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Spring 1993

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Inside:
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Cover: “Celebration of Law” painting by Rudy Pozzatti. See page 41 to order prints.
On Dec. 5, 1842, more than 150 years ago, this law school began with an inaugural lecture by Judge David McDonald, the school's first professor. That address was titled simply "The Study of Law." He delivered it in the chapel of Indiana University to the new Law Department—approximately five students and assembled guests. On Dec. 3, 1992, two days shy of our actual sesquicentennial anniversary, we celebrated our past and our future in a number of ways. Justice Shirley Abrahamson, JD'56, delivered the Sesquicentennial Lecture, published in this *Bill of Particulars*. Later that evening, we celebrated with a gala dinner in our own law library. We looked especially to the arts, and to two artists in particular, to celebrate this law school's 150th anniversary. In honor of this event, Distinguished Professor Rudy Pozzatti created a silkscreen print, which appears as the cover of this *Bill of Particulars*, and Distinguished Professor David Baker composed a three-movement jazz suite titled "Celebration."

Why turn to the arts to celebrate this law school anniversary? Every lawyer—every good one—is an artist. Every lawyer has to be able to see essential forms within unfamiliar patterns. Every lawyer has to learn to think across genres, institutions, jurisdictions, and conventions in order to create with the law. Every lawyer has to find fresh solutions—sometimes to old problems, sometimes new ones. Sometimes defining the issues themselves is a high art.

Why should we turn to the arts for inspiration in the law? To me, law and art both represent time, and they

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**President Ehrlich, Chancellor Gros Louis offer best wishes**

"Congratulations on your 150th anniversary. The Law School can look with justifiable pride on its distinguished past and with enthusiasm for its prospects in the years to come. As the world becomes smaller, law will play important new roles, as it has throughout the course of the school's history. Tonight, we congratulate the school's faculty, staff, students, alumni, and alumnai for their roles in leading the law and the school from its noble past to a bright future."

—Tom Ehrlich, President, Indiana University

"I am very pleased to offer my congratulations to the Law School family on this memorable occasion. As the University has grown since 1842, so too the Law School has reflected that growth and the energy that drove it. Having been Chancellor of the campus since 1980, I have come to know the Law School well and, because of comments from my counterparts across the country, to know its unique features. Many law schools, or so I am told, tend to float away from the university to which they belong and become islands unto themselves in some corner or perhaps handsome quadrangle of the campus. John Donne said almost 400 years ago that no person is an island and I would like to think that no school within a university should be an island either. What has most impressed me about this law school is its active and full participation in the total life of the Bloomington campus. Faculty members in the school have given generously to campus governance; participated creatively in interdisciplinary centers and projects; contributed conscientiously to debates on undergraduate education; made known their presence as members of an intellectual community that is a university at its best. The Bloomington campus would be diminished greatly without the involvement of Law School faculty and students. Similarly, the university would be diminished without what the Law School has given to its reputation. Thus, today's occasion is indeed one justifying celebration and gratitude. I am confident that a rich future will develop from the school's rich past. All good wishes and drink a toast for me."

—Kenneth R.R. Gros Louis, Chancellor, IU Bloomington
do so in similar ways. Like the arts, law defines the cutting edge. The future of the knowable, the history of the imaginable, these are the time frames of the law. The law, like art, turns to the past in its search for models and insight into the present. The law, like art, is lasting. Law and art alike teach us to appreciate the past while simultaneously freeing us from it. Music and the visual arts express us in ways that link the past and the future; like the law, they require that we imagine the future. The arts also reflect and express something very basic and timeless—human feeling and emotion, essential aspects of the human condition that are also the basic stuff of law.

The arts are entertaining, but in a way that allows us to take the measure of the world, and with it, the dimensions of our very souls. The law, too, can be something like this. Helping to solve the great human problems of society with law takes creativity and sensitivity. The arts inspire these, by inviting us to think beyond words, and then to find the words.

We tell our students that we are training them to think like lawyers—but that means educating them to think like artists: to keep technique firmly connected to judgments, rationality to dreams, traditions to innovation, routine to improvisation.

Students should be seen and treated as aspiring artists, not techni-

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**Law, art: Part of 'ceaseless stream'**

Rudy Pozzatti, Distinguished Professor of Fine Arts at Indiana University, created “Celebration of the Law” in honor of the law school’s 150th birthday. His work is well known throughout the world. He has had numerous one-man exhibitions in various museums and galleries throughout the U.S., Italy, and Germany, including the Art Institute of Chicago, the Cleveland Museum of Art, the Indianapolis Museum of Art, the Pushkin Museum in Moscow, the Toronto Museum of Art, and the Bibliotheque Nationale in Paris.

He has won numerous awards. In a booklet titled "The Art of Rudy Pozzatti, Four Decades of Printmaking," Dario A. Covi has written about Pozzatti in a way that also echoes the spirit of our own sesqui-centennial:

"It is not a nostalgic yearning for what has gone before that Pozzatti seeks to communicate... but admiration for what man through determination and creative gifts has been able to make and to maintain over the centuries. For Pozzatti is not in love with the past as such, but sees it as part of a ceaseless stream of which he too is inevitably a part.

"He can be inspired by a reading of Dante, by travel, both far and near, or simply by thinking about the world around him, both the natural and the man-made, by concern about current phenomena and past events, by the lasting and the disappearing."
cians. Soon, as first-rate lawyers, they will have the technique necessary to handle the easy cases and answer the basic questions, but they will also have the creativity and judgment to put form and shape into an amorphous set of facts that do not neatly fit a ready-made legal pigeonhole. Knowing the questions to ask is not just a technical skill. It is a creative, imaginative enterprise. As artists, students and the lawyers they will become must have the technique of their craft well in hand, but the goal is not technique for technique's sake.

As law teachers, we aspire to be artists too, giving our students a feeling for the materials, knowing—or hoping—that the results of a legal education will unfold for them over a lifetime. Like the practice of any art, legal education is never finished. At best, it is ever fresh, a language of connection to others that each attorney speaks with his or her own distinctive and wonderfully individual accent. As law becomes more global in the coming century, the diversity of these accents will undoubtedly increase, placing even more weight on the creative and artistic elements of the legal imagination.

As legal educators, we aim to inspire an appreciation of the creative role of law and a sense of what it means to mix vision with skill and wisdom with action. We aspire to stand for these qualities not only before our students and the academic community, but also for our alumni and alumnae at the bar and bench. We try to be good witnesses for these enduring values. In the stewardship of this school, all of us aspire to honor our graduates from our first 150 years by carrying their art forward, into the future.

So at our school's sesquicentennial, we celebrate creativity and the arts because theory and technique alone are not enough. The living reality of human beings in need of law demands that we be artists.

—Alfred C. Aman Jr.
Dean and Professor of Law

Celebrating the law—and all that jazz

David Baker, Distinguished Professor in the IU School of Music, composed a piece of music especially for the law school to celebrate this milestone in our history.

David Baker, a graduate of the IU music school, is now chair of the jazz department. He has performed with some of the greatest jazz artists of our times, including Stan Kenton, Maynard Ferguson, Lionel Hampton, Quincy Jones, and Wes Montgomery. His records and publications are numerous. He has written more than 2,000 original pieces of music in a variety of genres, including jazz compositions, orchestral works, sonatas, concerti, string quartets, vocal music, film scores, and music for television.

Baker has written more than 60 books and more than 130 articles. He has more than 50 recordings to his credit, appearing either as performer, conductor, arranger, or composer.
The Justice Who Never Graduates:
Law Schools and the Judicial Endeavor

Wisconsin Supreme Court Justice Shirley S. Abrahamson gave the Sesquicentennial Lecture on Dec. 3 on the Bloomington campus. Her talk is reprinted here for the benefit of those who were unable to be with us that night.

Mark Twain would often begin a speech with a dramatic pause followed by this announcement: "Aristotle is dead. Plato is dead. Goethe is dead. Nietzsche is dead. And I don't feel so well myself." I empathize with Mr. Twain's condition this afternoon.

I am deeply honored to participate in the celebration of the 150th anniversary of the founding of the Indiana University School of Law. I am, however, somewhat uncomfortable being here. I remember well my first days of law school, 40 years ago in 1953. The feelings of apprehension, bewilderment, and inadequacy with which I listened to the introductory speeches and confronted the Socratic method are still fresh in my mind. With this vivid recollection, I am relieved this afternoon to be standing at the podium rather than seated as a student in a law school classroom. In the past 40 years, I have moved from law student to lawyer to law professor and on to my present position as a justice of the Supreme Court of the state of Wisconsin. Nevertheless, I find my return to Bloomington disconcerting. I must perform before my former professors, mentors whom I remember with great affection and whom I continue to hold in the highest regard. My aspiration in law school was to fulfill the faculty's highest expectations—and that same ambition is with me today.

As Dean Alfred C. Aman Jr. wrote, anniversaries are about connections—connections that link the past, present, and future. I will speak today of connections—personal as well as institutional. My personal connection with the law school is of 40 years duration, spanning about one-fourth of its history. Some of your connections go back even farther.

By its very nature the celebration of a 150th anniversary forces us to reflect on the past as we examine the present and look toward the future. Professor Grant Gilmore of Yale Law School wrote that history is a systematic distortion of the past designed to tell us something meaningful about the present. With this observation about history in mind, let us go back to the Indiana of 1842, the 27th year of statehood, the year that this law school was established.

In 1841, Indiana had a hero of national eminence. William Henry Harrison, a Virginian turned Hoosier, was elected president of the United States. Indiana also had the highest illiteracy rate of any northern state, a legislature unwilling to levy taxes or spend money for education, and a public treasury being drained by a rage for banking and internal improvements. The Indiana Legislature had a great deal of power under the constitution of 1816, and, in 1842, it was vigorously attending to business, adopting both general and local laws.

In 1842, as for years before, lawyers were practicing law and judges were deciding cases, all without the benefit of a law school education. Law offices, where young men paid...
AB, JD, SJD, LLD: A justice who graduated

Justice Shirley S. Abrahamson earned an AB magna cum laude from New York University in 1953, a JD with high distinction from Indiana University in 1956, and an SJD degree in American legal history from the University of Wisconsin Law School in 1962. She is the recipient of nine honorary doctor of laws degrees, including one from Indiana University. She is also a member of our Academy of Law Alumni Fellows, the highest honor our school can bestow on its alumni.

Abrahamson practiced law in Madison for 14 years. She has taught as a faculty member of the University of Wisconsin Law School and lectured at Marquette University Law School. She was the first, and thus far continues to be, the only woman to serve as a justice on the Wisconsin Supreme Court. Appointed in 1976, she was elected in 1979 and re-elected in 1989 to her second 10-year term.

In addition to her duties on the court, Justice Abrahamson serves on the John D. and Catherine T. MacArthur Foundation Program of Research on Mental Health and the Law and is a member of the Council of the American Law Institute. She has been vice president of the American Judicature Society. She serves on our own Board of Visitors as well as on those of the University of Miami and Northwestern University law schools. Justice Abrahamson is the author of numerous law review articles on such subjects as juries, victims’ rights, and state constitutions. She has presented named lectures at the law schools of several universities, including The Ohio State University, the University of Minnesota, the University of Texas, the University of Utah, Southern Methodist University, and Hastings College of the Law.

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substantial fees to read law, were the chief means of legal education and would remain so well into the 19th century. Indeed, the lawyers of the 19th century were indifferent to the law schools. Law schools had little to do with certifying professional competence or controlling entry into the practice. In the 19th century, the courts controlled admission to the bar directly, and judges regulated the profession while riding the circuit.

Despite the lack of a law school, the activity in the Supreme Court of Judicature of the state of Indiana in 1842, when the law school was founded, suggests that Hoosiers were very litigious. In the November 1842 term, Judges Isaac Blackford, Charles Dewey, and Jeremiah Sullivan decided 70 cases. That is a substantial case load for three judges for only part of a year, even by today’s standards. Most of the judges’ opinions ranged in length from one paragraph to two pages, and altogether they comprise only 147 pages in 6 Blackford. Citations to precedent or authority for legal propositions were few and far between. Writing by hand probably forced the judges to be concise. There may be a lesson here for the judges of today.

The cases from this November 1842 term are diverse. The court dealt with promissory notes and bonds, aliens acquiring title to land, the rights of a mother as guardian of a child born out of wedlock, libel, mental incapacity at the time of making a contract, and partition.

Although the lawyers appearing before the Indiana Supreme Court that term had not learned about the niceties of procedure in law school, many cases involved matters of pleading and practice and at least five centered on rules of evidence. Lawyers were also conducting jury trials, and the Supreme Court was ruling on jury instructions.

While most cases on the Supreme Court’s docket that term were civil, the court also heard criminal cases, including about half a dozen pertaining to indictments. One criminal case involved peremptory challenges to the selection of jurors in a capital case, a subject still before the courts today.
During the November 1842 and May 1843 terms, the Supreme Court of Indiana considered two constitutional cases. The court upheld the statutes in each case. One case involved whether an 1838 statute relating to courts violated the judicial provisions of the state constitution. The other involved a challenge to a state statute abolishing imprisonment for debt. Because the case involved a contract made before the law’s enactment, the statute was challenged as a violation of the constitutional provision forbidding the passage of any law impairing the obligation of a contract. The opinion does not state which constitution the court was applying—the United States Constitution or the Indiana Constitution. Not much has changed. State courts still have a tendency to blur the federal and state constitutions. The Supreme Court dispatched the constitutional challenge swiftly, writing: “It is a matter too well settled to admit of controversy, that the Legislature is competent to pass a law, by which an insolvent may be discharged from imprisonment upon a previously contracted debt, without impugning the clause of the constitution alluded to.” No footnotes. No citations. Ah, those were the days.

