Summer 1993

The Justice Who Never Graduates: Law School and the Judicial Endeavor

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Wisconsin Supreme Court

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Available at: http://www.repository.law.indiana.edu/ilj/vol68/iss3/1
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, forty 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 forty 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.

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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 forty years duration, spanning about one-fourth of its history. Some of your connections go back even further.

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, and 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 substantial fees to read law, were the chief means of legal education and would remain so well into the nineteenth century. Indeed, the lawyers of the nineteenth 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 nineteenth 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

4. Id. at 199.
6. David McDonald, Introductory Address on the Study of Law, Delivered in the Chapel of Indiana University, Dec. 5, 1842, at 19 ("In our courts of justice, whither our citizens, in great numbers, constantly resort . . . .") (transcript printed by Marcus L. Deal, available at Lilly Library, Indiana University, Bloomington).
seventy cases. That is a substantial caseload 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 comprised 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, 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 a 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 Indiana Supreme Court considered two constitutional cases. The court upheld the statutes in

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7. The court apparently had two terms: May and November.
8. The cases reported in the November, 1842, term appear in 6 Blackf. 239-386 (Ind. 1842).
9. See, e.g., Duncan v. Cox, 6 Blackf. 287 (Ind. 1842).
10. Eldon v. Doe, 6 Blackf. 365 (Ind. 1842).
14. Shaw v. Parker, 6 Blackf. 369 (Ind. 1842).
15. See, e.g., Scott v. Brokaw, 6 Blackf. 257 (Ind. 1842); McFall v. Wilson, 6 Blackf. 276 (Ind. 1842); State ex rel. Harsh v. Scott, 6 Blackf. 280 (Ind. 1842); Halsey v. Hazard, 6 Blackf. 282 (Ind. 1842); Lowe v. Blair, 6 Blackf. 301 (Ind. 1842); Merkle v. Bolles, 6 Blackf. 307 (Ind. 1842); James v. Nicholson, 6 Blackf. 307 (Ind. 1842); Hagerty v. Wood, 6 Blackf. 312 (Ind. 1842); Town of Connersville v. Wadleigh, 6 Blackf. 316 (Ind. 1842); Curtis v. State Bank, 6 Blackf. 333 (Ind. 1842); State v. Eltzroth, 6 Blackf. 362 (Ind. 1842); Hickley v. Grosjean, 6 Blackf. 376 (Ind. 1842); Andre v. Johnson, 6 Blackf. 401 (Ind. 1843); Seeright v. Fletcher, 6 Blackf. 407 (Ind. 1843).
16. See, e.g., Jenners v. Howard, 6 Blackf. 255 (Ind. 1842); Foresman v. Marsh, 6 Blackf. 304 (Ind. 1842); Powers v. Hamilton, 6 Blackf. 313 (Ind. 1842); Mahon v. Gardner, 6 Blackf. 341 (Ind. 1842); Dumont v. McCracken, 6 Blackf. 381 (Ind. 1842).
17. See, e.g., Hartsock v. Reddick, 6 Blackf. 271 (Ind. 1842); Beauchamp v. State, 6 Blackf. 319, 331 (Ind. 1842).
18. See, e.g., State v. Freeman, 6 Blackf. 263 (Ind. 1842); State v. Little, 6 Blackf. 284 (Ind. 1842); State v. Deniston, 6 Blackf. 295 (Ind. 1842); Beauchamp v. State, 6 Blackf. 319 (Ind. 1842); State v. Tuell, 6 Blackf. 368 (Ind. 1842); State v. Harsh, 6 Blackf. 370 (Ind. 1842).
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 latter 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 Indiana Supreme Court’s 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, Hoosiers in the mid-nineteenth 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-nineteenth 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

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20. Id.
21. Fisher v. Lacky, 6 Blackf. 399 (Ind. 1843). According to the index of cases for 6 Blackf. (which I recognize may not be totally accurate), these two cases were the only constitutional cases the court considered from the November, 1841, term through the November, 1843, term reported in that volume.
22. The federal and state constitutions do differ somewhat. Because the court opinion tracks the language of the federal Constitution more closely than that of the state constitution, it can be argued that the court was relying on the federal provision.
24. Fisher, 6 Blackf. at 400.
25. For an account of the hostility, see James J. Robinson, Admission to the Bar As Provided for in the Indiana Constitutional Convention of 1850-1851, 1 IND. L.J. 209 (1926).
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 article 7, section 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 reflected not only hostility to the legal profession but 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 thirty-nine lawyer-delegates at the convention were outnumbered by the sixty-two farmers, sixteen physicians, and eleven 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.

