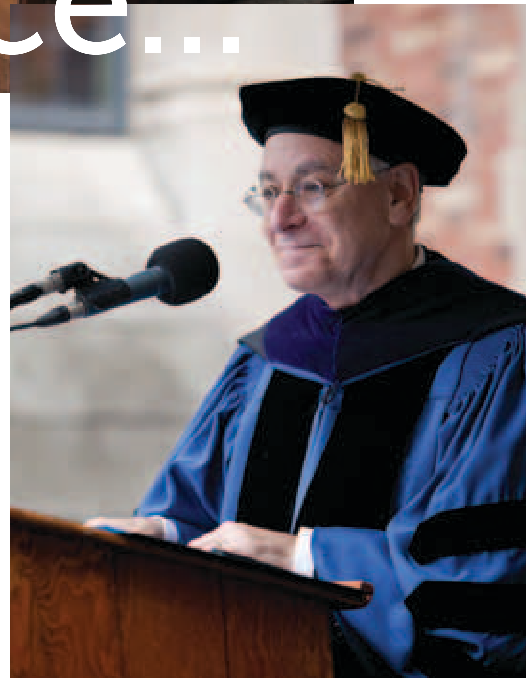
Yale Law School Commencement 2011

knowledge, vision, and confidence...



Degree Candidates Honored

Yale Law School Dean Robert Post '77 welcomed those assembled for Commencement on May 23, 2011, praising the achievements of the students and recognizing the efforts of families, friends, and Yale Law faculty and staff who "nourished and sacrificed, supported and sustained" to make the day possible.

He spoke of the "daunting world" the graduates would face outside the "calm courtyard" in which they now gathered.

"From WikiLeaks to the radiation leaks in Japan, from the collapse of the American housing market to the collapse of housing in Haitian earthquakes, from the oily tides of Deepwater Horizon to the Pakistani floods...the world is wobbling on its axis, spinning out inexorable and unfathomable challenges," he said before asking, "How could we possibly have prepared you for the uncertain challenges that await you?"

"I hope we have done so," he went on, "by giving you three gifts: knowledge, vision, and confidence."

Because of those gifts, Dean Post said, the students are capable of great things, but with that capacity comes great responsibility.

"We are confident that you will be faithful fiduciaries of this responsibility because you have already accomplished dazzling feats."

Next to address the graduates were Alfred M. Rankin Professor of Law Drew Days '66 and Sterling Professor of Law Owen Fiss, who are both retiring this year—Days, after thirty years on the Yale Law School faculty and Fiss, after thirty-seven. (*Remarks by both Professor Days and Professor Fiss are printed in full on the following pages.*)

The announcement of graduate degree candidates (J.S.D., LL.M., and M.S.L.) by Associate Dean Toni Davis '92 LLM followed. With rain dampening the ceremony, the announcement of the J.D. degrees was postponed and read later inside the building by Associate Dean Sharon Brooks '00. The students officially received their degrees after the Law School faculty voted on June 1.

Pre-empted by the weather were remarks by Sterling Professor Emeritus of Law Guido Calabresi '58 and former U.S. Senator George Mitchell. Mitchell received an honorary doctor of laws degree earlier in the day from the University and was scheduled to address the graduates at the Law School. Remarks from Judge Calabresi are available on the Yale Law School website.

website *www.law.yale.edu/commencement2011*

Photographs by William K. Sacco, Yale University and Yale Law School

confessions of an improbable professor

Remarks delivered by **Drew S. Days, III,** Alfred M. Rankin Professor of Law

Drew S. Days, III

Commencement 2011

Commencement speakers find almost irresistible the opportunity to offer oracular advice to graduating classes about how they ought to prepare themselves to meet the professional and personal challenges in the world awaiting them outside of the protective walls of the academy. I have certainly yielded on more than one occasion to that temptation. Today, however, my basic message is that no matter how much you may plan your careers after law school, fate often takes twists and turns that you may find hard to imagine as you sit here surrounded by your graduating classmates, family and friends on this momentous occasion. In that respect, allow me to offer up my own experiences in this regard—not as a model, to be sure, but rather as an object lesson, to move from the abstract to the concrete for your consideration.