As I mentioned earlier, the Supreme Court activity in the November term of 1842 suggests that the citizens of Indiana often brought their disputes to the courts. The public, however, was also unhappy with the legal system. Like Americans of today, the Hoosiers in the mid-19th century had a love-hate relationship with the law. While looking to the law to protect their lives, liberty, and property, they expressed hostility to the existing legal institutions. In the mid-19th century, the citizens of Indiana, along with citizens in other states, demanded reform and simplification of the law. Hostility to lawyers was especially evident at the Indiana constitutional convention of 1851. Delegate George Tague of Hancock, voiced the prevailing attitude, stating: “I do not wish to find fault with the attorneys, but when we go to them for advice, there is always too much of it. A common man cannot understand the law.” This antagonism to lawyers and the law did not lead the constitutional convention to abolish the legal profession or the common law. It did result, however, in the adoption of art. 7, sec. 21 of the Indiana state Constitution, which provided that “every person of good moral character, being a voter, shall be entitled to practice law in all courts of justice.”

Section 21 of article 7, which remained in the Constitution until the 1930s, was part of a general effort to demystify the law. Passage of this constitutional provision reflects not only a hostility to the legal profession, but also a disrespect toward formal education. John B. Niles, a lawyer from LaPorte, was finally convinced to vote for the measure. He said, “I am tired of the clamor against lawyers.... Open the door wide to free competition; and integrity, learning, and ability will be a sufficient certificate, and without such certificate, a man will have but a poor practice.” The free market argument won the day. As must be obvious, the 39 lawyer-delegates at the convention were outnumbered by the 62 farmers, 16 physicians, and 11 businessmen.

It was under these circumstances that this law school was founded. The university had been trying to establish a law school since the mid-1830s with no success. Then, in 1841, David McDonald, a resident of Bloomington and a judge of the circuit court, was enticed to become a professor of law. Judge McDonald drove a hard bargain. He would serve only if the school term could be reduced to three months in order to accommodate his schedule as a circuit judge. The trustees reluctantly agreed.

Little is known of 19th-century legal education, and there is little information about the legal profession during that period. Nevertheless, it would come as no surprise to historians of legal education that Indiana University turned to a judge as its first and only law faculty member. In the early part of the 19th century, teaching was an avocation of practicing lawyers and judges.

The Indiana University Law School began as a two-year undergraduate program, with two terms each year. The law library began with an appropriation of $150. The catalogue described the course of study as including lectures on common law, equity, commercial law, international law, and constitutional law. In addition, the law department promised a weekly moot court session in which the students’ pleadings and arguments on legal questions would be critiqued.

If you had been a law student in Bloomington in the 1840s, you would have found Bloomington to be a country village. Before the coming of
the Monon railroad, it was isolated and difficult to reach. In 1849, when William Pitt Murray traveled from Centerville, Ind., to Bloomington to attend law school, it took him nearly three days: two days by coach to cover the 62 miles from Centerville to Indianapolis, followed by a 20-hour trip from Indianapolis to Bloomington in the three-seated open wagon.

Upon his arrival, William Murray found Bloomington to be a village without sidewalks or graded streets and with mud everywhere. The “homes and business houses were of the most primitive kind,” he wrote, “the old State University building built without regard either to ancient or modern architecture or convenience.” His observations about the rustic qualities of the village extended to “society in Bloomington,” which he characterized as different from society in 1899. “Some of the young men,” he wrote, “wore jeans suits and cowhide boots.” Imagine how he would view our attire today.

On a chilly Dec. 5, 150 years ago, Judge McDonald gave the law department’s inaugural address, titled “Introductory Address on the Study of the Law.” The university invited the public to attend. The business of the law department and the administration of justice were too important to be left to academicians, lawyers, and judges alone. Judge McDonald understood that distrust of the legal system ran long and deep in our culture. Only through community education and public participation could the citizens be assured that the justice system would operate in the public interest.

There is no record of the number of townsfolk who attended Judge McDonald’s lecture. We can assume that law student attendance was required, but we do not know how many students comprised the entering class. We do know that in 1843 there were 15 law students—six seniors and nine juniors. The first graduating class, the Class of 1844, numbered five. I owe thanks to three students of that class—Randolph Ross, Henry Tanner, and Joseph B. Carnahan. As members of a student committee, they requested a copy of McDonald’s speech, which was subsequently published and kept available for us today.

Judge McDonald’s public address of Dec. 5, 1842, spans 22 printed pages, and I estimate that he took three hours to deliver it. (I will not demand equal time.) As you might suspect, parts of McDonald’s speech are dated. For example, he spends significant time and effort explaining the value of the common law and reassuring his audience that it is not a humiliation for Indiana and the nation to have borrowed the common law from the English. But then few speeches can survive 150 years intact. More important than the judge’s discourse on the English common law is his exploration of three themes that still concern us today: What is the role of law in society? What do we expect of the legal profession? What do we expect of a legal education? I take Judge McDonald’s exploration of these three themes as the focus of my text.

Judge McDonald viewed the law as a necessary and inevitable by-product of the human desire for an ordered society. “Man was made for society,” he said. “His social is his natural state... his nature continually urges him to [a state] of society, civilization, and refinement.... But society,” McDonald continued, “cannot subsist without order, nor order without government. And we may, hence, conclude that order and government are not entirely artificial, but that they belong, in their origin, to the nature of man.”

Judge McDonald viewed the law as the major force bringing order to society and holding it together. He believed in a single, universal concept of justice, which could be attained through the legal process. Judge McDonald regarded the law as the framework upon which society’s moral order was built, and he saw the study and practice of law as a noble calling. As he told his audience, “Other calamities may befall a nation, and it may survive them,... but when the laws, by which the people are governed and protected, have fallen into disrepute, revolution or ruin is the inevitable consequence.... To study our jurisprudence as a science,” he continued, “and to be thoroughly learned in its precepts, are... not only honorable to us [as lawyers] and necessary to a wise administration of justice, but of the highest moment to the permanence of our political institutions.”

Despite his “natural law” perspective, McDonald regarded the law as a distinctly human creation, believing the development and application of legal rules to be an exercise of human reason. The common law was, in his opinion, a product of and monument
We must recognize that our society is far more complex than any envisioned by Judge McDonald.

individuals, and the leader of the community, setting the pace in local government, statesmanship, and business. It remains true today that legal education trains lawyers for practice, community service, business, and government. But litigation is a minor part of a lawyer’s practice. Practitioners’ major roles today are those of the counselor, resolver of disputes, and facilitator of transactions. Much of lawyers’ daily work involves everyday transactions of buying, selling, leasing, tax planning, and probating estates. As for judges, much of our work is settling disputes that are important primarily to the parties themselves. Still, all this work has a moral dimension. And much of the moral dimension of law is made up of the choices we make to be knowledgeable, hard-working, thoughtful, dependable, honest, compassionate, considerate, and careful each day as we practice our profession.

The lawyer has the power to call upon the authority of the community. Because we lawyers possess this power, we can alleviate or aggravate injustice. As Judge McDonald said, “We must remember that the power to do good is generally accompanied with ability to do harm....” He envisioned lawyers as engaging in a noble and humane profession. Judge McDonald saw lawyers as agents through which the law performs its function of maintaining a just society.

Despite his idealism about the law and the legal profession, Judge
McDonald did not anticipate the potential and significance of modern legal education in a university setting.

The judge viewed the creation of the law department as an experiment, "an experiment, which touches a variety of interests dear to the University and dear to the legal profession of the state of Indiana."

Interestingly, Judge McDonald devoted only a small part of his lengthy speech to the design of the experiment or to the nature of the legal education he contemplated. He advocated the study of common law. Although he thought that students should also study constitutional and international law, he regarded these as subjects that could be mastered with little effort and disposed of quickly. (I wish someone had told me that when I was struggling with the commerce clause cases.)

McDonald's vision of his task as a teacher of law was "to unfold" what he saw as "the science of the constitution and laws of our country." The law was, to Judge McDonald, a liberal science rather than "a dry and crabbed art, interesting only to those who practice it for gain." He saw the law's evolving framework of rules as akin to the systems of rhetoric and grammar. He envisioned that the law department would draw on the university's science departments for insights about unifying the law into a methodological arrangement and harmonious order. Perhaps here were the beginnings of an interdisciplinary approach to the study of law.

Judge McDonald cautioned the law students in his audience that they would need to work hard to find order in the mass of judge-made law. "[T]he study of law," he stated, "requires indefatigable diligence and untiring perseverance.... Genius and talents alone will not do. To these must be added application.... If, then, we would be distinguished in this profession, we must be willing to endure all the inconveniences of long and laborious research, and accustom ourselves to habits of persevering investigation." On the basis of my experience, I would say the judge got that right.

While Judge McDonald foresaw that the law school's responsibility included not only teaching law but also working toward its improvement, I am sure he would be surprised at the significant, direct, and substantial contribution that today's legal academic can make to the development of the law. As a judge, I view the law review writer as an amicus curiae in our cases. Lawyers and judges look to academic writing for better understanding of doctrinal law, for information about the practice in other jurisdictions, for critical analysis, and for better approaches to legal problems.

The law school has also become an intellectual watchdog of the profession. One of the law school's obligations, in the classroom and in publication, is to critique the judicial work product, providing the judiciary with an informal check and balance. To quote Professor Kirschner of Marquette University Law School, the task of the academic lawyers is to "tweak the noses of members of the judiciary when [the academicians] find [the judges'] actions suspect." Judges hope, of course, that our critics will be kind. Chief Justice Taft cautioned law review editors not to be too hard on the judges, saying, "Remember, if you will, we are the only courts you have."

Thus the courts and the academy engage in an ongoing dialogue and exchange of ideas about the values at the core of the legal system. The judge's task is to evaluate the academic's criticism and make adjustments as needed. A robust and uninhibited dialogue is necessary for this process. In fact, I would like to see the academy pay more attention to the work of the state courts.

Implicit in Judge McDonald's lecture is the recognition that the law school, bench, and bar are intertwined and that the education and training of legal professionals is a lifelong process. As Justice Holmes said, "Your education begins when what is called your education is over...."

Law school teaches us rules, but those rules will soon change. What is more important, law school also teaches us a system of self-education, of self study. But lawyers and judges are well-advised to return to the law school periodically, as students of law, to re-tool. The quality of our practice reflects the quality of the legal system. "[I]n the public estimation," Judge McDonald asserted, "the legal profession and the laws themselves are nearly identical." He feared that without well-educated lawyers and judges, respect for the law would decline.

Lawyers and judges must take the time to examine anew the roots of our legal heritage and to explore history, economics, philosophy, religion, literature, and ethics as they relate to
law. The burden of the daily caseload all too often gives the lawyer or judge little opportunity to integrate her learning or to engage in rigorous evaluation of the administration of justice. Scholarly endeavors put the lawyer and judge in touch with a broader world of ideas and provide an important source of intellectual nourishment.

And, in turn, judges and lawyers can add to the intellectual life of the law school. A judge or lawyer teaching a course or participating in the law school as a jurist-in-residence can have a synergistic effect.

Law students also have a role. They can forge connections between the law school, the bench, and the bar through their jobs in law firms and in judge’s chambers.

The experiment of founding a law school has taken on dimensions Judge McDonald would not have imagined. Today’s law school has a monopoly on entry into the profession, and law school teaching has become a profession unto itself, separate from the bench and bar.

This latter development has been a mixed blessing. In the law department’s early days, the faculty of practicing judges and lawyers oriented the students’ training toward law practice. Later, the full-time academician and the case method of study would offer students a more systematic, academic intellectual experience. The case method, however, has also distanced legal education from the practice of law by emphasizing principles of legal doctrine while de-emphasizing fact development and advocacy skills. The comparative value of a legal education stressing a broad, theory-based, intellectual agenda and a legal education accentuating practical skills has been debated for at least 100 years. The dichotomy between theory and practice is, in my opinion, a false one. Legal theory benefits when tested by practical insights. The good practitioner is well grounded in the theory of the law and public policy. The best forms of legal education can combine theoretical approaches to law with the development of practice skills.

The 1842 experiment of founding a law school at this university has succeeded, I am sure, beyond Judge McDonald’s wildest expectations. The original experiment involved less than a dozen students. In 1992, the Indiana University School of Law is a significantly larger and more diverse institution than McDonald could have imagined. When Judge McDonald delivered his lecture he referred to the law students as “men” and “young gentlemen.” And on Dec. 5, 1842, the male nouns and the male pronouns definitely did not include women. Fifty years later, 100 years ago this year, Tamar Althouse Scholz became the first woman to graduate from this law school.

As Muriel Rukeyser wrote, “The universe is made of stories, not of atoms.” Thus it is appropriate during this sesquicentennial celebration that we remember Tamar Althouse Scholz and the pioneering role she played in the history of legal education and the cause of women in Indiana. I join the law school in taking pride in this the 100th anniversary of her graduation.

Within the 19th century, only three other women received their LLB degrees from this institution. Even when I was in the law school, from 1953 through 1956, you could probably count the number of women law students on the fingers of one hand. There was only one female faculty member—Betty Lebus, the law librarian, who became the first woman tenured faculty member at this institution. Despite the demographics, I found this law school to be a friendly, open, warm, and protected environment. If there was gender bias, I did not detect it.

My experiences with blatant sex discrimination came when I was seeking employment. I remember well that a Bloomington practitioner who taught at the law school (and gave me an ‘A’ as I remember it) refused to hire me for part-time work in his law office. He claimed people would gossip if he worked with a woman. The fact that his secretary was a woman seemed irrelevant. He remained convinced that a woman lawyer in the office would offend community sensibilities.

When I was about to graduate from the law school in 1956, Dean Leon Wallace took me aside to express his relief that I was leaving Indiana. He thought that my being a woman would make it very difficult for me to land a job with a law firm in the state, except perhaps as the firm’s law librarian. I was surprised. According to law school gossip, the largest Indianapolis firms gave offers automatically to the graduate who stood first in the class. In 1956, I learned there was a proviso—the offers would go to the highest
The education of lawyers is integral to the maintenance of a free and just society.