26. Id. at 210 (quoting the Official Report of the convention).
27. IND. CONST. art. 7, § 21 (repealed 1935), reprinted in THORPE, supra note 22, at 1086.
28. For discussions of the history and interpretation of this provision, see, for example, Bernard C. Gavit, Legal Education and Admission to the Bar, 6 IND. L.J. 67 (1930) [hereinafter Gavit, Legal Education]; Bernard C. Gavit, Indiana's Constitution and the Problem of Admission to the Bar, 16 A.B.A. J. 595, 743 (1930); Robinson, supra note 25.
29. Attorney Niles went on to say: "The law must be a vast and learned science, so long as it affords protection to the varied interests of civilized society. The idea of making every man his own lawyer by simplifying the rules of practice amount to about as much as the scheme of some who wrote a book entitled 'Every man his own washer-woman.'" Robinson, supra note 25, at 211-12 (quoting the Official Report of the convention).
30. Id. at 210.
31. THEOPHILUS A. WYLIE, INDIANA UNIVERSITY: ITS HISTORY FROM 1820, WHEN FOUNDED, TO 1890, at 88-89 (1890).
32. Id. at 89.
Little is known of nineteenth 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 nineteenth century, teaching was an avocation of practicing lawyers and judges.

The Indiana University School of Law 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 travelled from Centerville, Indiana, to Bloomington to attend law school, it took him nearly three days: two days by coach to cover the sixty-two miles from Centerville to Indianapolis, followed by a twenty-hour trip from Indianapolis to Bloomington in a three-seated open wagon.

Upon his arrival, William Murray found Bloomington to be a "village . . . without side-walks or graded streets" and with mud everywhere. The "homes and business houses were of the most primitive kind," he wrote, and "the old State University building, built without regard either to ancient or modern architecture or convenience." His observations about the rustic

33. For discussions of 19th century legal education, see, for example, FRIEDMAN, supra note 5, at 278-82; HURST, supra note 5, at 256-76; WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES (1978); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983); Calvin Woodard, Justice Through Law—Historical Dimensions of the American Law School, 34 J. LEGAL EDUC. 345 (1984).
34. FRIEDMAN, supra note 5, at 528; HURST, supra note 5, at 257-58; STEVENS, supra note 33, at 38; Alfred S. Konefsky & John H. Schlegel, Mirror, Mirror on the Wall: Histories of American Law Schools, 95 HARV. L. REV. 833, 845-46 (1982).
35. WYLIE, supra note 31, at 89. For historical information about the Indiana University School of Law, see Colleen K. Pauwels, Inferior to None, BILL PARTICULARS (Ind. Univ. Sch. of Law-Bloomington), Fall 1992, at 15; STEVENS, supra note 33, at 43 n.7; WYLIE, supra note 31, at 88-90.
37. WYLIE, supra note 31, at 89.
38. Id.
40. Murray, supra note 39, at 6-7.
41. Id. at 6.
42. Id.
qualities of the village extended to "[s]ociety in Bloomington." "Some of the young men," he wrote, "wore jeans suits and cow-hide boots." Imagine how he would view our attire today.

On a chilly December 5th, 150 years ago, Judge McDonald gave the law department's inaugural address, entitled "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 was 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 students were required to attend, but we do not know how many students comprised the entering class. We do know that in 1843 there were fifteen 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 December 5, 1842, spans eighteen 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 spent significant time and effort explaining the value of the common law and reassuring his audience that it was 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 was 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.

43. Id. at 7.
44. "It is said that lawyers became even more unpopular during the Revolution than they had been before. . . . [The American lawyer] has played a useful role, sometimes admired, but rarely loved." FRIEDMAN, supra note 5, at 265-66.
45. Pauwels, supra note 35, at 15.
46. Id.
47. McDonald, supra note 6, at unnumbered introductory page.
48. Id. at 12.
I. THE ROLE OF LAW IN SOCIETY

Judge McDonald viewed the law as a necessary and inevitable by-product of the human desire for an ordered society. He said:

Man was made for society. His social is his natural state. . . . [H]is nature continually urges him to [a state] of society, civilization, and refinement. . . .