When I entered Yale Law School in September, 1963, I had thought that I might seek to join the Justice Department of John F. Kennedy after graduation. Of course, by November, Kennedy was dead and, with his death, many of my like-minded fellow students and I felt a sense of disorientation with respect to our career plans. Nevertheless, I took a range of courses with particular focus on individual rights taught by Professors Alexander Bickel, Thomas Emerson and Boris Bittker, among others.

During the summer between my second and third years at the Law School, I served as an intern in the office of C.B. King, a courageous lawyer in Albany, Georgia, under the auspices of a national student organization called the Law Students Civil Rights Research Council. During the academic year, law students at Yale and other law schools worked on various projects to assist Southern lawyers challenging the still-rampant acts of violence against civil rights workers and deeply entrenched institutions of racial segregation. After that summer, I determined that I, too, wanted to become a civil rights lawyer.

Back at the Law School for my third year, it was my dream to work for the NAACP Legal Defense Fund (or LDF)—Thurgood Marshall's organization. I found, however, that only lawyers with at least two years' experience were being considered for positions there. Once again I was forced to contemplate my life after law school. My faculty advisor, the noted First Amendment scholar, Professor Emerson, called me to his office one day to suggest that I contact a small, union-side Chicago firm about a job. This came somewhat as a surprise to me in view of the fact that I had expressed clearly to him my firm plan to pursue a career in civil rights. I asked him why the firm might be of interest to me, to which he responded that it had ten lawyers and four partners: one black, one Jew, one WASP and one woman. He was right. I *did* find it interesting, contacted the firm, and was ultimately hired. It seemed to be a good match. By early summer of 1966, I was firmly settled in Chicago and soon became a member of the Illinois Bar.

Competing with my thoughts about my legal career and new firm responsibilities, however, were ones of a romantic character. A young woman, Ann Langdon, whom I had been dating during Law School, had coincidentally moved to Chicago for the summer to visit her mother. At the end of the summer, she would be entering Peace Corps training for a two-year stint in Brazil.

Well, I had terribly mixed emotions about our impending separation, given what I had no doubt was going to be a career in Chicago that promised both fame and fortune. We had many intense conversations over the summer about the future of our relationship. She insisted that our love was strong enough to survive a two-year separation whereas I continued to be skeptical. Drawing deeply from a college philosophy course, I responded, "As Heraclitus said, 'You can't step in the same river twice.'" She looked at me in complete bemusement, smiled and said, "Why don't you come into the Peace Corps *with* me?" It dawned on me that what Ann had just said was not simply a suggestion that I join her in the Peace Corps, but was also a marriage proposal since only married couples could be certain they would be assigned to the same continent, much less the same country or site. So I said, "Yes." I applied immediately, getting recommendations within a day from professors at the Law School, such as Lou Pollack, and was accepted.

After our reassignment by the Peace Corps to Honduras, Ann and I headed off to three months in a Peace Corps training camp in Puerto Rico. There I was, a newly-minted member of the Illinois Bar, learning all about raising hogs, attending Spanish language classes five hours a day, as well as instruction on cooperative development strategies.

Both of us, once in Honduras, were assigned to a small, dusty town located mid-way between the Caribbean and Pacific, and given the responsibility for organizing local cooperatives—Ann, a credit union and I, an agricultural cooperative. After two years of hard work, we were both successful. But imagine me, if you will, in jeans, a cowboy hat and boots, riding up into the surrounding hills on a borrowed mule to convince farmers of the benefits they could reap from working together through a cooperative: I was not quite the Marlboro Man, but not too shabby either, if I say so myself.

After two years away, we returned to New York City where, to my great surprise and delight I got the job I had wanted in the first place: becoming a staff attorney at LDF. I handled school desegregation litigation in the South, as well as suits on behalf of victims of police brutality and employment discrimination nationwide.

