

Rutgers Law School-Newark
COMMENCEMENT ADDRESS
The Honorable Ronald K. Chen '83
Public Advocate of New Jersey

May 26, 2006

Members of the Boards of Governors and Trustees,
Provost Diner
Dean Deutsch
Members of the Faculty and Administration of the School of Law, whom I hope I can still call
my colleagues and friends
Parents, Spouses, Partners, Children, Family and Friends of the Graduates
Women and Men of the Class of 2006

Let me confess at the outset that this is a scary experience for me.

Having just been through a four-way police background check before being nominated, having gone through confirmation hearings and a vote before the State Senate, and having testified before skeptical Senate and Assembly Budget Committees in the last few weeks in the current state fiscal crisis, I would have thought that the intense scrutiny and heightened expectations of this moment would not faze me in the least.

Moreover, there are usually precious few enforceable obligations that one can entertain about a graduation speaker. I could promise that I won't drone on too long. I could promise to be funny, or profound. But since you all have passed successfully through first year Contracts—and by my count one-third of you taught personally by me—I know that you instantly recognize that such promises, not being supported by valid consideration, are mere *nudum pactum*, and thus unenforceable. (I already see some concerned looks of the faces of parents, wondering what three years of law school tuition has taught their child. Let me assure you that there is nothing salacious about my last remark.)

One can, however, usually at least hope that the graduation speaker, while perhaps boring and tendentious, couldn't possibly say anything embarrassing about any of the individual graduates in front of their family and friends, since she would normally be a stranger, selected for star quality, public prominence, or Q-rating, but not due to any affinity with the graduates. The graduation speaker normally does not know the graduates at all, and would certainly not be privy to their secrets, foibles, or assorted weaknesses.

Today, you have the reverse. I certainly have no measurable Q-rating. As for public prominence, my prior title of Dean brought much more instant recognition, or at least more outward deference, than that of "Public Advocate," since some people thought I could get them admitted to law school (which I couldn't), and they think all I can do as Public Advocate is sue them (which I can). But having watched this class progress in the last three or four years, I

certainly have come to know you collectively and often individually. And a rich source of legend thus emerges.

But graduation day is your day, and I would not dream of tarnishing it with reminders of moments of human frailty. So rest easy, Ms. Conring. Your response in class that the Statute of Frauds was the same thing as the Parol Evidence Rule will never be spoken of again. And be assured, Mr. Stratton, that the events leading to you being denied admission to that electronic bull ride will never pass my lips. (Well, the less said about that electronic bull ride, the better for all concerned.) And Mr. Karounos — well, Mr. Karounos, ethical obligations may compel me to say something to the Bar about your wardrobe. My best piece of advice to you and others similarly situated—at least invest in some sweater vests. It did wonders for my current boss.

This day and this ceremony are special to you, or at least we have tried to make it so. No matter how cynical, how impervious to emotion, you may think you are, this last moment of your youth — whether original or recaptured youth — is a milestone that deserves solemn and dignified recognition. I have been present at the past 19 law school commencements, and for the last ten, as associate dean, have actually had a lot to do with its organization. My two main functions were to bear the gonfalon—the ceremonial banner symbolizing the law school—during the academic procession (which today Dean Rothman has undertaken); and second, to present the class for their degrees and read the names of the graduates (a task which Dean Bell will perform in a few minutes).

Two years ago, when I was placing the gonfalon into its stand at the beginning of the ceremony, I had to use considerable force, since the wooden pole had expanded somewhat due to humidity. But then at the end of the ceremony, when I had to remove the gonfalon from its socket, it wouldn't budge. I tried again, and still it would not come loose. We were moments away from the time when the order of ceremony called for the Provost to say "Dean Chen, will you lead us in the recessional?" I was pretty desperate. The faculty in the back row who heard me huffing and puffing were looking back with puzzled expressions wondering what I could possibly be doing. I had two choices. Either lift the gonfalon and its stand (which is made of lead and weighs about 40 pounds) and drag both of them down the stage and up the aisle, trying to look dignified or pretend that this was actually some ancient Rutgers ritual, or else I could quietly take another gonfalon belonging to another unit, and hope that no one noticed and thought they were at the wrong ceremony in which they had just been mistakenly granted an M.B.A. rather than a J.D. Finally, like young King Arthur making his last attempt to extract Excalibur from the stone, I gave it one last tug, it came loose just as the bagpipe started playing. Members of the Class of 2004 may have noticed that I seemed a little out of breath as I slowly lead the procession out of the hall.