But society 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.49

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 [sic] 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, 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.50

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 a “monument” to the accumulated “wisdom of English and American jurists and statesman [sic].”51 He believed, however, that the duty of the legal profession was “to study, improve, and enforce” the common law, rather than to “worship” it from afar.52 Yet in other parts of his speech, Judge McDonald approached the law with a near-religious reverence, declaring that the principles of the common law, “founded in reason and justice, are strictly ethical, and are but the voice of God speaking in man.”53

McDonald devoted a considerable portion of his speech to extolling the virtues of the common law, which he viewed as the best legal system. He had

49. Id. at 6.
50. Id.
51. Id. at 14.
52. Id.
53. Id. at 16.
little faith in the codification of laws and condemned those critics of the common law who, "'angry at the want of simplicity in our laws[,]... mistake variety for confusion, and complicated cases for contradictory.'"\(^5\)

According to McDonald, uncertainty about the outcome of a case in the tribunals of justice arises not out of the law, but out of difficulty in proving the facts.\(^5\)

McDonald had an idealized view of the law as a comprehensive moral ordering force, with the lawyer as society's moral agent. Contemporary scholars are skeptical about McDonald's perspective. Law and society movement scholars (and our own experiences) have shown us gaps between the laws as written and their social impact. Rights skeptics urge us to question whether the system of laws legitimates, rather than eliminates, inequalities. A currently widespread deconstructionist view is that the law is indeterminate and there are no absolute rules that offer a ready answer for each situation. The relativists make us wonder if it is ever possible to identify what is right in a world of competing perspectives and limited resources.

Going beyond these critiques, we must recognize that our society is far more complex than any envisioned by Judge McDonald. We are a diverse, multi-cultural society engaged in international commerce. Our laws reflect our commercial and social complexity. Laws apply across boundaries: physical, cultural, and national. We live in an administrative state that revolves around statutes and rules which probably outnumber appellate judicial decisions. Today we speak of the codification of common law and of a common law of statutory interpretation.

But despite the changes that have occurred, we can learn from Judge McDonald. His vision was that of a rational, wise, and moral society under the rule of law. He saw the law as a means of preserving the achievements and values of our past while adapting to a changing world. Our celebration today demonstrates the timeless relevance of this perspective.

II. THE ROLE OF THE LEGAL PROFESSION

Included in McDonald's vision of the law was his vision of the role of lawyers. McDonald's ideal of the lawyer was the litigator in the courtroom, protecting the rights of individuals, and the leader of the community, setting the pace in local government, statesmanship, and business.\(^6\) It remains true today that legal education trains lawyers for practice, community service,

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54. Id. at 10 (quoting Blackstone without a citation).
55. Id. at 11-12.
56. Id. at 19-21.
business, and government. Litigation, however, is a minor part of the modern lawyer’s practice. Practitioners’ major roles today are those of counsellor, 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, much of which 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 . . . .”37 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.

III. THE ROLE OF LEGAL EDUCATION

Despite his idealism about the law and the legal profession, Judge McDonald did not anticipate the potential and the significance of modern legal education in a university setting. Instead, 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.”58

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.59 (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.”60 The law was, to Judge McDonald, a liberal science rather than “a dry and crabbed art,
interesting only to those who practise it for gain . . . .”61 He saw the law’s evolving framework of rules as akin to the systems of rhetoric and grammar. 62 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. 63 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. He stated:

[T]he study of the law 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. 64

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 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. 65

61. Id. at 14 (quoting an unnamed “eloquent American lawyer”).
62. Id. at 14-15.
63. Id. at 18.
64. Id. at 18-19.
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 Kircher of Marquette University Law School, the task of 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 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 life-long 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 on the quality of the legal system. "In the public estimation," Judge McDonald asserted, "the legal profession and the laws themselves are nearly


67. Fuld, supra note 65, at 921 (quoting Chief Justice Taft's address to law review editors).

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 the 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 among the law school, the bench, and the bar through their jobs in law firms and in judges' chambers.

The experiment of founding a law school has taken on dimensions Judge McDonald could 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 deemphasizing 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 one who 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.