Many law firms may not have been ready for a woman lawyer in 1956. There is evidence, however, that women practiced law in some counties in Indiana as early as 1875. In an 1893 case, In re Leach, the Indiana Supreme Court formally opened the legal profession to women. The trial court had ruled that women could not practice law, basing its determination on the 1851 constitutional provision I mentioned earlier. This provision reserved the practice of law to persons of good moral character who were eligible to vote. Since women could not vote in 1893, the trial court concluded that they were not eligible to practice law.

The Indiana Supreme Court reversed the decision of the trial court, reasoning that the Constitution did not expressly prohibit women from practicing law; that the common law did not exclude women from the profession of law; and that the customs and usages of “Westminster Hall” that excluded women from the practice were based on fictions about the sex that “are rapidly disappearing.” Relying on both the state and federal constitutions, the Supreme Court of Indiana declared that a woman’s right to choose a vocation was an inalienable right that could not be abridged by the state.

Indiana University School of Law has led the courts, the legislature, and the bar in opening the legal profession to women. The academy has played an important role in sensitizing all of us to gender bias in the law. But, unfortunately, just as Judge McDonald’s use of the male form of address reveals the exclusion of women from the profession in 1842, a variety of contemporary practices point up a failure to grant women equality in the profession and in the courts. About 20 states have studied the legal system and found numerous examples of gender bias in the administration of justice.

It is incumbent on the faculty to continue to lead us in our efforts to become an open, unbiased profession and society. The law school must set an example in its own hiring and promotion practices, in its standards for admission, and in the faculty’s classroom behavior. I also hope faculty will teach the students that sensitivity to equality issues does not stop when they leave the schoolhouse gates; this sensitivity must continue in practice. The education of lawyers is integral to the maintenance of a free and just society. The law school, which instills in lawyers both the skills and the values they bring to their practice, has an effect on us all. This law school has performed its vital responsibilities in legal education with distinction. We applaud those achievements today.

Judge McDonald’s view of the law, the legal profession, and the law school may strike us today as somewhat formalistic, simplistic, or anachronistic. It may also strike us as idealistic. I choose to focus on its idealism. For all of us are, at some level, society’s moral agents. We, as lawyers, should embrace McDonald’s idealistic vision of our role in creating a just society.

I conclude my remarks today with the concluding remarks of Judge McDonald, delivered 150 years ago: “The due administration of justice depends almost entirely upon the members of this profession. The Bench is filled from the Bar; and the good and powerful influence of our courts of judicature is everywhere felt and acknowledged. The administration of the law ‘comes home to the business and bosoms of [all people].’ It discourages and punishes crime, and maintains and cherishes good order and wholesome morals in society. It secures the poor against the oppression of the wealthy; and it guards the rich against lawless violence. It protects the husbandman in...peaceful avocations, and the mechanic in...useful labors. None are so lofty as to be above its powers; none so low as to be out of its protection.

“Such is the usefulness of lawyers; and such the due administration of the law. And now, young [gentlepeople], if you are willing to endure the labor of mastering this noble science; if you are willing to spurn the trifles which engage the time and affections of too many of our youth [and elders]; if you glow with honorable emulation; if you desire to be distinguished among your fellow citizens, and useful to our beloved country,—here is a field worthy of your labor—a field, in which you may, at once, gratify a laudable ambition, and promote the best interests of society.”

So sayeth Judge David McDonald. Abrahamson, J., concurs.
The New First Amendment and Its Impact on the Second

When the Indiana Law Journal invited me to submit commentary on the future of the law, I was terrified by the prospect. Having proclaimed long ago that “[p]rediction is a hazardous business,” I was prepared to decline the invitation, or perhaps to submit a title and nothing more. As the deadline approached, I became more and more frantic. Finally, I gave up. I decided not only to decline the invitation, but also to resign from the faculty. It was a matter of principle.

I worked late into the night, preparing my letters to the Journal and to the dean. It was hard to find the words. Fatigue overcame me, and I fell asleep at my desk. Immediately I began to dream. And what a dream it was! When I awoke, I was delirious with joy. Now I could contribute to the Journal after all. Now I would not have to resign. Now I could predict the future, because, at least for one small corner of the law, I had actually seen what the future might hold.

In my dream, I was standing in a long corridor. Near the end of the corridor was an open door in which stood a very peculiar man. He was dressed all in black, from his head to his foot. And, yes, the stump of a pipe he held tight in his teeth. The man beckoned me toward him, and, with some hesitation, I walked down the corridor and followed the man through the door. We entered a large and ornate office. The man spoke not a word, but went straight to his desk. He picked up a document and handed it to me. It was a draft opinion of the United States Supreme Court, and I realized at once that I was standing in the chambers of a Supreme Court justice. The peculiar man now looked familiar. Could it be Justice Scalia? No, this man was much too old. But the resemblance was striking, so I asked him. He smirked in response and ushered me to the door.

I stood in the corridor and read the draft opinion from start to finish. It was dated May 12, 2011. Labeled “Draft Opinion of the Court,” it did not identify its author. I assume that the opinion was written by the man who gave it to me, but I cannot be sure. I also cannot be sure that the opinion was actually issued by the Court, and I know nothing of any concurring or dissenting opinions. But as I already have noted, “[p]rediction is a hazardous business.”

What follows, without further commentary, is the draft opinion that I read.

Johnson v. Indiana, No. 10-603
Draft Opinion of the Court—

1 Professor of Law and Louis F. Niezer Faculty Fellow, Indiana University School of Law at Bloomington, received no help from anyone in the preparation of this commentary.
4 My WordPerfect thesaurus file had inexplicably disappeared, and our computer assistant had gone home for the night.
5 The smoke, it encircled his head, but it looked more like a halo than a wreath. Cf. Clement C. Moore, The Night Before Christmas (1949).
6 Cf. id.
7 See supra note and accompanying text.
8 Curiously, all of the draft’s citations were to cases decided in 1992 or before, and many of them referred only to the unofficial Supreme Court Reporter. I can offer no explanation for this curiosity, except to repeat that...
May 12, 2011

During a Fourth of July celebration in Indianapolis, Petitioner Johnson fired his machine gun into the air. He was charged and convicted under Section 35-47-5-9 of the Indiana Code, which provides that "[a] person who ... operates a loaded machine gun" commits a criminal offense. The Indiana Supreme Court affirmed in an unpublished decision. We granted certiorari to consider Johnson’s claims that the statute is unconstitutional both on its face and as applied. We accept Johnson’s facial challenge, and we therefore reverse his conviction.

It is settled that “[l]iberty finds no refuge in a jurisprudence of doubt.” Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803 (1992); see id. at 2876 (SCALIA, J., concurring in the judgment in part and dissenting in part) (describing this phrase as “august and sonorous”). Yet 19 years after the adoption of the new First Amendment, its impact on the definition of liberty is still questioned.

In 1992, the states ratified a new amendment to the Constitution, one that James Madison had originally proposed more than 200 years before. This amendment, which limits the ability of Congress to grant itself a raise, was proclaimed at the time of its ratification to be the Twenty-Seventh Amendment. This popular understanding, however, was “plainly wrong—even on the methodology of ‘reasoned judgment,’ and even more so (of course) if the proper criteria of text and tradition are applied.” Casey, supra, 112 S. Ct. at 2875 (SCALIA, J., concurring in the judgment in part and dissenting in part). As written and approved by the First Congress, this amendment was intended to precede what ultimately became the First Amendment. Upon its ratification, the pay-raise amendment therefore became not the Twenty-Seventh Amendment, but the new First Amendment, and this in turn required that all of the other amendments be renumbered. Thus, the old First Amendment has become the new Second Amendment, and so on.

Through the crucible of litigation, this Court gradually has confronted the implications of this renumbering. Given our strong commitment to selective stare decisis, see Casey, supra, 112 S. Ct. 2791, we have ruled that our precedents under the old Second Amendment continue to control under the new Second Amendment. We accordingly have held that under the new Second Amendment, state restrictions on expression and religion are not subject to federal constitutional review, because the doctrine of incorporation does not extend to Second Amendment rights. See Presser v. Illinois, 116 U.S. 252, 264-68 (1886).

“prediction is a hazardous business.” See supra note and accompanying text.

9 The text of this amendment provides as follows: “No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.” Speaking in support of his proposal, Madison noted the “seeming impropriety” and the “seeming indecorum” in allowing Senators and Representatives “to put their hand into the public coffers, to take out money to put in their pockets.” 5 The Founders’ Constitution 28 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting Rep. Madison’s remarks in the House of Representatives on June 8, 1789). By contrast, Representative Don Edwards, a member of Congress in 1992, called this amendment “disturbing”: “If James Madison had been interested in this provision, he would have put it in the Constitution. He was sitting there the whole time.” Richard L. Berke, 1789 Amendment Is Ratified But Now the Debate Begins, N.Y. Times, May 8, 1992, at A1, A21 (quoting Rep. Don Edwards). We express no view on this “Madison was sitting there” argument, but we note that it would apply equally to all of the Bill of Rights (assuming that Madison in fact remained seated throughout the Constitutional Convention).

10 See Berke, supra note 1; 1789 Amendment on Congress Pay to Be Certified, N.Y. Times, May 14, 1992, at A9; Foley, in Switch, Backs Amendment on Pay Raises, N.Y. Times, May 15, 1992, at A8; Don J. DeBenedictis, 27th Amendment Ratified, 78 A.B.A. J., Aug. 1992, at 26. As these 1992 sources indicate, the age of the proposal made some question the validity of its ratification. As far as we are concerned, however, the older the better. Thus, that the enactment rests in part on the acts of “representatives of generations now largely forgotten,” Dillon v. Gloss, 256 U.S. 368, 375 (1921), surely is a point in its favor. We need say no more on the validity of this amendment, for to do so “would unduly lengthen this opinion.” Coleman v. Miller, 307 U.S. 433, 454 (1939).

11 The new First Amendment actually was the second of twelve proposed amendments to the Constitution. The last eleven of these twelve have now been ratified, but the first proposal, dealing with the number and apportionment of Representatives, has not. We express no view on the renumbering that might be required if that proposal ultimately is ratified.

12 The rewriting of precedents, of course, is an
General laws that are not specifically targeted at weapons are immune from constitutional scrutiny.

Here, the issue is the continuing impact of our precedents under the old First Amendment. The logic of our Second Amendment jurisprudence might suggest that these precedents should be applied to the new First Amendment, but that would be mindlessly formalistic. The better analogy, we believe, is to the doctrine of reverse incorporation, whereby the Equal Protection requirements of what was then the Fourteenth Amendment were incorporated into what was then the Fifth. Here, as there, any other result would be “unthinkable.” Bolling v. Sharpe, 347 U.S. 373, 390 (1954). We therefore hold that our precedents under the old First Amendment, which is the new Second Amendment, are now applicable to issues arising under the new Third Amendment, which was previously the Second.

The relevant constitutional language provides that “the right of the people to keep and bear Arms, shall not be infringed.” The right to keep and bear arms, that is, weapons, holds a “preferred position” in our constitutional jurisprudence. See, e.g., Saia v. New York, 334 U.S. 558, 562 (1948). In the words of Justice Brandeis, “Those who won our independence ... valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.” Whitney v. California, 274 U.S. 357, 375 (1927) (BRANDEIS, J., concurring). What could be more reflective of courage than the bearing of arms, either as an end in itself or as a means to some other good? The right to bear arms is a fundamental right that applies to the states as well as the federal government. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925). It includes not only the right to possess arms, but also the right to use them, subject of course to reasonable time, place, and manner regulations.

Respondent, the State of Indiana, argues that its machine-gun prohibition, as applied to Johnson, is valid as a time, place, or manner regulation. In particular, the State contends that Johnson’s firing of the gun occurred among a crowd of people, and that, in this type of setting, the State has an interest in public safety that is sufficient to override Johnson’s constitutional claim. This argument misses the mark. In the first place, Johnson did “not stand on his chair and shout obscenities.” Lee v. Weisman, 112 S. Ct. 2649, 2681 (1992) (SCALIA, J., dissenting). Nor did he display “[a] shockingly hard core pornographic movie that contains a model sporting a political tattoo.” R.A.V. v. St. Paul, 112 S. Ct. 2538, 2543-44 n.4 (1992) (SCALIA, J.). Furthermore, he and his group of onlookers did not “crowd into the Hoosierdome to display their genitals to one another.” Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2465 (1991) (SCALIA, J., concurring in the judgment). But by its terms, the machine-gun prohibition applies nonetheless. It is a total
ban on the use of machine guns. As a result, our time, place, and manner cases are not controlling.

Indeed, we need not conduct an as-applied analysis at all, because the Indiana law is clearly unconstitutional on its face. General laws that are not specifically targeted at weapons are immune from constitutional scrutiny. Thus, for example, a state can maintain a general law against robbery, even if this law is sometimes applied to robbers who use guns. See Employment Div. v. Smith, 494 U.S. 872, 878-82 (1990) (SCALIA, J.); Barnes, supra, 111 S. Ct. at 2463-68 (SCALIA, J., concurring in the judgment). When a law specifically restricts the possession or use of weapons, however, even for a purpose that has nothing to do with their suppression (for instance, to reduce noise), we insist that the law meet a high standard of justification. Barnes, supra, 111 S. Ct. at 2465-66 (SCALIA, J., concurring in the judgment).