Reading the names of the graduates was even a greater challenge. I knew that not so much the graduates, but their mothers, would and could hold me accountable if I uttered even a slightly mistaken rendering of their child's name. Now, after getting to know a class for several years, I liked to think that I could, with just a little practice, and some help from Dean Garbaccio, pronounce all the names correctly. And I did practice considerably. But then I discovered the bane of my existence — middle names. Where do you get them? Of course, we never use middle names, and often not first names, in law school; you are entitled to the dignity of being called

“Mr.” or “Ms.” with your surname. But students whose first names were straightforward, like Charles or Diana, and had simple last names like Singh or Kim, suddenly presented a seven syllable middle name that created at least a rebuttable presumption either of a mixed Welsh-Tibetan heritage, or the fact that your parents had read some 1970s avant garde theory of inculcating individuality through unique nomenclature when you were born. So I do ask all the mothers in the audience to be understanding.

Well, I think I’ve caused both Dean Rothman’s and Dean Bell’s stomachs to get upset enough as they contemplate their upcoming duties. I suppose the expected theme for this address is: “Dean Chen goes to Trenton.” What have I found and what have I done in the five months since I have left. And the answer is, a lot. This is some of what I have learned.

They tell the story in Trenton of three persons: a minister, a lawyer, and a member of the State Legislature. They were hiking in the woods, and came upon a small creek, with no apparent way to cross without getting wet. First the minister, invoking divine providence and with a determination fed by the power of her faith, boldly took a step forward from the bank of the creek, and appeared miraculously to walk on the surface of the water, barely getting the soles of her shoes damp, and crossing safely to the other side. Then the lawyer, invoking the majesty of the law and the protection of ten centuries of jurisprudence, also took a step forward, and step by step crossed the water without getting wet in the slightest. Well, after seeing these apparently miraculous events, the member of the State Legislature, vested with the power of the people as an elected public official, could not appear to be capable of anything less, and after duly invoking the strength of the principles of democracy and with the founders of the Republic as his guide, confidently and resolutely took a leap forward from the bank of the creek, and promptly sunk right to the bottom, getting soaked as a result. And as the legislator dragged himself out of the water onto the opposite bank, drenched and bedraggled, the lawyer turned to the minister and said: “Do you think we should have told him where the stones are?”

The moral of this story is obvious. Knowledge is power, and more particularly knowledge that is held by some but not others, i.e. that is a form of mystery that can both enlighten and frighten, is a very potent power – power that can be used for great good or great mischief, depending on the character of the holder. Perhaps that uncertainty regarding the unguided use of knowledge was the genesis of the so-called “learned professions,” i.e. one of the three professions – theology, law and medicine – traditionally believed to require advanced learning, and with that advanced learning, also an expectation of high principles and a refined code of ethics. It is the fact that law is a learned profession that actually entitles its members to the traditional honorific “Esquire” that we so enjoy using.

Now to some extent, this assertion of power is artificial. We like to think that becoming a lawyer makes one part of a secret guild whose members--and only whose members--are privy to secret devices and enchantments that give us the aura of wizards. Latin phrases, non-intuitive concepts like “21 years within a life in being,” or opaque metaphors such as “fruit of the poisonous tree,” add to the mystique. A lot of this is unnecessary. The knowledge and skill that represents real power does not have to be clothed in mystery to be effective. So do me a favor, so that I can’t be called inconsistent or hypocritical. Right after the ceremony, tell your family and friends what *nudum pactum* really means.

Real knowledge is still power, and for the past few years, we have been empowering you. It may not have always seemed that way. Law school is not always an institution known for inflating the ego or allowing one to forget one's limitations. Nor should it. Indeed, you should appreciate the fact that, if we did what we were supposed to, you emerge from this place with a keener sense of your faults, your weaknesses, and your limitations. Only by knowing them can you hope to contain them, and avoid having their repercussions visited upon others, particularly your clients.

For the most part, however, we have been empowering you. But, to quote Spiderman, with great power comes great responsibility. We have given you knowledge, and with the acquiescence of the bar examiners, through another perhaps less festive ceremony that takes place in eight weeks, a license. A license to represent and affect the life of your clients. But also, more generally, the power to manipulate the legal system to achieve change. The word "manipulate" does not necessarily have a negative connotation. It can mean simply to manage or utilize skillfully. It can also mean to change by unfair or insidious means so as to serve one's purpose. But that meaning attaches only when required by the nature of the person doing the manipulating. I certainly hope the dictionary you construct for yourself in your professional life does not include the second meaning, as much as I hope equally that it does include the first. Be skillful. Be artful. Manipulate. Cause change where change is needed.