69. McDonald, supra note 6, at 6.
70. In speaking to Harvard Law School Alumni on March 3, 1990, Professor Paul Freund maintained that the law school should make more "place for theory" and at the same time make more "place for clinical education." He defended the soundness of this position as follows:

You may say that those are inconsistent, they are incompatible, theory and clinical work. I don't think so. I think that they reinforce one another. If our mission is the pursuit of justice, we need both. We need a theory or theories of justice. How many practicing lawyers could talk coherently for five minutes on what is justice? But we also need to see the clinical application
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 December 5, 1842, the male nouns and the male pronouns definitely did not include women. Fifty years later, one hundred 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 one hundredth anniversary of her graduation. 

Within the nineteenth century, only three other women received their LL.B. 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 of law, the pursuit of justice in practice, in actuality. Each is a kind of corrective of the other, supplemented by the other, and both are necessary if we are to get a better rounded sense of the meaning of justice.


71. For a discussion of Tamar Althouse Scholz and women at the Indiana University School of Law and in the Indiana Bar during the 19th century, see Colleen Kristl Pauwels, Tamar Althouse Scholz, First Woman Law Graduate, IU L. UPDATE (Ind. Univ. Sch. of Law—Bloomington), Summer 1992, at 10.

At the Indiana Constitutional Convention of 1850, delegate Daniel Kelso facetiously suggested that women be allowed to practice law. He commented: "I say admit every man, and every woman, too, if you please. The more pettifoggers we can get into our courts the more money your good lawyers will make. I am quite willing that every man should practice law; and if there are not men enough to break down the bar by their practice, let the women have a chance at it, too." Robinson, supra note 25, at 211 (quoting the Official Report of the convention).


73. Pauwels, supra note 35, at 19.
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 would be 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 ranking male graduate.

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

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74. Id. at 25.
75. In re Leach, 134 Ind. 665 (1893).
76. IND. CONST. of 1851, art. 7, § 21; see supra note 27.
77. In re Leach, 134 Ind. at 667.
78. The court cited article one, section one of the Indiana Constitution as declaring the right to choice of vocations as “inalienable.” Id. at 669. The court also cited article one, section 23 of the Indiana Constitution as providing that “the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” Id. at 669-70.
constitutions, the Indiana Supreme Court declared that a woman’s right to choose a vocation was an inalienable right that could not be abridged by the state.

The 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 thirty 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

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79. The court relied on section one of the Fourteenth Amendment to the federal Constitution providing that “no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen.” Id. at 669.

80. For an analysis of the constitutional provision and the cases interpreting it, see Gavit, Legal Education, supra note 28. Professor Gavit viewed the court’s interpretation of the constitutional provision in the Leach case as “strained.” Id. at 82.


By the time the Leach case came before the Indiana Supreme Court, the issue of the admission of women to the bar had been litigated around the country for about 25 years. In Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), the United States Supreme Court had affirmed the right of the Illinois courts to deny Myra Bradwell admission to the bar. In re Bradwell, 55 Ill. 535 (1869). Also, the Wisconsin Supreme Court had denied Lavinia Goodell admission to the bar. In re Goodell, 39 Wis. 232 (1875), reprinted in THE JUDICIAL HUMORIST 165 (William L. Prosser ed., 1952). Ultimately, the battle to admit women was won in the legislatures, as well as in the courts. For a history of women in the legal profession, see KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT (1986). For an extensive bibliography of writings on women and the legal profession, see Anthony P. Grech & Daniel J. Jacobs, Women and the Legal Profession: A Bibliography of Current Literature, 44 RECORD 215 (1989).


82. For one nonlaw faculty member’s view of the academy and gender bias in hiring and tenure decisions, see Anne Matthews, Rage in a Tenured Position, N.Y. TIMES, Nov. 8, 1992, § 6 (Magazine), at 47. For a fictional treatment of gender bias in the academy, see AMANDA CROSS, DEATH IN A TENURED POSITION (1981). (Amanda Cross is the pseudonym of Professor Carolyn Gold Heilbrun, Department of English, Columbia University.)
teach students that sensitivity to equality issues does not stop when they leave the law school halls; 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 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 power; 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.83

So sayeth Judge David McDonald. Abrahamson, J., concurs.

83. McDonald, supra note 6, at 21-22.