Here, the Indiana law not only is directed at weapons, but it is aimed at a particular type of weapon, namely machine guns. Clearly, this is a law that is intended to suppress weapons precisely because they are weapons. See Barnes, supra, 111 S. Ct. at 2466 (SCALIA, J., concurring in the judgment). But “[the right to bear arms] means that government has no power to restrict [a weapon] because of ... its [weaponry].” R.A.V., supra, 112 S. Ct. at 2543-44 n.4 (1992) (quoting Police Dep't. v. Mosley, 408 U.S. 92, 95 (1972)). Not only does the Indiana law violate this prohibition, it appears to reflect a kind of weaponry discrimination, the most offensive form of weapon regulation. Under the Indiana law, the use of machine guns is banned, but there is no similar ban on the use of weapons against machine guns, which “seemingly [are] usable ad libitum.” R.A.V., supra, 112 S. Ct. at 2548. Indiana “has no such authority to license one side ... to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.” Id. In a decision that was summarily affirmed by this Court, Judge Easterbrook concluded that the old First Amendment would not tolerate a viewpoint-discriminatory ban on pornography. “This is thought control,” he wrote. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986). By analogy, this is gun control.

The State's attempt to satisfy strict scrutiny is feeble. It makes no claim that it has banned the use of machine guns “not because they harm others, but because they are considered, in the traditional phrase, 'contra bonos mores,' i.e., immoral.” Barnes, supra, 111 S. Ct. at 2465 (SCALIA, J., concurring in the judgment). If the State had asserted a “traditional moral belief” of this kind, id., we would be reluctant to disturb its judgment. Instead, the State contends only that machine guns are harmful, and, indeed, that they are particularly harmful. But other things are harmful as well, and the State has not banned all harmful things. Thus, “the only interest distinctively served” by the Indiana law “is that of displaying [the State's] special hostility towards the particular [weapons] thus singled out.” R.A.V., supra, 112 S. Ct. at 2550.

Indiana has attempted to make an ideological statement about machine guns, but this the Constitution forbids. “[O]fficial suppression ... is afoot.” Id. at 2547. The judgment of the Indiana Supreme Court is therefore

Reversed.
Invited to look forward on the occasion of the School of Law's 150th birthday, I look backward first. In order to understand what the 21st century holds for the field of employment discrimination, I need to recall its past history. When I was a law student more than 20 years ago, there was no field of law called employment discrimination. The premise of my student note, a walk through Title VII of the 1964 Civil Rights Act, seems quaint. The piece was written more than seven years after Congress had passed Title VII, prohibiting discrimination in employment on the basis of race, sex, religion, and national origin, but shortly before the United States Supreme Court ruled that a state statute classifying on the basis of gender was unconstitutional.

Now, in my office, I have a loose-leaf reporter service with nearly 60 volumes devoted solely to employment discrimination cases.

Overt discrimination, if not commonplace, was not unusual during my student days. I was one of nine women in my class, more than double the number of women students in the class ahead of ours. I still remember a time during my third year of law school when a male friend and I were walking to class. He turned to me and said, "Don't you feel bad?" "About what?" I responded. "Taking the place of a man in law school." Interview season was particularly stressful. One large law firm from Chicago decided to interview me (and the other woman candidate) on a Saturday morning rather than during the normal weekday times. I not only willingly acquiesced, I also allowed the interviewer to lecture me on the inappropriateness of my desire to represent professional athletes in labor negotiations (even though I am the nuttiest sports fan, and it was a great labor law firm). "Besides," he said, "you wouldn't really like it."

Of course, things were worse 150 years ago. Women and African Americans did not have the right to vote or the right to practice law; slavery was lawful in some states; and married women could not own property in their own names. We have indeed come a long way: Today, more than 25 percent of our first-year class are minority group members. In the United States, women now comprise approximately 20 percent of the legal profession.

In Title VII, Congress made a commitment to eliminate discrimination in the workplace. However, Congress has never defined what it meant by discrimination nor articulated its vision of equality by which one could measure success or compliance. Many of the important cases in 25 years of Title VII litigation turn on what is the right kind of evidence, or even more formally, what is the right order of proof, without focusing on the significance of that evidence in any systematic way. This failure reflects our collective ambivalent attitude toward employment discrimination or discrimination in general: It is easy to have an opinion about discrimination if one does not have to think about it very hard.

Expansive Interpretation of Rights Under Title VII

In recent years, the United States Supreme Court has rendered several unanimous decisions that adopt an expansive interpretation of the rights protected by Title VII. Two recent
cases stand out: Meritor Savings Bank v. Vinson\(^4\) and UAW v. Johnson Controls.\(^5\) In the early 1970s, there was no recognized cause of action for what we now call sexual harassment. Early cases found that such conduct was not properly considered under Title VII. The claim was dismissed under one or more of the following theories: (1) Congress never intended such a cause of action;\(^6\) (2) state tort law provided a remedy; (3) the possibility of a bisexual supervisor making advances to both sexes illustrated the folly of considering sexual overtures to be gender discrimination; or (4) the pervasiveness of sexual consideration and advances in the workplace meant too many federal lawsuits. In addition, the behavior in question was considered personal, not professional.

In 1986, the Supreme Court held in Vinson that nondiscrimination under Title VII included the right to be free from "unwelcome sexual advances that create an offensive or hostile working environment ..."\(^7\) While we might question why it took so long for the Court to recognize sexual harassment as a form of gender discrimination, the important fact is that it did, and in a unanimous opinion. The Court rejected strict liability of the employer, but it also rejected the employer's argument that failure to notify the employer or failure to use a grievance procedure would insulate the employer. My primary objection to the Vinson opinion was the Court's failure to see that the early reasons articulated to exclude sexual harassment from gender discrimination claims were the very reasons to include it as a cause of action under Title VII.

In UAW v. Johnson Controls,\(^8\) female plaintiffs challenged an employer's policy of excluding women from jobs that involved exposure to substances known or suspected of causing harm to fetuses. Similar exclusions were common under early 20th-century state protective legislation. That legislation was justified in terms of harm to women's reproductive functions.\(^9\) Today's fetal protection policies are justified on the basis of moral qualms about endangering the health of children. While the scientific evidence does not support the exclusory policies of the early 20th-century state protective laws, no one scoffs at the prospect of injury to future children who cannot protect themselves or participate in the decisions that will govern their lives. The Supreme Court upheld early state protective legislation against challenges that they were unconstitutional.

By contrast, the Court in Johnson Controls struck down these policies. In this case, the process used by Johnson Controls to make batteries involved exposure to excessive levels of lead. And we are suspicious of employers who assert their ethical feelings at the expense of women. The Title VII question for the Supreme Court was whether this employer's interest in the health of unborn children met the "bona fide occupational qualification" (BFOQ) exception to the statute. Construing the exception very narrowly, the Court was unanimous that it did not.\(^10\)

Erosion of the Disparate Impact Theory

In contrast to these decisions adopting an expansive interpretation of the rights protected by Title VII, the Supreme Court has in recent years rendered several opinions that erode the doctrinal and analytical underpinnings of the disparate impact theory. The Court itself established the disparate impact theory in Griggs v. Duke Power Co.\(^11\) Rejecting the view of the lower courts that Title VII prohibited only intentional discrimination, the Griggs Court held that Title VII proscribes "practices that are

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\(^2\) 477 U.S. 57 (1986).


\(^4\) For a fuller discussion, see Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 818 (1990).

\(^5\) Vinson, 477 U.S. at 64.

\(^6\) 111 S. Ct. 1196.

\(^7\) 401 U.S. 424 (1971).

\(^8\) The most famous case is Muller v. Oregon, 208 U.S. 412 (1908) (upholding constitutionality of maximum hours legislation for women only).

\(^9\) The Court split on whether any policy would meet this exception. A majority of the Court said that the BFOQ is limited to those situations where a woman cannot efficiently perform her job; in fetal protection cases everyone agrees she can. Johnson Controls, 111 S. Ct. at 1207. The concurrence thought this reading too narrow. For them, excessive costs to the employer could be a defense. Id. at 1210.

\(^10\) The Court split on whether any policy would meet this exception. A majority of the Court said that the BFOQ is limited to those situations where a woman cannot efficiently perform her job; in fetal protection cases everyone agrees she can. Johnson Controls, 111 S. Ct. at 1207. The concurrence thought this reading too narrow. For them, excessive costs to the employer could be a defense. Id. at 1210.
fair in form, but discriminatory in operation." Thus, disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. An employer's only defense was that the disparate impact was justified by business necessity. Subsequent to Griggs, litigants and courts often confronted the issue of the scope of the business necessity defense. Essentially, there were two questions: (1) Is there a substantial relationship between the neutral hiring criterion and the employer's stated purpose? (2) Is the employer's interest in using a particular criterion sufficiently important given its adverse effect on members of a protected group?

By 1989, with the Court's decision in Wards Cove Packing Co. v. Atonio, many observers concluded that disparate impact was no longer a viable theory under Title VII. In Wards Cove, the Court held that the plaintiff could not establish a prima facie case of discrimination by comparing the racial composition of the "cannery" work force, which was essentially unskilled and filled by non-whites, with the "non-cannery" work force, which was skilled and filled by whites. The Court additionally undercut the utility of the disparate impact theory by imposing a specific causation requirement on the plaintiff and reducing the defendant's burden on the issue of business necessity.


Primarily in response to the decision in Wards Cove (and others decided that same term that also weakened the effectiveness of Title VII), Congress passed the Civil Rights Act of 1991. Overruling Wards Cove was so integral to the congressional action that the stated purpose of the act mentions both Wards Cove and Griggs by name. An additional purpose of the 1991 act was to provide monetary damages for intentional discrimination and unlawful harassment. This damage award is a direct consequence of the Court's 1986 recognition that sexual harassment is a form of gender discrimination under Title VII. Once the Court recognized that cause of action, the inadequacy of Title VII's equitable remedies was obvious. The damage remedy will have a profound but unknown impact on future Title VII litigation because these claims will now be tried before a jury. Ironically, it was the civil rights organizations who opposed jury trials during consideration of the 1964 Civil Rights Act, just as it was the civil rights organizations who pushed for them in 1991. Obviously, the calculation of whom to trust to balance the interest of employers and employees has changed over the years.

In contrast to these definite, intended changes in how Title VII cases will be litigated, the effect of the provision overruling Wards Cove is less clear. In the 1991 Act, Congress intended to codify the concepts of "business necessity" and "job-relatedness" enunciated by the Supreme Court in Griggs and in the other decisions prior to Wards Cove. Congress also intended to provide guidelines for the adjudication of disparate impact claims. The statute provides that plaintiffs can establish a disparate impact claim if they prove that "a particular employment practice" causes a disparate impact and the employer fails to prove that the challenged practice is both "job-related" and consistent with "business necessity.

This language apparently achieves two goals of those who sought to neutralize the Supreme Court's decision in Wards Cove. First, the employer, not the plaintiff, has the burden of showing that the employment practice is justified in the face of its adverse impact. Second, the employer's burden is considerable, requiring it to show both the employment practice's relationship to the job in question and the importance of the employment practice to the employer. Thus, this language resolves some issues that are often raised in disparate impact cases, such as the relationship between job-relatedness and business necessity on the one
hand and the relationship between business necessity and the BFOQ defense on the other. The language does little, however, in setting a standard by which to decide whether a practice is "job-related" or "consistent with business necessity."

How these provisions are implemented will preoccupy litigants, courts, and scholars for some time. Besides the statutory language, Congress did not tell us very much. The agreed-upon exclusive piece of legislative history concerning Wards Cove provides that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co. and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio."

In codifying the law as it existed before Wards Cove, all Congress accomplished was to adopt the messy state of the disparate impact theory, the business necessity defense, and the relevance of alternative employment practices. It does seem clear that in the future "business necessity" will provide the context in which to work out the question of how far we are willing to intrude on individual autonomy in order to stamp out discrimination. My point is simply that these were hotly contested issues before and will continue to be. Legislative agreement was forged by continuing our ambiguous commitment to equality in the 1991 statute.

### Something Different: Feminist Jurisprudence

When thinking about the effects of the Civil Rights Act of 1991, the future looks very much like the past. One gets a different sense, however, about the future of employment discrimination by taking notice of a new direction in scholarship and its theoretical underpinnings. In 1964, when Congress considered Title VII, the overriding notion of equality was that blacks and whites, and, therefore, presumably, women and men, should be treated the same for nearly all employment decisions. The harms of discrimination in employment were overt exclusions because of prejudice or bias and the use of irrational stereotypes that did not allow individuals to be judged on their own merits.

The goal of Title VII was to remove artificial barriers to employment, opening previously closed jobs or careers. The result has been more women in traditionally male-dominated fields, such as law, medicine, science, and publishing. But this goal does not do much to address issues of special concern to women, such as pregnancy or childrearing leaves. It does little to change existing workplace norms that may be inhospitable to women. It does nothing to address the concerns of women who do not want to be pathbreakers, tokens, or one of the few in male-dominated jobs.

It is clear that the notion of equality that prevailed in the 1960s and 1970s is not sufficient to eliminate gender discrimination in the workplace, nor is it effective in addressing the reality of women's lives. In response, feminist legal theorists ask how the workforce can accommodate women. A primary focus of this inquiry has been to acknowledge the differences between men and women and among women themselves. Additionally, these theorists ask whether Title VII allows or requires employers to take such differences into account if they relate to job qualifications or the workplace more generally. There are many controversies within this scholarly literature and whether we achieve meaningful equality in the 21st century is dependent on working out these controversies.

Feminist legal theory has already transformed the debate about the analytical puzzle posed by pregnancy. But the prevalence of male models of behavior, especially male models of success, continue. It is important to understand, for ex-
ample, why so many women join major law firms throughout the country only to quit, and often withdraw from the work force altogether, before they become partners. We need to understand why, assuming a woman stays at the firm, she finds it necessary to give birth on Friday and return to the office on Monday. Incorporating lessons of feminist legal theory into Title VII jurisprudence means that we will think about gender separately from other forms of discrimination. In the past, we tended to lump all forms of discrimination together. It was important to see the similarities between race and gender discrimination, to interpret the Age Discrimination in Employment Act of 1967 in line with Title VII, and to model anti-discrimination provisions for the disabled on Title VII. Now, it is crucial to recognize our differences.