In the short time that I have been in Trenton, I have no hesitation in saying that I have attempted to manipulate, because it is the nature of the position with which I have been entrusted to advocate for change, especially for those who have no voice otherwise.

- I. I have found, for instance, that here in Newark, almost 10% of children have dangerously elevated lead levels in their blood, which can and will cause irreversible neurological impairment, even though it has been decades since the dangers presented by lead and lead based paint were definitively established.
- II. I have learned that New Jersey has the third highest institutionalization rate in the country for persons who have developmental disabilities, a community that it is often too convenient to forget and which has been shockingly neglected. And there are at least 1500 persons who have been certified as able and willing to live in the community, but who are still housed in one of our developmental centers, despite a Supreme Court decision seven years ago mandating a non-institutional arrangement whenever possible.
- III. I have heard from persons whose homes were taken by eminent domain, but who, despite the constitutional requirement of "just compensation," received an amount so little that was it too small to buy a replacement house, thus effectively depriving them of the ability to own their own home again.
- IV. And just this week, a complaint was lodged with the Board of Public Utilities, before which the Public Advocate represents all ratepayers through its Division of Rate Counsel, alleging that phone companies have been disclosing our private billing information to the National Security Agency, without a judicial warrant or probable cause. You can probably guess what my reaction was to that.

In each of these instances, I think the legal system affords a vehicle to change the current status. I certainly intend to try. You may not agree all the times with my judgment as to what result serves the public interest, just as I might not agree with yours. So go out and manipulate on your own. That type of disagreement is natural in human affairs. But I hope we do agree that it is our obligation as lawyers, which you are about to become – part of the heightened set of principles by which we agree to abide as the members of a “learned profession”– to discharge your duty, as you have been given the light to see that duty, to use the law to effect positive change.

You are entering the legal profession at a critical time, and one fraught with potential danger to the established tenets that define our profession. It may seem to each generation that it was always a critical time when they entered the profession, but I think it is especially true today. Not only is the profession itself changing, with the norms of business and proprietorship melding with the more traditional maxims of a “learned profession,” but the role of the law in current society is being re-examined, and some think that this re-examination may not result in a positive outcome.

We are taught as schoolchildren the phrase that John Adams wrote into the Massachusetts state constitution in 1780, and still in force, that we have a “government of laws and not of men.” The legitimacy of government depends not on the merit, or lack thereof, of those individuals who may occupy office at any particular time, but rather on the constancy and the impartiality of the rules that we place above any one person who may wield transient power, up to and including the President.

This concept of separation of powers, in the view of some, is being improperly eroded in favor of the primacy of the executive. Others may argue the new realities created after 9/11 require that we re-examine our allocation of powers among the branches of government as the only way to combat the forces of evil who would destroy us if given the chance. I am not going to attempt to resolve that issue before you now. But on a personal note for those of us who have been associated with the Law School longer than you, the current debate over electronic surveillance by the executive branch without judicial warrant echoes a controversy in which one of our revered colleagues, whose name cannot be mentioned without emotion, that of the late Professor Arthur Kinoy, played a critical role as an advocate, arguing in the United States Supreme Court in the case entitled *United States v. United States District Court*.

There, a prior President argued that he had the inherent power to engage in warrantless surveillance in order to protect the national security. Professor Kinoy argued the cause, which resulted in a unanimous decision rejecting the concept of inherent power to act outside the contours of the Fourth Amendment. The Court said that:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those

charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

And in response to the argument that national security matters were too sensitive to commit to court review, the Court said:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of "ordinary crime." If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

As I said, I do not cite this case in order to make or promote a substantive argument. (Well, maybe a little bit.) But my main point in raising *United States v. United States District Court* was to reflect on my own law school experience. I had Arthur Kinoy for Constitutional Law. I recall vividly when he taught this case in class. To say that it was thought-provoking to learn these fundamental constitutional principles from the person who actually argued them in the Supreme Court, and to rehear the tale on occasion as the spirit moved him, is a fair statement. I felt, in a word, empowered.

I hope you have had similar experiences here. We all have great expectations for the impact you will have on the profession and on the community that we have trained you to serve. That you will do so with skill, with thoughtfulness, and sagacity, we have no doubt. Because, you will know where the stones are.