One Sunday evening in late November, 1976, I was in my office working on a post-trial brief when the phone rang. The caller identified himself as an aide to Griffin Bell, President Carter's Attorney General-Designate and a former judge on the U.S. Court of Appeals for the Fifth Circuit before whom I had argued a number of school desegregation cases. The aide said that he was calling on behalf of Judge Bell to find out whether I would be interested in discussing with him a "high-level" position in the Justice Department. Quite frankly, I found it hard to take the call seriously. I had been litigating Florida school desegregation cases for several years and had found Judge Bell not always in agreement with my position on those cases. While I viewed Judge Bell as a fair-minded and candid judge who never "hid the ball" during oral argument, letting lawyers know clearly what was on his mind, I had no reason to believe that my appearances before him would have led to the call I had just received.

In any event, I told Ann, and only her, that I was going to follow up on the call to see where it might lead. Two days later, I flew to Atlanta and met with Judge Bell for a 45-minute cordial and substantive conversation. It was probably the most relaxed interview I had ever had up to that point in my life because, frankly, I thought there was nothing at stake. It was only toward the end of the meeting that he said he had enjoyed our meeting, and asked me to go home and put down in no more than three type-written pages the key points that I had made to him about my becoming the U.S. Assistant Attorney General for Civil Rights, if I were appointed. He wanted "to show them to the President." By April of 1977, I was comfortably settled into my office in the Justice Department, overseeing 400 lawyers and support staff, and responsible for both civil and criminal litigation nationwide.

After four exciting and challenging years, I began to think seriously about "life after the Justice Department." Thanks to two years at Temple University Law School as a "test drive" at teaching law and to my frequent conversations with Dean Harry Wellington, I decided that law teaching offered the most appeal-

ing next career move. By May of 1980, I had firmly committed myself to joining the Yale Law faculty.

Once at Yale, I began teaching a range of courses in the fields of Federal Procedure and Individual Rights from January, 1980, to the early spring of 1993 when I got another call, this time to meet with the White House Counsel about my interest also in a "high position" in the Justice Department. The position in question was that of Solicitor General of the United States, as you know, the Federal Government's lawyer before the Supreme Court. After several weeks of thorough background checks and meetings with White House Counsel's Office lawyers and with Attorney General Janet Reno, I found myself on my way to an interview with President Clinton. Needless to say, this time I was in a state of "high anxiety" as I contemplated this encounter.

The President invited me into the Oval Office. I had tried to anticipate every possible question that he might ask having to do with law, life, people we knew in common, and the future of the universe. It turned out, however, not to be an interrogation, but rather for about fifteen or twenty minutes more like a friendly chat. Then he looked at me and asked pointedly: "What *is* the relationship between the Solicitor General and the President?" This sounded like a trick question posed by a Yale Law School alumnus, a former law professor, a former state Attorney General and former Governor. Taking a deep breath, I said, "Mr. President *you* are in the Constitution and the Solicitor General is not." He seemed to like my answer greatly and the rest of my path to assuming office was clear and unproblematic. Only my older daughter appeared to be unimpressed by my new, high station in life: when I returned from a ceremony at the Justice Department announcing my appointment, I walked from the airport terminal to my waiting family. It was then that I saw a bright red sign in the passenger's window of our car that said, "No Soliciting."

So, here I am, back at the Law School since 1996, granted the pleasure of having you and prior classes as students and—as I mark my own professional Right of Passage—graced with the great honor of offering sincerest wishes to all of you as you pursue lives with distinction in the law or other fields of human endeavor. And after forty-four years of marriage, two daughters, and two granddaughters, Ann and I are still trying to comprehend the fateful nature of our Chicago exchange! *Y*

"Imagine me, if you will, in jeans, a cowboy hat and boots, riding up into the surrounding hills on a borrowed mule to convince farmers of the benefits they could reap from working together through a cooperative: I was not quite the Marlboro Man, but not too shabby either, if I say so myself."

a confession

Remarks delivered by **Owen M. Fiss**, Sterling Professor of Law

Owen M. Fiss

Grown men should not confess their love in public, especially when it is the love of an institution, even worse, a law school. But this, I fear, is the last opportunity I will have to be true to myself and to you.