Autonomy can mean a number of different things. To the liberal individualist (that is, the typical American) it means the ability and the opportunity to choose one’s course of action and to act to effectuate one’s choice. It means freedom from constraint as long as one’s behavior does not injure others. It tends not to recognize the extent to which most actions, even the most apparently private ones, have an impact on others, and the more apparently private an activity is, the more liberal individual autonomy insists that it not be regulated.

Concern for patient autonomy in the liberal individualist sense dominates the rhetoric of American medical law and medical ethics. Cardozo’s dictum that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body” is ubiquitous. The entire law of informed consent is premised on the dominance of patient autonomy over competing values, including the value of good medical care. Abortion law, right-to-die law, and even some wrongful birth and life opinions are explained textually as reflecting respect for patient autonomy. Occasionally, the law goes to extraordinary lengths to preserve the apparent dominance of autonomy, for example, by resorting to the fiction of “substituted judgment” to decide cases of never competent patients approaching death and of incompetent potential organ donors, on the basis of what those persons would have decided for themselves if they had been competent.

Yet, in reality, autonomy does not seem to be as dominant a value as rhetoric would suggest. This is not surprising. Not only does liberal individualist autonomy ignore the needs of others, but also, by putting all of its eggs into the choose-and-act basket, liberal individualism disables itself from dealing effectively with cases involving persons who cannot choose and act effectively. It reduces human beings to their choose-and-act function, thus creating the risk that the law will treat incompetent persons as less than human. Liberal individualism also overemphasizes one aspect of humanness even in competent persons. This poses some danger, especially if science should
reveal that our ability to choose is not as great as we think it is.

Of course, the law allows autonomy to be sacrificed when important public needs are at stake. Thus, compulsory vaccination laws are plainly valid.10 However, their existence does not really challenge autonomy’s dominant position. It simply demonstrates that even a dominant value must sometimes be sacrificed for the public good.

Often, however, autonomy yields in the face of less clearly public access to the health professions, thereby excluding practitioners thought to be insufficiently trained or unrespectable. See, e.g., Ind. Code Ann. §§ 25-10-1-1 to 25-10-1-14; 25-13-1-1 to 25-14-3-16; 25-22.5-1-1 to 25-24-2-3; 25-27-1-1 to 25-27-1-10; 25-29-1-1 to 25-29-1-9; 25-34.5-1-1 to 25-34.5-3-2 (Burns 1991 & Supp. 1992).


conditions. The most obvious rejections of autonomy are professional licensure statutes11 and the regulation of drugs and medical devices by Congress and the Food and Drug Administration.12 Licensure and the control of allegedly beneficial medicines and devices are designed to protect persons from themselves, to paternalistically prevent individuals from autonomously making bad choices. Fraud and profiteering at the expense of the desperate or the ill-advised are not tolerated, and the United States follows an explicit policy of requiring specified levels of
designed to take the law to non-legal audiences. He is bringing insights from his work at the Poynter Center to undergraduates in a course called Health and Human Values, which he co-teaches with Carol Parker, director of the law school’s legal writing program. And with Dr. James Rogge, he is putting together a series of presentations on medical ethics for hospital trustees.

“If you believe, as I do,” says Dworkin, “that difficult medical decision making is more likely to be well done by an educated citizenry than by courts or physicians acting alone, then trustees are a natural group of citizens who have demonstrated already that they’re interested and concerned, but who are not likely to know very much about issues in medical ethics. In addition, David Smith, director of the Poynter Center, is currently doing a book on the ethical obligations of trusteeship.

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Dworkin named Poynter Scholar

Professor Roger Dworkin has been named Nelson Poynter Scholar and Director of Medical Studies in the university’s Poynter Center for the Study of Ethics and American Institutions. He is the first person to be honored as a Poynter Scholar. As director of medical studies, Dworkin is in charge of the center’s medically related programs. These include, for example, an interdisciplinary medical studies group, an undergraduate course on health and human values, and several extensive educational programs for physicians. He is also involved in consultation about center policies and public representation of the center.

Through his work with the Poynter Center, Dworkin has developed a number of programs...
certainty about the safety and efficacy of new drugs and devices before it allows them to be made available in interstate commerce.  

The American style of discussing rights is so deviant from that of other Western democracies that Professor Mary Ann Glendon refers to it as a "dialect" and suggests that it "is turning American political discourse into a parody of itself." Our focus on the individual and his rights increases conflict and impedes the search for common ground. It ignores responsibility, without which rights become license, and it ignores our interdependence. By making the autonomous actor and "lone rights-bearer" our model for social thought we inadvertently disparage and injure those who do not fit the model, "the very young, the severely ill or disabled, the frail elderly, as well as those who care for them."  

Glendon recalls the standard argument against mandatory seatbelt or motorcycle helmet laws: "It's my body and I have the right to do as I please with it," and remarks, "This which makes a focus on trustees especially timely."

In honor of the Poynter Center's 20th anniversary, Dworkin has also been putting together a joint Poynter Center-School of Law conference on "Emerging Paradigms in Bioethics." The conference will test the continuing utility of a principle-based method of medical decision making focused on patient autonomy.

"The focus on autonomy has increasingly come into question from different strains of scholarship," says Dworkin. "Increasingly in the philosophical literature there's criticism of this model, and all the inclusionary approaches to scholarship, such as communitarianism and feminism, question an ethic that is so strongly autonomy-based. I have never felt that a focus on patient autonomy in medical ethics was a satisfactory way to proceed. I also question an ethic that is principle-based."

The conference brings together law professors, philosophers, and faculty in public health to debate other approaches to medical decision making. Each will present an original paper, to be published in the Indiana Law Journal. Commentators from departments throughout the university, including Fred Cate and Susan Williams from the law school, will discuss the papers.

Dworkin has also spent his time at the Poynter Center continuing work on a book, Limits: The Role of Law in Biomedical Decision Making.

"The title is meant to be a play on words, suggesting that the law is a limit on developments in biology and medicine," says Dworkin. "But what the book is really concerned with is the limits of the law's ability to limit developments in biology and medicine. I explore existing American legal institutions to find out which ones seem most likely to be able to deal best with which kinds of biomedical development and find out which kind of biomedical developments don't seem well suited to any of our institutions."

While Dworkin foresees an audience of legal and medical policy-makers, he hopes that the book will also reach other interested people. His undergraduates will have the first opportunity to determine whether he has succeeded in his desire to make difficult material accessible: They are reading chapters of the book for class this spring.

(The accompanying text is excerpted from Professor Dworkin's full article in the Indiana Law Journal.)
way of thinking and speaking ignores the fact that it is a rare driver, passenger, or biker who does not have a child, or a spouse, or a parent. It glosses over the likelihood that if the rights-bearer comes to grief, the cost of his medical treatment, or rehabilitation, or long-term care will be spread among many others. The independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward.21

The same point can be made in every area of bioethics: Pregnant women have fetuses, mates, and parents. Mentally incompetent persons have parents or guardians and may have children. Persons with genetic diseases have relatives at different degrees of risk. Persons with healthy organs may have siblings with unhealthy ones. Potential surrogate mothers have husbands, preexisting children, the new child, men with whom they have contracted and those men’s wives, all of whom are affected by the surrogate mother’s behavior. Dying persons have families with both emotional and financial needs.

Autonomy based systems undervalue those other persons’ needs. They assume that it is possible to ascertain who is most affected by an action or condition and then allow that person’s interests to trump all others. The factual assumption is true sometimes, but only sometimes. Who is most affected by a decision about whether to use a kidney from an incompetent “donor” to save a dying competent sibling with end-stage renal disease?22 Who is most affected by a decision whether to perform a Caesarian-section delivery that may shorten the life of a terminally ill, episodically competent pregnant woman by a few days in order to run a percent chance of saving her fetus?23 Even when the factual assumption is correct, the decision to let the most affected person’s interests dominate is problematic. If, as will almost always be the case, the most affected person is involved with others, surely taking some account of the other persons’ interests seems appropriate. A full social impact calculus would consider the number of persons affected, the nature and extent of the effects on them, the certainty of the effects on them, and alternative ways to modify those effects, as well as the interests of the person most affected. In some cases, the sum of the effects on others may outweigh the impact on the person most affected.

One could adapt Learned Hand’s famous formula for determining negligence24 to express the point: If P is the probability of an effect, S is its severity (considering all types of loss of money, emotional distress, etc.), N is each collateral person affected, and M is the person most affected, then the interests of the person most affected should prevail only if \( PS(M) > PS(N_1 + N_2 + \ldots + N_i) \).

The interests of the person most affected should prevail only if the probability and severity of the effect on him is greater than the probability and severity of the effect on everybody else.

The danger in this approach is that the judge or other person performing the calculus may undervalue the effect on M and overvalue the effects on the various Ns, especially if the Ns are healthy and competent and M is not. A system that rejects an exclusive focus on the person most affected must include a method to prevent itself from becoming a way to legitimate imposition on underdogs.

Modern genetics compounds the difficulties by simultaneously reemphasizing the poverty of autonomy-based approaches and highlighting the risks in surrendering the focus on individuals. Genetic medicine illustrates convincingly the shortsightedness of the individually focused approach, and genetic research throws the possibility of liberal individualist autonomy into doubt. Genetic medical practice challenges the conventional notion of the individually-based doctor-patient relationship. Genetic medicine only makes sense if it is understood as a family-centered, rather than an individually-focused form of medical practice. Typically, physicians and other genetic counselors are con

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21 Id. at 45-46.
24 A person’s behavior is negligent if the burden of taking adequate precautions is less than the product of the probability of injury and the severity of the injury if it occurs, that is, if B=P.L. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir., 1947).
sulted by couples who want to learn their risk of having a child with a genetic disease, by couples and their already affected children, or by persons who seek information about their own health based on the condition of their relatives. Each of these situations requires learning about one person to help another. Each may present the diagnostican with information about persons whom he has never seen and may raise serious questions about his obligations. To what individual does the doctor owe a duty when tests of husband, wife, and child reveal that the husband is not the child’s father? What are the doctor’s duties when diagnosis of a person present in the doctor’s office necessarily informs him that relatives of that person are at risk for developing avoidable colon cancer or having a child with hemophilia? In a profession whose raison d’être is doing family studies to reveal family situations requires learning about one individual if the individual’s geno-

type predisposes him to alcoholism, schizophrenia, crime, cancer, or heart disease? To the extent that most American law and ethics are based on assumptions about personal moral accountability, modern genetics throws those legal and ethical positions into question.

However, to say that modern genetics throws legal and ethical positions into question is not to say that it answers the question. A predisposition to cancer is not cancer. A person with a predisposition to lung cancer who later contracts the disease could be viewed as a blameless victim to be compensated by insurance or whatever social mechanism exists to pay for catastrophic diseases. Alternatively, he could be viewed as having heightened individual responsibility—to learn of his disposition and avoid risky behavior like smoking or working around known carcinogens—and be denied relief if he “allows” himself to contract cancer. Alternatively again, he could be viewed as deserving of some social measures to equalize his position vis-a-vis the non-predisposed; the existence of identifiable predisposed persons could heighten demands to ban smoking and clean up workplaces and could impose the costs of lung cancer on those who activate others’ predispositions.

Recognizing that there are limits to what individuals can do or control is not a concession to total determinism. The danger of modern genetics, like the danger of the old eugenics, is that society will mistakenly believe it proves more than it does and use it as an excuse to injure further those who are already disadvantaged. Thus, again, the challenge is to incorporate new understandings in a way that moves away from the excesses of individual autonomy and its frequent inability to help solve problems, without legitimating imposition on underdogs. How is that to be done?

I suggest that a useful way to begin would be (1) to refocus our rhetoric and our rules away from concern for individual choice and toward respect for individuals, while (2) recognizing that individuals live in groups whose individual members deserve respect too. In other words, we should combine what I have called respectful paternalism with respect for all affected members of society.

Respect for individuals requires valuing their apparently freely made choices, even if we do not always follow them. Respect for individual affected members of society recognizes the reality of the social condition but reduces risks of imposition by insisting on finding real impacts on real persons before those interests may be weighed against others. Respect for all individuals rejects as unacceptably dangerous a focus on the alleged interests of society as a whole.

Under this approach, it would be unnecessary to ask who is most affected by a proposed action. The full interests of whoever is being acted upon, as well as other affected persons, are all relevant. If one person is most affected, the degree of impact on him will necessarily be reflected in the social calculus, which takes the total impact on each affected person into account.

In determining an individual’s interests, the individual’s ability to
Society cannot be allowed to solve its health care cost crisis by running roughshod over its sickest members.

Everyone concerned means each person concerned. In a sense everyone is affected by everything, but taxpayers, persons down the block, etc., have interests so small as to be de minimis. The social collective's interests must not be considered. If they are, respect will give way to tyranny, and the poor, the unpopular, the different will never win.

Perhaps the approach suggested here can be made clearer by applying it to a few examples:

Suppose the question is whether to sterilize Mary X, who is mildly mentally retarded and a carrier of the gene for hemophilia. The goal is to prevent her from transmitting hemophilia. Mary does not want to be sterilized. Respect for her requires us to value her choice even though it is not enough to end the inquiry because her ability to choose is questionable and because other persons are affected. Decision making requires inquiry into the pleasure Mary will receive from the opportunity to bear a child and be a mother as well as the pain and sense of loss she will undergo both if sterilized and if not sterilized. Will Mary lose her liberty to live in an unrestricted environment if she is not sterilized? Everything relevant to maximizing Mary's welfare must be considered. In addition, the well-being of her potential offspring, and the burden on Mary's parents of refusing to sterilize her are relevant. The well-being of the state or society is not, because evaluating the costs and benefits to society of increasing by even one the population of persons with hemophilia would always lead to sterilization. It would sacrifice the individual and demean an entire class of persons who are different from the majority. That is simply an ethic of might makes right and is unacceptable. Respectfully considering the interests of all relevant individuals, but not the state, would almost surely lead to refusing to sterilize Mary, although facts could be imagined that would lead to the other result.

