that a high level of government spending hurts an economy. In fact, any government expenditures under the Austrian school—save police functions—are presumptively bad policy, as Hayek puts it—and Congressman Ryan apparently agrees—leading ultimately, in Hayek's terms, down a “road to serfdom.” For them, the issue is not data—an area on which they cannot compete—but “freedom from government,” a misguided understanding of the original compact of 1789.

On the other hand, Professor Jeffrey Sachs, of Columbia University, an internationally recognized expert on economic development, observes that the data does not support Hayek (or Congressman Ryan). In fact, Sachs says, the data, not ideology, show that among developed countries, those with high rates of taxation and high social welfare spending perform better on most measures of economic performance compared to countries with low rates of taxation and low social outlays. [Jeffrey D. Sachs, *The Social Welfare State, Beyond Ideology*, Scientific American, Nov. 2006.]

I began with a reference to Shakespeare. As I have reviewed the facts of 2008, and ensuing ideological debates, I returned to the comments of Prince Hamlet, as cogent today in the United States as they were in England more than 400 years ago:

In the corrupted currents of this world
Offense's gilded hand may shove by justice;
And oft 'tis seen the wicked prize itself
Buys out the law.

[The King, *Hamlet*, act 3, sc. 3.]

For a different kind of lawyer, it need not be.

Thank you.