Soon after I started my legal education at that other law school, I realized that I had made a mistake. I could not bring myself to transfer, but I wore my heart on my sleeve. When I first was interviewed for a position at Yale, almost a lifetime ago, Ralph Brown put the first question to me—and what a question it was: "Your professors at Harvard say that you belong at Yale. What do they mean by that?"

I started teaching at Yale in 1974 and only now fully realize how lucky I have been. The Yale faculty enjoys a freedom of which others can only dream. We are free to decide what to teach, when to teach, and how to teach. The risks of this freedom are well known to every student who has spent one month, no two months, no three months, parsing *Goldberg v. Kelly*.

I began my teaching career in 1968, not at Yale but at Chicago and was then assigned to teach a course that had been entitled "Equity." Before starting to teach, I had been involved in civil rights litigation, and in response to my new assignment, eagerly put together a course I called "Injunctions." The Dean of Chicago found this course title unacceptable and since he controlled the catalog, he insisted I call the course "Equitable Remedies," which mystified my students since I only knew of one equitable remedy.

In moving to Yale, I was anticipating another go-around over the title of the course with the then Dean, Abe Goldstein, the most imposing of them all. Much to my surprise, but in keeping with the traditions of this school, he expressed complete disinterest in the subject. So, after teaching for six years and after having published a casebook on the subject, I was finally allowed to give the course I taught the name I wanted.

Bruce Ackerman also joined the Yale faculty in 1974, and at a lunch soon after we had both arrived in New Haven, he asked what course I was teaching in the fall. I proudly said, "Injunctions." He then said, in the manner that all of us have come to know and love, "That's the worst course title I have ever heard. It is completely inappropriate for the Yale Law School. At Yale it must be 'The Activist Judiciary Meets the Bureaucratic State in the Post New-Deal Era.'"

Soon after this encounter and many others of a similar nature, I had a better sense of what to expect from colleagues during my time here, and I secretly adopted as the theme song of the Yale faculty a new album that Paul Simon had just released. It was entitled, "Still Crazy After All These Years."

Yes, the Yale faculty is crazy, but crazy in a good sense: intellectually restless, unwilling to accept any conventional accounts of the law, boldly and defiantly crossing all disciplinary boundaries, and determined to push and push the law, sometimes even beyond all sensible limits. These were the norms that governed my elders—the giants of the Yale Law School—and these were norms that defined the culture of the place. It was this culture—a culture that prizes above all else the innovative and idiosyncratic—that nourished me all these years and helped me understand what it means to be a professor at the Yale Law School.

A community of individuals so very strong minded (surely a euphemism) is likely to spin out of control at any moment. We need a leader, but it has to be one who is capable of governing an anarchy. Here, too, I have been fortunate, though until this very moment, I stubbornly refused ever to acknowledge my gratitude to the Deans—three are sitting before you—under whom I served.

My love for this school is the kind of love that belongs to a convert, which as St. Augustine teaches, is the most passionate of them all. So, for almost forty years I have been an unqualified pain in the neck to each and every Dean under whom I served, sending them endless memos accusing them of betraying the most sacred traditions of the school. No doubt, all of these memos, known in some quarters, as "Fissiles," wound up in the Deans' circular file, yet they were always received in a gracious manner, which of course only egged me on.

One Dean, desperate to find a way to deal with me and the other self-appointed keepers of the faith, started a practice of calling each and every faculty member on his or her birthday and singing "Happy Birthday," with a few refrains in Italian. Can you imagine? A Dean who sang "Happy Birthday" to each member of his faculty and who continues this practice to this very day, more than fifteen years after he left office and became a federal judge.

One of the foundational principles of the Yale Law School declares that it is up to each individual faculty member to decide what is educationally required and that it is the responsibility of the Dean to find the funds needed to support and implement the individual faculty member's plans. This principle may strike the fiscally responsible as bizarre, as indeed it is, but it makes perfect sense in an institution that values the autonomy of each individual faculty member and demands that this autonomy be used in bold and inventive ways, not subject to decanal or even peer review.

Guided by this precept, Abe Goldstein funded in an instant the Legal Theory Workshop when it was first proposed in 1974, and in the 1990s Tony Kronman—only partly corrupted by our friendship—did the same for the Global Constitutionalism Seminar and the Latin American and Middle East programs that have been at the center of my attention in recent years.