Respect for all affected individuals would require that before consenting to treatment patients' be given the amount of information that a person who cared about their well-being (including their psychological and dignitary well-being) would give them—not the amount a hypothetical reasonable doctor would provide or a reasonable patient would want. Conversation with close family members of the patient and some attention to their desires would be relevant as well. Failure to provide adequate information under such a vague standard should be viewed as an ethical lapse. Whether it makes sense also to treat it as a tort is beyond the scope of this essay.

25 Daughters will not have hemophilia. Sons may, but the alternative for them is not to be born. The feasibility of sex selection through selective abortion also may affect the calculus.

26 Of course, ethical obligations do not always become legal obligations. The difficulty of complying with vague standards that are fact sensitive; questions about the efficacy of communications; the problems of developing rules to control conduct after the fact through common law adjudication; and doubt about whether there is any loss that the community should bear through shifting, all might lead one to question the wisdom of retaining a tort of failure to obtain informed consent.

27 This does not mean there can be no health care rationing. It means it must only be done in advance of a particular need in a system in which all potentially needy claimants can be accorded respect.
incompetent and have expressed no choices about withholding or withdrawing medical care deserve respect. They retain an interest in dignity and in avoiding unnecessary suffering. However, their loved ones' interests are also strong and should be accorded great weight. Suffering from watching a close relative die a prolonged death is real. On the other hand, the anguish of believing one was premature in letting the loved one die is real as well. Respect for relatives requires that they be accorded significant discretion in deciding whether to allow the patient to die. The doctor's sense that he is wasting his time in a futile exercise is probably worth something, especially if the patient is past suffering and the family is split. An identified salvageable patient's need for the dying person's hospital bed is also relevant. A generalized concern about not wasting resources is not. Society cannot be allowed to solve its health care cost crisis by running roughshod over its sickest members.27

Medical law and ethics based on individual autonomy are rooted in fiction and ignore important values. The salutary role of the autonomy focus is that it avoids state imposition and the abuse of the weak. As the illustrations here suggest, an approach rooted in respect for all individuals would avoid fiction and increase the chance of sound results by considering all relevant persons and values in each case, while keeping the door to state imposition and abuse of the powerless tightly closed.

Jack Kimberling, JD'50, has always been a friend of both IU and the law school, serving on the school's Board of Visitors as well as on the Board of Directors of the IU Foundation. This semester, Kimberling is down in the trenches, sharing his substantial and extensive trial experience with law students through teaching two trial process courses at the school.

Kimberling's interest in teaching others how to litigate is long-standing. He developed an in-house training program for young associates at Dewey Ballantine Bushby Palmer & Wood, where he is a partner. He has taught trial advocacy classes at the University of Southern California and Loyola–Los Angeles.

"In the early '70s," he says, "I chaired a committee of the American College of Trial Lawyers that was concerned with how law students learned trial advocacy. We surveyed all the accredited schools and discovered that even that long ago, 80 percent of them offered a course on trial practice. But the schools had problems with both staffing and materials. Because they couldn't get regular assistance from practitioners, they were forced to draft faculty with little trial experience. Even when the schools could get help from lawyers, they often faced the problem of good lawyers who were not good teachers."

Kimberling developed strong views about the kinds of contributions practicing attorneys can make to students in a clinical course.

"I told my students early on that I would not be regaling them with stories from practice, unless the anecdote illustrated a mistake I had made from which I thought they could benefit. And I encouraged them to let me know if I lapsed—by coming into class early and writing WAR STORIES in two-foot high letters on the board, if necessary."

The committee's report led the National Institute of Trial Advocacy to develop trial materials that allow students to practice their trial skills through simulations. At IU, the trial courtroom is equipped with remote videotaping equipment, as are interview rooms, so students alternate between live and videotaped presentations. Kimberling individually critiques all of the student videotapes and performances, and the students critique each other (often offering the toughest evaluations).

"So far, the students have all taken depositions, done a voir dire and picked a jury, and done an opening statement. As the semester continues, they will handle problem and expert witnesses, direct and cross examination, and closing arguments. At the end of the semester, each team will participate in an entire trial."

In addition, Kimberling has invited U.S. District Judge John Tinder to do one session on criminal trials.

"About half of the students in my classes have already committed to litigation, and there are several who are quite talented. At first, the students seemed a little intimidated, but no longer. I had one who argued with me last week, and I was glad to see it."

Kimberling says he is enjoying the contact with students.

"I find it interesting and enriching. Being at the school brings back good feelings and happy memories. Teaching here would be rewarding for that reason alone."
Law school inducts four into Law Academy

On Sept. 11, the Academy of Law Alumni Fellows inducted four graduates of the School of Law during the Annual Law Conference. Those honored are Tamar Althouse-Scholz (posthumously), Jost Delbrück, Leroy W. Hofmann, and William F. McNagny. Fellows of the academy are inducted for their exceptional accomplishments in their chosen careers. While anyone can nominate a fellow, an anonymous committee of law school graduates selects candidates for induction.

**Tamar Althouse-Scholz** was the law school's first woman graduate. Her induction into the academy marks the 100th anniversary of her graduation in 1892. Admitted to the Indiana Bar in 1893, nearly 30 years before women received the legal right to vote, she joined the Evansville law offices of J.E. Williamson, becoming the first woman to practice law in Vanderburgh County. Ever a pioneer, Althouse-Schultz was a founder of the first Women's Rotary in the nation and was active in the Indiana Federation of Business and Professional Women's Clubs. Although she retired from practice in the mid-1920s, she continued to be influential in women's business and professional groups until her death in 1936.

**Jost Delbrück** was born in 1935 in Pyritz, Pomerania. He first came to IU on a scholarship from Christian-Albrechts-University in Kiel in 1959 to study international relations and constitutional law. After receiving a master of laws at the IU School of Law in 1960, he returned to the University of Kiel to complete his doctorate in 1964. He was recently named visiting professor at the IU School of Law.

Delbrück has had a distinguished career in legal education, international law, and university administration. Having had a lengthy association with the Institute of International Law at the University of Kiel, he began as a junior assistant in 1962 and eventually became director in 1976. Concurrent with his appointment as dean of the faculty of laws at Kiel in 1979, he was judge at the
administrative court of appeal for Schleswig-Holstein and Lower-Saxony at Luneberg. He has been a member of the German Research Foundation’s Commission of Peace and Conflict Research, of the Human Rights Advisory Group of the World Council of Churches, and of the American Society of International Law. Delbrück served on the Permanent Court of Arbitration in The Hague and twice represented Germany at the UNESCO Committee on Conventions and Recommendations. He was president and rector of Kiel University from 1985 to 1989.

Leroy W. Hofmann was born in Indianapolis in 1929. He received a bachelor’s degree in sociology at IU in 1950 and then sought employment in Indianapolis before returning again to IU in 1956 to study law. While a law student, Hoffman was editor of the Indiana Law Journal. After graduating with honors from the law school in 1959, he moved to Arizona to clerk for Justice Fred C. Struckmeyer Jr., of the Arizona Supreme Court.

Towards the end of his clerkship, Hofmann began a law practice that became a partnership continuing to this day. During his more than 30 years practicing law, he gradually specialized in personal injury cases. An authority on liability insurance and medical malpractice, he has served on commissions that provide guidance to Arizona’s lawmakers and on committees governing the ethics and discipline of Arizona attorneys. A respected leader in his community, he has been president of his United Church of Christ congregation and chair of the board of the retirement home it sponsors. He is a trustee of the Pacific School of Religion at the University of California at Berkeley.

William F. McNagny graduated first in his class at the IU School of Law in 1947. On returning to Fort Wayne, where he was born and raised, he began his practice in the firm Barrett and McNagny, where he is now senior partner. He is a fellow in the American College of Trial Lawyers and served for many years on the Indiana State Board of Examiners.

McNagny continues a long family tradition of leadership in his political party and of service to his city. He was Fort Wayne’s city attorney from 1951 to 1960 and sits on the boards of several corporations. Active in the local art community, he has worked with the city’s Fine Arts Foundation, art institute, civic theater, and historical society. As a member of the advisory board of Indiana University-Purdue University Fort Wayne campus, he was recently awarded the Ralph E. Broyles Medal for his commitment to high standards of education.

Sesquicentennial Dinner draws alumni to Bloomington for celebration

On Dec. 3, the IU School of Law in Bloomington transformed its library into a gala hall of celebration as we commemorated our 150th birthday with music and art. Alumni from all parts of the country and from all disciplines of law joined in the festivities.

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School appoints new faculty

The law school has appointed five new permanent faculty members. New faculty add strength and depth in a number of areas, from corporations to environmental law, and bring a broad array of approaches to their teaching and research.

- **Kenneth Dau-Schmidt**'s expertise in economics informs both his research and his teaching. He received his PhD in economics and his JD from the University of Michigan. He teaches antitrust, employment law, labor law, and law and economics.

  Dau-Schmidt notes, “My interest in unions and labor law began in high school and college. On a personal level, unions intrigued me because I grew up in a working-class neighborhood and identified with that class. As I learned more about how our economic, social, and political systems worked, I decided that unions were the primary institution pursuing working-class interests. On an intellectual level, labor law and industrial relations fascinated me because of the complexity and importance of the relationship involved. Labor and management have individual interests that diverge in that one can gain at the expense of the other, yet they also have collective interests in cooperating to increase the success of their joint enterprise. Moreover, the relationship is very important to people in that they derive their daily sustenance and, indeed, very essence from the relationship. They say ‘I am a carpenter’ or ‘I am a truck driver.’ To a large extent people define themselves and their success by what they do.”


  “The article uses a game theory model of the divergence of individual and collective interests in industrial relations to explain many of the current doctrines of American labor law. It has been one of the most satisfying intellectual experiences of my life to finally capture the divergence of individual and collective interests I find so fascinating in labor relations in a model that gives insight into the rationale of American labor law.”

  Dau-Schmidt describes himself as a skeptical economist:

  “I’ve always maintained a healthy skepticism about many of the simplifying assumptions commonly used in economics, always looking at criticisms of the discipline and proposals to make it more flexible and realistic. This skepticism has proven useful in my scholarship. Much of the economic analysis of law that has been done to date has applied very simple neo-classical models to the very complex social problems we deal with in the law. As a result, there is a lot of room for a critique of the current scholarship from an economist who is already skeptical of many of the basic assumptions and who has for years been marshaling critiques of economic analysis as too simplistic.”


- **Robert Fischman** received his JD and his MS in natural resources from the University of Michigan. After working for the Environmental Law Institute in a number of capacities, including as director of the Natural Resources Program, he joined the University of Wyoming College of Law. Fischman adds great strength to IU’s environmental program. He will be teaching Environmental Law, Public Land and Natural Resources Law, Water Law, and Environmental Ethics in Resource Management.

  Recently, Fischman traveled to Mexico, where he compared notes on environmental protection with law professors and practitioners from around North America. He took advantage of his trip to visit the Transvolcanica Mountain refuge of...
Robert Fischman

the monarch butterflies with the environmentalists who helped establish the preserve. The Mexicans are struggling to protect the last five intact habitats where monarch butterflies returning from the U.S. and Canada east of the Rockies winter every year.

“My interest has always been domestic environmental law, but in recent years, the boundaries between nations and disciplines have blurred. Migratory species like the monarch symbolize the trans-national nature of environmental law. Habitat for the monarch is widespread in Canada and the U.S., but is barely surviving logging in Mexico.”

Fischman also notes that conservation needs present problems that cross disciplinary as well as geographic boundaries. “Like many conservation issues, monarch protection depends on a global economy that supports local development that will not damage the ecology that sustains the monarch in the short term and all of us in the long term. It is impossible to separate the environmental issue from the economic issue.”


Aviva Orenstein

Since her arrival this fall, Orenstein has been active in continuing education efforts directed at professional responsibility issues. She is also justly proud of her stand-up comedy routine before the Law School’s perennial Demurrer’s Club at Nick’s English Hut, as well as her rousing rendition of “Like A First Year,” (patterned after a well-known Madonna song) at the annual BLSA Gong Show.

Alysa Rollock, a graduate of the Yale Law School, practiced corporate law in New York with Cahill Gordon & Reindell and Battle Fowler before joining Ice Miller Donadio & Ryan in Indianapolis. Rollock teaches Corporations and seminars in Corporate Governance issues, and her research interests lie in these areas. In addition to her teaching duties this fall, she has served as a member of the transition team for the new Indiana attorney general. As part of this team, Rollock’s responsibilities have included advising the new

Alysa Rollock

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attorney general on the mission of the office and working with attorneys, judges, and others from around the state to develop a realistic and comprehensive view of what role the attorney general’s office should play in Indiana.

• David and Susan Williams, graduates of the Harvard Law School, join our faculty from Cornell Law School. David will teach Constitutional Law and Indian Law, and in addition has a teaching interest in State Constitutional Law. Susan teaches Property, Family Law, and First Amendment.

David’s research interests are in Indian law and constitutional law. His most recent article, “Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment,” appeared at 101 Yale Law Journal 551 (1991).


David Williams

Susan Williams

Faculty win grants

Several members of the School of Law faculty have recently been awarded grants to pursue their research.

• Mary Ellen O’Connell has been awarded a grant from the John D. and Catherine T. MacArthur Foundation that will allow her to travel to Cambridge, England, next year to work at the Research Center for International Law. O’Connell has also received a fellowship from the Alexander Von Humboldt Foundation in a worldwide competition. She plans to use the grants to write a book on the enforcement of international law.

