

2001

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Repository Citation

Donaldson, John E., "Playing the Game of Life" (2001). *Popular Media*. 120.
https://scholarship.law.wm.edu/popular_media/120

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THE PRACTICE OF PROFESSIONALISM

Playing the Game of Life

BY PROF. JOHN E. DONALDSON, *Marshall-Wythe School of Law, College of William and Mary*

The following article is an abridged version of the remarks delivered by Professor Donaldson during this year's Marshall-Wythe commencement exercises.

The thoughts I wish to share with you are not profound. To borrow from Thomas Jefferson, they are largely “self-evident truths.” I wish to develop three themes: the education you have received, some of the opportunities you will have, and what you will take with you as you leave.

My first theme calls for you to reflect with me on the nature of the education that you have received here and will continue to enhance as you pursue your careers. But first a digression into the subject of just what is “law.” Except tangentially in connection with a few elective offerings, the question of just what is meant by “law” is not addressed in our curriculum. We study legal doctrine in contract, in tort and in bankruptcy without any special focus on “what is law.” Scholars and theorists, including “legal positivists,” “legal realists,” and adherents to the critical legal studies movement, drawing on the methods of philosophy and the social sciences, have advanced complex and abstract normative notions of just “what is law.” I will not discuss these theories. I prefer something more pragmatic and useful.

Justice Holmes was right on target when he said “The prophecies of what courts will in fact do, and nothing more pretentious, are what I mean by the law.” What courts say and do in matters not governed by statutes is what we call common law. Not surprisingly, the Code of Virginia states that “The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and the Constitution of this Commonwealth, shall continue in full force ... and be the rule of decision, except as altered by the General Assembly.”

A definition that I like especially because of its relevance to legal education is one used by Dudley W. Woodbridge, dean of this law school when I was a student here from 1960 to 1963. I first heard this definition in the basement of the tall brick building—Bryan Dormitory—which towers above the stadium wall to my rear. Dean Woodbridge defined law as the “rules of the game of life” which society enforces. He equated the roles of judges and legislators with those of referees and sports commissioners who apply the rules fairly and revise them from time to time to the end that the game of life be more satisfying to the participants. He equated the role of lawyers with that of coaches in the game of life whose task it is to assist participants in working within the rules to score points without incurring unacceptable penalties. I agree with Dean Woodbridge that the study of law is a study that embraces the game of life.

I think that you, in reflecting on your three years here, will agree that your studies have not only embraced the game of life but have done so in a manner that goes far beyond a mere understanding of the rules.

In studying law you have, to use the terminology of Professor Hohfeld, examined and reflected on the rights, privileges, immunities, powers, disabilities, duties and liabilities that arise from the status and the dealings and interactions of the participants in the game of life. In so doing, you have examined the methods by which business is carried on, the ways in which people, organizations and institutions interact in circumstances generating disputes, and the functioning of instrumentalities of government at all levels.

In short, in your study of legal rules, the myriad circumstances and contexts

in which disputes arise, the institutions and forces which mold our economy and social order, and the values underlying our civilization, you have acquired an advanced understanding of our society and of humanity itself. You are liberally educated at a very advanced level. Your J.D. degrees are equivalent to Ph.D.s in the Structure and Functioning of Society.

My second theme focuses on how you will use the knowledge and skills you have acquired. What opportunities and challenges will you pursue? You are professionally trained to be advocates for clients involved in disputes. Just as important, if not more so, you are professionally equipped to coach the players in the game of life.

However, the training and education you have received over the last three years, and which will be refined and enhanced by experiences gained in the course of your legal careers, will be significantly underutilized if employed only in generating revenues from legal services rendered. Talents that are underused are to that extent wasted resources.

Alexis de Tocqueville, a Frenchman touring the United States in the early 19th century, observed that “lawyers form the political upper class and the most intellectual section of society” and that the “American Aristocracy is found not among the rich, who have no common link uniting them [but] at the bar and bench” [and lawyers] “are naturally called on to fill most public functions.” While his observations regarding the dominance of lawyers in leadership positions have become less accurate with the passage of time, lawyers who have been willing to share their talents in improving the game of life for all participants have made valuable contributions vastly disproportionate to their number.

What qualities possessed by lawyers

have so specially suited them to this role? It is not just their knowledge of law! Anthony Kronman, then dean of the Yale Law School, in 1993 observed in his book *The Lost Lawyer: Failing Ideals of the Legal Profession* that the disproportionate contributions made by lawyers to the improvement of society have been attributable to the “prudence” or “sound judgment” which lawyers bring to bear on issues of public importance, whether they be matters of public policy concerns or practical nonlegal problems faced by community hospitals and local school boards. Kronman states, and I concur, that lawyers as a class have disproportionately greater wisdom and capacity for sound, prudent decisionmaking. This capacity derives from the study of law and from the career insights and knowledge gained from experience with the workings of society.

Unfortunately, there is increasing reluctance of lawyers to share their talents for prudence and sound judgment in the larger arena of public service. Major blame for this phenomenon falls on the legal profession itself, and arises from forces molding the culture of most of the largest law firms. This is a culture that stresses monetary values and billable hours at the expense of other values, a culture that demands unconscionably long workdays, a culture that demands allegiance and loyalty to the firm at the expense of service to broader interests, and a culture that in emphasizing specialization, generates lawyers who deal only with a narrow range of legal issues, and lack the interaction with the larger social and economic order that provide insights important to the exercise of sound judgment. In his book, Kronman refers to the lawyer who accepts civic responsibilities as a “lawyer-statesman.” At this law school, we, borrowing from the ideal of George Wythe and Thomas Jefferson, use the term “Citizen-Lawyer.”

I urge you, as you consider the opportunities and challenges that lie ahead, to early on acknowledge a duty, a commitment, an obligation to share your knowledge, skills and insights — that is, your exceptional capacity for prudent and sound judgment — in the broader arena of public service; that you not yield to the forces operating in the legal profession that discourage you from pursuit of the role of citizen-lawyer. Should you accept and discharge this obligation, you will enjoy one of the greatest satisfactions that can be won in the game of life, the satisfaction that proceeds from the consciousness that you, in playing the game of life, have improved the game for all the participants — an awareness that your lives have been rewarding not only to you individually, but to humanity itself.

My third and final theme is simply a reminder of facts obvious to each graduate. The Marshall-Wythe School of Law is a unique place and you have shared a wonderful experience. You are united by shared experiences and values and the bonds of companionship. When you leave, you will carry with you something of far greater personal value than the degree conferred on you. You will carry with you the friendship of colleagues that will sustain you for your lifetime.

As you pursue your respective careers, most of you will be playing important roles in seeing that the game of life is played by the rules of law. I hope many of you will work to make the game of life itself a better game. ♦