"Today, you go forth in the world and when you do, remember that you carry not only your dreams and those of your family and parents, but also those of your teachers."

I am also immensely grateful, my dear students, for the opportunity to have been one of your teachers, grateful not just for your brilliance, but even more, for your attitude toward learning. I have been moved by your willingness to discard your preconceptions of what law is or might be, and to fully engage the lessons of the day—at first bewildered, maybe resistant, but also open and indulgent and finally stirred to forge for yourself an entirely new stance on the law. You soon became comfortable—maybe too comfortable—in speaking back, and whenever you did, you transformed the exchanges in Room 129 into a learning experience for everyone, including the instructor.

The faculty likes to tease one another. In that spirit we often proclaim, usually as part of the faculty recruitment process, that the best thing about the Yale Law School is the students. This is supposed to be a self-deprecating joke, but like any good joke, it has a kernel of truth. The other day Muneer Ahmed, one of our newest recruits, acknowledged the truth of this tease and reformulated it eloquently. The specialness of Yale Law students, he said, derives from the fact that they do not feel encumbered or limited by the law, but rather see themselves as masters of the law, entitled to reshape it in ways that will make it a more perfect instrument of justice.

Last fall, I once again taught first year procedure here at Yale. It was almost the 40th occasion, and as soon as the students sensed that the end was near, I was invited by one small group, then another, then another, and so on, to have drinks late in the afternoon at Mory's. These were special occasions. They allowed for an intimacy never achievable in Room 129. Students asked about different phases of my career, delicately inquired about my family life, and probed some of my heretical views on procedure. The french fries were also great.

Then one student turned to me and asked with startling simplicity: "Professor Fiss, what is your proudest achievement?" I paused for a second, maybe long enough to start scrolling in my mind's eye my list of publications, and then I suddenly realized that the answer lay in an entirely different domain. I answered, with remarkable clarity and firmness, "You." Yes, you are my proudest achievement.

You are the ones that have been at the center of my professional life. You are the ones for whom I write. You are the ones I have in mind as I sit in the library each morning preparing for class. You are the ones with whom I am in conversation in the still hours of the morning as I lie half awake imagining how the class that is to be held later in the afternoon will unfold. You are the ones I am often thinking about, sometimes even when my children or now my grandchildren pull on my sleeves. You are the ones I count on to realize my deepest dreams and hopes for the law.

I have devoted my entire life to make the world a little bit more just, but always with a clear understanding that as a teacher, I will only achieve this purpose through you. Today, you go forth in the world and when you do, remember that you carry not only your dreams and those of your family and parents, but also those of your teachers.

I realize that this is a difficult time to achieve these larger purposes; so much of the law is in shambles and needs to be righted. We live so far short of our ideals. The challenge before you is staggering, but perhaps even for this endeavor, Yale may have one more lesson to teach—a lesson first told to me by Grant Gilmore.

Grant Gilmore was one of the greatest teachers of this Law School. His subject was Contracts, indeed Article 9 of the Uniform Commercial Code. He had visited Harvard when I was a student there, and as it turned out, was on the Chicago faculty when I first joined it in 1968—his time at Chicago was a short, self-imposed exile. He returned to Yale in the early 1970s and I soon followed him here.

Once Grant was pressed to define the difference between Harvard and Yale and in response, he said that the essential difference was a frame of mind or attitude toward the law. At Harvard, the Golden Age is always the present, but at Yale, the Golden Age lies in the past and awaits us in the future.

The Golden Age of American law began on May 17, 1954, and continued until the mid 1970s, when a newly-constituted Supreme Court began its disheartening project of emptying *Brown v. Board of Education* of its generative meaning. I came to Yale as this process of retrenchment began and lived out my career here during an era of American law that is, as you so often heard me declare in class, anything but golden. Yet I know—I know in my heart of hearts—that someday soon the Golden Age of American law will once again come into being and will arrive on your shoulders and as a result of brave efforts to turn the lessons you have learned in these halls into a living reality. *Y*