• Joseph Hoffmann is part of a team of interdisciplinary researchers who have been awarded a National Science Foundation grant to study death penalty implementation in the United States. The scholars are gathering empirical data about the application of the death penalty.

• John Scanlan has been awarded a National Science Foundation grant to write a history of early immigration law in the United States. He will spend part of next year at the Virginia Center for the Humanities in order to use its collection of materials, and has received a grant from the Virginia Fellowship for the Humanities. He will then travel to the John Carter Brown Library in Providence, R.I., where he has been named a fellow, to work with its collection.

Scanlan’s interest in immigration history is longstanding. “I got interested in immigration history primarily because I was doing research in immigration policy in the early 1980s. I was at the University of Notre Dame Center for Civil and Human Rights, and at the time, Father Hesburgh, president of Notre Dame, had recently been named the chair of the U.S. Select Commission on Immigration and Refugee Policy, and the Center agreed to do what seemed
John Scanlon to be a fairly limited research project into American refugee and political asylum policy. I directed the project and brought in a good friend of mine from the political science department at Notre Dame, Gil Loescher, to help me with the research. We became very interested in some of the historical aspects of America’s refugee policy.

That interest led to the publication of Loescher and Scanlan’s book Calculated Kindness (Free Press, 1986). The book is a history of immigration policy from the end of World War II to the mid-1980s.

Scanlan’s current project, which traces the history of immigration law from the colonial period, grows out of that work. “A lot of the policies that I saw as part of immigration law in that study and in the immigration law course that I’ve taught for the last eight or nine years seemed to have roots that went back quite a ways, and I was interested in where the law came from and how it had changed over the course of time. I thought that it would be useful to do a little bit of research into the origins of the law. I originally thought I needed to go back only as far as 1870, but I discovered that a lot of the things that were being considered by Congress in the 1870s and the 1880s were already part of state immigration practices at the time.”

His research convinced him that much current immigration policy has roots that go back to the dawn of the country. “For instance, there’s still a provision in American immigration law that prohibits people who are likely to be a public charge from entering the United States. This provision goes all the way back to Tudor England and the poor laws that were designed to keep the poor from entering neighboring villages and taxing public resources.

It seems fairly clear that these local laws regulating the travel of the poor and imposing restrictions on settlement ended up serving as the basis for some of the earliest colonial immigration legislation. Similarly, some of the exclusionary legislation designed to keep criminals out of the United States and designed to keep certain people who are physically incapable of taking care of themselves go back to colonial times. American immigration law has become significantly less restrictive in some of these areas, but only in the last two or three years.”

Scanlan’s research throws light on our vision of early America as a land of unlimited welcome.

“In fact, I’m convinced that, far from being a land that indiscriminately welcomed everybody, from the earliest period of American history that welcome was always tempered by political considerations that resulted in many people being turned away.”

Yvonne Krips

Visitors enrich international programs

Visitors and lecturers from around the world brought an international perspective on law to the school this year. Yvonne Krips, a lecturer in law at the Cambridge University and a fellow and college lecturer in law at Emmanuel College, is the author of Controlling Technology: Genetic Engineering and the Law, and of numerous articles on intellectual property. Krips
visited the law school for several days in August, when she spoke to the faculty about issues in the European Community and also met with faculty at the Institute for Advanced Studies.

Paul Craig, a fellow and reader in law at Worcester College, Oxford, taught European Community Law this fall. Craig, who teaches Administrative and Constitutional Law, is the author of several books, including the major British text on administrative law. He is currently working on a text on European Community law.

Visiting this spring, Fernando Teson is a professor at Arizona State College of Law, where he teaches Comparative Constitutional Law, International Law, and International Human Rights. Before entering academics, he was a diplomat with the Argentine Foreign Service and served as a member of the Argentine delegation to the Falkland negotiations. He is the author of *Humanitarian Intervention: An Inquiry into Law and Morality* and *The Philosophy of International Law*. Teson is teaching International Business Transactions and a seminar in International Jurisprudence.

Last fall, Emilia Kandeva-Spirodonova taught a course on changing legal systems that explored new legislation in Eastern European countries and its role in the process of dramatic political, economic, and social change. Kandeva holds the post of deputy minister in the government of the Republic of Bulgaria, working within the Office of the Prime Minister as director of the Center for Administration. She was formerly with the Institute of Law in the Bulgarian Academy of Sciences. She has a long and distinguished career as a professor of law, with particular interest in comparative and administrative law. She played a significant part in the transformation of Bulgaria from a totalitarian state to a multi-party democracy.

## IU law professor evaluates Indiana Rules of Evidence

The Indiana Supreme Court is in the process of taking a hard look at Indiana evidence practice. Few of Indiana's evidence rules are currently codified, and the Court has created four committees around the state to consider whether Indiana should move to codified evidence rules along the model of the Federal Rules of Evidence. If things go according to plan, Indiana could join the more than 34 other states that have codified their evidence rules, thus making life easier for attorneys with multi-state practices.

Professor Alex Tanford, author of the book *Indiana Trial Evidence Manual*, is serving as a reporter for one of the groups.

"Over the last few years, the Indiana Supreme Court has given a tremendous amount of attention to Indiana's evidence law," says Tanford, "and they really have clarified a lot of the rules. In the process, they have eliminated quirks in Indiana evidence law that were out of the mainstream—such as Indiana's 'depraved sexual instinct' rule."

The committee's goal is to make recommendations to the Supreme Court in February, and for the Supreme Court to promulgate a set of Indiana Rules of Evidence sharing the format and numbering system of the Federal rules for notice and comment in July.

## Law and business schools offer joint law/finance seminar

Professor Bruce Markell of the Law School, and Sreenivas Kamma, professor of finance at the business school, have joined forces to allow a limited number of business and law students to participate in a seminar designed to help future investment bankers and future business lawyers learn each other's language.
After an introduction to both disciplines, the students will be presented with a series of scenarios taking a company through initial capitalization, a variety of environmental and antitrust concerns, expansions, acquisitions, and—alas—a bankruptcy. The students will work in teams, and present their analysis of the legal and financial implications of each scenario to Markell, as chief counsel, and to Kamma, as chief financial officer.

Markell hopes the seminar will allow the law students to begin their professional lives with an understanding of the concerns of the business world. At the same time, he hopes that the seminar will demystify investment banking for law students.

"Much of the learning is going to occur when the students meet in their groups," says Markell. "Our object is to force the students to work with others not trained to think in the way in which a lawyer is trained to think, but who are smart people. Our hope is the students will interact by forcing each other to explain their concerns clearly. I feel that an absolutely brilliant lawyer is of no help unless he or she can communicate. The seminar should get students talking to one another about how you solve problems, as opposed simply to how you identify issues."

Cathy Crosson tackles the Supreme Court

Ferris Alexander Sr. had three tons of his Minneapolis media empire crushed and burned because four of his magazines were judged obscene by a jury. He was forced to forfeit his chain of 13 book stores, theaters, and video stores. All of this transpired before the U.S. Supreme Court heard the appeal from his conviction.

IU law school writing instructor Cathy Crosson, JD '82, who wrote the briefs for Alexander's appeal, called the government’s action "the most massive book-burning since the Bill of Rights was adopted." In her petition, Crosson wrote, "in upholding such forfeitures, the decision ...would destroy the central guarantee of the First Amendment: that government cannot punish a disfavored speaker by stifling future, presumptively protected speech, cannot suppress a book, because another was found unlawful."

The assets from Alexander's $25 million business were seized under the federal Racketeer Influenced Corrupt Organizations (RICO) statute. Enacted to fight organized crime, RICO was amended in 1984 to allow obscenity violations to serve as predicate RICO offenses. Since then, RICO has been applied to "bookstores, theaters, and other 'speech-related' businesses." Crosson believes forfeiture in the context of such businesses constitutes prior restraint.

John Weston, who argued the case, predicted that if Alexander's appeal is unsuccessful, the "government will have the green light to pass legislation to permit forfeiture on national security grounds. Something like CNN in its entirety could be targeted for forfeiture simply because Peter Arnett broadcast from Baghdad during the Persian Gulf War."

For the government, Solicitor General Kenneth Starr argued that the assertion that forfeiture amounts to unconstitutional prior restraint is far too sweeping. In his briefs to the court, he wrote that RICO forfeiture "only deprives a defendant of assets that were related to the racketeering offenses for which he was convicted."

But Crosson disagreed: "RICO, in practice, takes the entire business, not just the proceeds from the sale of the obscene material. We conceded that a forfeiture of the proceeds from the obscene material would be constitutional. But RICO is designed to take the entire business, and that’s the way it’s been used in prior cases."

In addition to Crosson’s briefs to the high court, Alexander’s case attracted the amicus support of groups ranging from the American Bookseller Association and...
the American Library Association to Feminists for Free Expression and the Video Software Dealers Association.

This case was not Crosson's first at the U.S. Supreme Court. She remembers the first time she sat in front of the Court: "I was surprised at how excited I was. I was awe-struck." This time, the argument seemed "more routine. The novel thing for me was having my children there."

In addition to teaching two sections of legal writing and a class in constitutional law for the political science department, Crosson does appellate litigation for Weston Sarno Garrou & DeWitt. She became involved with First Amendment law because of her strong opposition to censorship. (By Chad Broughton, excerpted with permission from the Bloomington Voice.)

150th anniversary continues with special events

• On Jan. 29-30, the school sponsored the National Association on Environmental Law Societies Conference. Panel topics included "International Environmental Law Enforcement"; "Poverty, Race, and the Environment"; "Trends in Environmental Regulation"; "Endangered Species: Economics v. The Environment?"; "Market-Incentive Solutions for Environmental Problems"; and "Interstate Disposal of Waste and Federalism." Panelists include faculty members at the law school, as well as representatives from Congress, the EPA, the Council on Competitiveness, and the Wilderness Society.

• On Feb. 4-7, the school hosted the 1993 Midwest Regional Jessup International Moot Court Competition as part of its sesquicentennial celebration. The competition involved a hypothetical case before the International Court of Justice.

• March 4-7 brought a conference on "The Globalization of Law, Politics, and Markets: Implications for Domestic Law Reform." Participants examined trade and the environment and the inter-relationships between them and analyzed the impact of and responses to globalization in these areas by U.S. domestic legal processes.

The ultimate purpose of this interdisciplinary and agenda-setting conference was to help create an intellectual foundation for a new public law appropriate for the global era in which we live.

• On March 29, the Honorable Richard Posner will present the Addison Harris Lecture. The lecture is titled "The Material Basis of Jurisprudence." Judge Posner has written on topics as diverse as the economic foundations of most areas of law and the legal system's treatment of issues of gender and sex.

• On April 12, the Honorable Jesse Eschbach of the United States Court of Appeals for the Seventh Circuit will speak to the school. Judge Eschbach has served for 30 years on the federal bench, first as chief judge of the Northern District of Indiana, then as an appellate judge at the Seventh Circuit in Chicago. Judge Eschbach is a member of the Academy of Law Alumni Fellows.

• On April 23, the Conference on Emerging Paradigms in Bioethics will be jointly sponsored by the law school and the Poynter Center for the Study of Ethics and American Institutions. Conference participants will present papers evaluating the continuing utility of autonomy-based methods of medical decision making. Participants include Professor James Childress, of the religion department at the University of Virginia; Professor John Arras, of the Albert Einstein Medical Center; Professor John Roberts, of the University of Texas Law School; and Professor Carl Schneider, the University of Michigan law school. Roger Dworkin organized the conference, which is open to the public and will be in the Moot Court Room at the law school.

For more, see calendar on page 41.
IU's globalization conference garners national interest

The conference on the Globalization of Law, Politics, and Markets brought policymakers, practitioners, and academics from many disciplines to the School of Law in Bloomington on March 4-7 to discuss the impact of globalization on domestic law reform. For the benefit of alumni who could not attend the conference, here is the program. Papers from the conference will appear in the first issue of the law school’s new journal, The Indiana Journal of Global Legal Studies.

Panel I: The Processes and Domestic Impact of Globalization
Discussant: Thomas Ehrlich, President and Professor of Law, Indiana University
Panelists: Peter Katzenstein, Professor, Department of Government, Cornell University
Martin Shapiro, Coffroth Professor of Law, University of California—Berkeley
Davydd Greenwood, Kight Professor of International Studies, Cornell University
S. Tamer Cavusgil, Director, International Business Center, Michigan State University

Panel II: Global Trade and Domestic Law
Discussant: Randall Baker, Professor, School of Public & Environmental Affairs, Indiana University
Panelists: Richard Rosecrance, Professor and Director, Center for International & Strategic Affairs, UCLA
Frederick M. Abbot, Assistant Professor, IIT Chicago–Kent College of Law
William J. Davey, Professor of Law, University of Illinois
Jost Delbrück, Director, Institute for International Law, Kiel University, and Professor of Law, Indiana University Bloomington

Panel III: The Global Environment and Domestic Law
Discussant: Fernando Teson, Visiting Professor of Law, Indiana University Bloomington
Panelists: Philippe Sands, Director, Centre for International Environmental Law, Kings College, London
Mary Ellen O’Connell, Associate Professor of Law, Indiana University Bloomington
Richard Benedick, Ambassador (ret.), and Senior Fellow, World Wildlife Fund
Daniel Magraw, Associate General Counsel, International Office, U.S. Environmental Protection Agency

Keynote Address
Benjamin Barber, Director, Political Science Department, Rutgers University—New Brunswick

Panel IV: Global Trade and Environment: Perspectives from the Developing World

Discussant: Patrick O’Meara, Professor, School of Public & Environmental Affairs, Indiana University
Panelists: Hon. R.S. Pathak, former Chief Justice, Supreme Court of India and former judge, International Court of Justice
Henry Shue, Hutchinson Professor of Ethics & Public Life, Cornell University
June Nash, Distinguished Professor of Anthropology, City University of New York

Panel V: Domestic Law Reforms
Discussant: Bruce A. Markell, Associate Professor of Law, Indiana University Bloomington
Panelists: Diane P. Wood, Green Professor of International Legal Studies, University of Chicago, Lieutenant Governor’s Office, State of Indiana
Michael Punke, Legislative Assistant to Senator Max S. Baccus (D-Mont.)
J. William Hicks, Dutton Professor of Law, Indiana University Bloomington
Fred H. Cate, Associate Professor of Law, Indiana University Bloomington

Panel VI: Roundtable Discussion
Panelists discussed issues raised by the other panel discussions. Panelists included practitioners, faculty, and business people involved with substantial regulatory issues involving domestic and global law.
Before 1960

Paul G. Jasper, LLB'32, was honored by the Central Indiana Council on the Aging as Older Hoosier of the Year, an award that recognizes older people who donate their time and talents to the community. A former Indiana Supreme Court justice, he retired from law and is now serving as the secretary-treasurer of the Indiana Electric Association. He has been a member of the Indiana State Police Board, chair of the Fort Wayne March of Dimes, and president of the Marion County Council on the Aging. Ray G. Miller, JD'54, of Zanesville, Ohio, serves as judge of the Court of Common Pleas, Muskingum County. He was recently elected president of the Ohio Association of Common Pleas Judges.

John W. Donaldson, JD'54, who served 34 years as a representative to the Indiana General Assembly, R-Lebanon, was honored on his last day before retirement when the assembly passed a resolution recognizing his 34 years of "legislative loyalty to Indiana University" despite living in the heart of Purdue University country. The resolution was proposed by Jerry Denbo, BS'72, MS'75, D-French Lick.

1960–69

Donald W. Buttrey, JD'61, a senior member of McHale Cook & Welch, Indianapolis, was appointed by Governor Evan Bayh to the Indiana State University Board of Trustees, Terre Haute. Buttrey is a past president of the Indianapolis Bar Association in 1990, a past chair of the Taxation Section of the Indiana State Bar Association, and a fellow of the American College of Tax Counsel. He and his wife, Karen Lake Buttrey, MS'79, have three children.

Stephen C. Cline, LLB'63, and Michael Owen, JD'67, have announced the formation of the law partnership of Cline Owen & Kinzie, Indianapolis. The firm will mostly represent management in matters of employee, labor law, and related litigation.

Larry B. Coffey, JD'65, has expanded his Charlotte, N.C., law office in the areas of international trade and investment. Many of his clients have international business interests.

Thomas R. Lemon, JD'66, specializes in product liability law with Razar Harris Lemon & Reed, Warsaw, Ind. He was appointed president of the Indiana State Bar Association. He is active in his church and serves as a member of the Warsaw Community Schools Board.

Richard A. Boehning, JD'67, law partner with Bennett Boehning & Poynter, Lafayette, has received the Gold Heart Award from the American Heart Association, the highest honor the organization gives its volunteers.

John Clouse, JD'67, an attorney in Evansville, can be found in the 1993 edition of the Guinness Book of World Records as being one of the four most traveled people in the world. Of all the sovereign nations and territories in the world, Clouse has not yet visited only two: the Canton and Enderbury Islands in the Pacific Ocean.

1970–79

A. David Meyer, JD'70, vice president and general counsel of O&C Chemical and International Engineering Services Co., Indianapolis, has been selected by the American Bar Association to assist the Republic of Albania with its economic reform program. Meyer will advise the ministries of Foreign Economic Relations and Industry, Mining, and Energy on multilateral and bilateral trade agreements and foreign investment proposals.

John G. Baker, JD'71, adjunct professor of law and public and environmental affairs at IU, serves as appellate judge in the Indiana Court of Appeals. Baker presided over Monroe County superior and circuit courts from 1976 to 1979 before his appointment to the appellate court.

John Patrick McDonald, JD'72, a candidate for the Washington State House of Representatives, maintains a law practice in labor, business, and tax law in Vancouver, Wash.

John Onoda, JD'76, joined Levi Strauss & Co. in 1989 as director of corporate communications and was promoted to vice president of corporate communications, where he is responsible for managing a team of professionals who handle internal and external communications, media relations, and video communications. Onoda previously worked for McDonald's Corp., Holiday Corp., and Holiday Inns and has been a newspaper reporter for the Omaha World-Herald and the Houston Chronicle.

Charles P. Sammut, JD'77, has become counsel to the intellectual property law firm of Limbach & Limbach, San Francisco.

Viola Taliaferro, JD'77, is magistrate of the Monroe County Circuit Court. She was the speaker at the Monroe County Branch of the NAACP Jubilee Day Celebration and the Martin Luther King Jr. Day ceremony in January in Bloomington.

Wayne D. Boberg, JD'78, was recently elected as a capital partner with the Chicago law firm of Winston &
Strawn. He joined the firm in 1978 and has been a partner since 1985. He was also elected to the IU Law Alumni Board of Directors in September.

Renee Mawhinney McDermott, JD’78, was named liaison from the ABA Business Law Section to the ABA’s Standing Committee on Environmental Law at the August ABA annual meeting in San Francisco. McDermott practices law as a partner with the Indianapolis firm of Barnes & Thornburg.

Joseph D. O’Connor, JD’78, partner in Bunger Robertson Kelley & Steger, Bloomington, was elected vice president of the Indiana State Bar Association. He is the group’s next president-elect and will be president in fall 1994.

Daniel D. Beckel, JD’79, has accepted a position with Arthur Andersen & Co., Societe Cooperatif, as associate general counsel for Europe, the Middle East, India, Africa, and Australia. He will practice out of offices in Paris.

Sandra Leek, JD’79, executive director of the Indiana Civil Rights Commission, hopes to increase efficiency and continue to focus on the commission’s educational mission of teaching individuals and businesses about discrimination and how to combat it.

1980–89

Sue A. Beesley, JD’80, is the corporation counsel for Indianapolis and Marion County. Named to the position by Indianapolis Mayor Stephen Goldsmith, she is responsible for providing all legal services to the city and county.

Thomas C. Pence, JD’80, was elected partner in the Milwaukee firm of Foley & Lardner, Wisconsin’s largest law firm.

Thomas A. Pyrz, ’80, of Carmel, has been named executive director of the Indiana State Bar Association. He replaces Jack Lyle, who retired on Dec. 31 after serving 23 years in that position. Pyrz is general counsel to the Indiana State Family and Social Service Administration, Indiana’s largest state agency, where he is responsible for the design and implementation of legal services delivery.

Linda E. Valentine, JD’82, was appointed vice chair of the administrative and governmental law committee of the American Bar Association’s 1992-93 general practice session. She is a partner in the Indianapolis firm of Bose McKinney & Evans and a member of the IU Law Alumni Board of Directors. She was appointed to the board of directors of the Indianapolis chapter of the Network of Women in Business.

A. Stephen Lacy, JD’82, recently received his LLM in taxation from DePaul University School of Law. He is manager of financial services for the Midwest Stock Exchange in Chicago.

George M. Streckfus, JD’82, has set up private practice in Floyds Knobs.

Kenneth L. Turchi, JD’83, as first vice president of First Indiana Bank, Indianapolis, heads a newly created marketing and strategic planning division. Turchi is also responsible for the bank’s marketing, advertising, strategic planning, and shareholder relations. He first joined the bank in 1985 and was promoted to vice president in 1989.

M.J. (Mike) Asensio III, JD’85, practices employment law as a partner in the Columbus, Ohio, law firm of Baker & Hostetler. Asensio’s emphasis is on matters involving union organizations and contracts, but he also advises clients on general employment relations matters.

Ted M. Parker, JD’85, was promoted to vice president of merchant banking for National City Financial Corp., a subsidiary of National City Corp., Cleveland. He joined National City in 1987 and has provided investment banking services as assistant vice president in merchant banking since 1990.

Christopher Gutowsky, JD’86, who rode in four Little 500 races, twice winning first place, established TWT, a sports management and marketing company that specializes in bicycling events and tours. During his career in cycling, Gutowsky nearly made the 1984 Olympic team, won a national championship in 1985, and helped organize some of the most prestigious cycling events in the country, including the Tour du Pont.

Bernard Paul, JD’86, is a project engineer in the environmental affairs division of Eli Lilly, where he is partly responsible for air-pollution regulatory issues for Lilly manufacturing facilities. Previously, Paul was a manager for Thomson Consumer Electronics and an assistant administrator at Indianapolis’ air pollution control division, where 20 years ago he authored the city’s air pollution laws that are still used today.

Tammy Babcock, JD’89, deputy prosecutor for Monroe County, handles cases involving domestic violence.

Jean Erickson Hadley, JD’88, formerly a trust administrator with the National City Bank of Evansville, has joined the Evansville law firm of James W. Little.

Sean D. Major, JD’89, has taken a leave of absence from the Chicago law firm of Dickinson Wright Moon Van Dusen & Freeman to work as a foreign legal assistant for the Tokyo law firm of Nagashima and Ohno. His wife, Elizabeth A. McDevitt-Major, JD’89, has resigned from the Cook County State’s
Attorney's Office and is studying the Japanese language.

1990–Present

Angela M. Marotto, JD'90, of Hermosa Beach, Calif., is practicing employment law with Seyfarth Shaw Fairweather & Geraldson, a Chicago-based firm with a 37-attorney office in Los Angeles.

John O. Renken, JD'90, has transferred to the Ann Arbor law office of Miller Canfield Paddock & Stone, where he will be involved in public and private financial matters. He comes from the firm's Detroit office, where he practiced municipal finance law.

Jeffrey R. Pankratz, JD'91, an attorney in Indianapolis, is the part-time executive director for the Community Organizations Legal Assistance Project, a new coalition of Central Indiana attorneys who provide free legal help to non-profit community groups.

Daniel S. Bopp, JD'92, won first place in the 1992 International Association of Defense Counsel Student Writing Competition for his paper addressing the merging of tort concepts into insurance contract law.

Steven D. Hardin, JD'92, is an associate of McHale Cook & Welch, Indianapolis.

Anne M. Frye, JD'92, and Brian K. Lawson, JD'92, have joined Buchanan & Bos, Grand Rapids, Mich., as associate attorneys practicing in the area of litigation.

Lisa C. McKinney, JD'92, has joined the Indianapolis-based law firm of Bose McKinney & Evans. She will concentrate her practice in the areas of financial institutions and environmental law.

Barry Phillips, JD'92, is the assistant state public defender in the Milwaukee Criminal Trial Division. He was admitted to the Wisconsin State Bar in August 1992.

Richard J. Suhrheinrich, JD'92, and Mark J. Wassink, JD'92, have joined the law firm Warner Norcross & Judd, Grand Rapids, Mich., as associates.

Courtney R. Tobin, JD'92, practices law as an associate with Krieg DeVault Alexander & Capehart, Indianapolis. Tobin's work includes litigation, environmental law, family law, employment issues, and general corporate matters.

Alan S. Townsend, JD'92, has joined the Indianapolis-based law firm of Bose McKinney & Evans, practicing in the area of litigation.

Send Us Your Class Note

Pass along the latest about yourself to Bill of Particulars, Indiana University Alumni Association, P.O. Box 4822, Bloomington, IN 47402-4822. Your class note will be used either in this alumni magazine or in the Law alumni newsletter, Update. Please use this form for address correction. (Please send letters to the editor to Dean Lauren Robel at the Law School.)

Your news

Date

Your news

Name

Address

IU degree(s) / date(s)
### Sesquicentennial Calendar of Events

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<tr>
<td>January 28-30</td>
<td>National Association of Environmental Law Societies Conference</td>
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<td>February 4-6</td>
<td>Jessup International Moot Court Competition</td>
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<td>April 3</td>
<td>Spring Law Day for admitted students</td>
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<td>April 12</td>
<td>The Honorable Jesse E. Eschbach Lecture: &quot;Judges on Judging&quot;</td>
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<td>April 23</td>
<td>Joint Law School-Poynter Center Conference: &quot;Emerging Paradigms in Bioethics&quot;</td>
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<td>April 29 – May 1</td>
<td>Indiana State Bar Association annual meeting; Fort Wayne</td>
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<td>April 29 – May 1</td>
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**To order Pozzatti’s “Celebration of Law”**

The cover of the *Bill of Particulars* is a print by Distinguished Professor of Art Rudi Pozzatti, created in honor of the Law School’s 150th birthday. At the Sesquicentennial Dinner, the artist explained the symbolism of the print:

"When I was talking to people at the Law School, one of the things that kept coming up was the setting of the library and the beautiful windows overlooking the woods. Those conversations were a wonderful beginning for me.

"I started with the landscape: from the left to the right of the print, each of the seasons is represented. The seasons show the perpetual cycle of change—the world we live in is ephemeral. These images set a cycle of growth, diminishing, decay, and renewed growth.

"The center of the print is dedicated to the law. Law is at the center of the image, as a stable support. The center has qualities of a column—the fluting, or decorative elements of a column. It also has a robe-like quality, like the robes that judges wear. It shimmers from the top of white down through the grays. There are a lot of grays in the portraits. Some people see the law as black and white, but many see it as the shades of gray.

"The Constitution is the centerpiece of our democracy. It is represented in large capital letters as it flows over a surface and bends, twists, and turns. I thought to use the image to represent how the Constitution has been pulled and stretched and still manages to maintain itself. Through that, there are many legal concepts intertwined.

"The portraits represent the masses of people; they are in two separate columns. These are the people that the law serves and range across the spectrum from children to the elderly."

There are a limited number of prints available for purchase. For information write to Assistant Dean Art Lotz, Indiana University School of Law, Bloomington, IN 47405.