

College of William & Mary Law School
William & Mary Law School Scholarship Repository

Commencement Activities

Archives and Law School History

2001

Commencement 2001: Remarks of John E. Donaldson, J.D. '63, Ball Professor of Law

John E. Donaldson

William & Mary Law School

Repository Citation

Donaldson, John E., "Commencement 2001: Remarks of John E. Donaldson, J.D. '63, Ball Professor of Law" (2001). *Commencement Activities*. 79.

<https://scholarship.law.wm.edu/commencement/79>

Copyright c 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/commencement>

Commencement 2001

Remarks of
John E. Donaldson, J.D.'63
Ball Professor of Law



College of William & Mary
Marshall-Wythe School of Law

Zable Stadium
Williamsburg, Virginia
May 13, 2001

Colleagues, parents, friends and family of the degree recipients we honor today, and members of the Class of 2001 – Let me begin by thanking Dean Taylor Reveley for that very warm and generous introduction. The individual selected to give commencement remarks is usually a person considered to have considerable stature and wisdom and the potential for saying something worthwhile. At law school graduations, this traditionally has meant the speaker would be an eminent jurist, statesman or leader of the bar. You have broken with that tradition in selecting me. I am deeply honored and the honor lies not in any suggestion of stature or wisdom. It is greater and more personal. It is an expression of your appreciation, respect and goodwill. No teacher can receive any higher recognition. Thank you!

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. I will (1) comment on the education you have received, (2) discuss some of the opportunities you will have, and (3) remind you of 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 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. The degree of juris doctor which you receive today is not only a professional degree providing you entry to the calling of lawyers. It is equally, perhaps more importantly, a graduate degree reflecting successful completion of advanced studies in a demanding liberal arts curriculum. Although not suggested in the name juris doctor, I believe your JD degree is very much equivalent to a PhD degree in the Structure and Functioning of Society.

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 organized and conducted, the ways commerce is carried on, the myriad ways in which people,

organizations and institutions interact in circumstances generating disputes, and the functioning of instrumentalities of government at all levels. You have examined the values underpinning our social order and the economic and societal forces which mold our civilization. You have focused on the human condition in all its manifestations and variables. You have explored the nature of the institution of marriage and the nature of families. You have examined health care delivery systems. You appreciate the duties and responsibilities that govern undertakings by fiduciaries. You have critically examined relationships between employers and employees and principals and their agents. You understand the nature of corporations and the respective relationships of shareholders, bondholders, directors and officers. You are aware of the expectations society holds of the hypothetical "reasonable prudent man." You have studied the institutions governing our social order, ranging from the roles of courts, state legislatures and administrative agencies to those of trustees in bankruptcy and police officers. You have even learned that the Internal Revenue Service and similar instrumentalities of state and local government have a keen interest in just how well participants play the game of life.

In the course of your study, you have examined, even though you may not have resolved, questions that have divided philosophers and social theorists for generations:

In a property context, does the world belong to the living or to the dead? Does an owner of property also own the right to control its use and enjoyment after death? If so, how far into the future? Does the Rule Against Perpetuities make sense? May a person create a perpetual conservation easement? Can one generation bind and limit another generation?

Or, in a criminal law context, is punishment for a crime proper only because of the need to protect society and deter offenses? Or is punishment proper when its purpose is retribution and revenge? Was Clarence Darrow, in his plea for mercy on behalf of acknowledged murderers in the Loeb-Leopold case, right or wrong in suggesting that the game of life, or life itself, can be unfair in the roles it assigns to participants? Was he right or wrong in suggesting that an individual participating in the game of life is like a fragile bottle in a storm-tossed sea that may, through the accidents of currents and terrain, be thrown upon a soft, sandy shore unblemished and unbroken, or may be thrown upon a rocky shore, deformed and flawed? Should the deformed bottle be destroyed because the currents were unkind and the shore unreceptive? Should the deformed bottle be destroyed because it was created from defective materials and could not withstand the impact when thrown ashore? In demanding the death penalty be imposed on murderers, do we exalt or degrade the values on which our social order is based?

As did Plato, you have explored the concept of "justice." Is justice served only by finding the truth? Is justice obtained where the process for dispute resolution is fair, but truth is uncertain? Is justice really about process, not outcomes? In a proceeding where process is fair, should a decision resolving the matter be considered final in situations where further relevant evidence subsequently comes to light?

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 JD degrees are equivalent to PhD's in the Structure and Functioning of Society. In the process you have developed and honed analytic skills and a facility for clarity and precision in oral and written expression. You have learned to evaluate and to tolerate differing point of view. You have acquired formidable powers of persuasion and an awesome capacity for problem solving. You can focus on the relevant components of a problem or issue and ignore the irrelevant – a capacity that can be, as some of you may have already found, particularly annoying to spouses and family when it results in an attitude of "don't bother me with facts I don't need to know." At the Marshall-Wythe School of Law you have had an

extraordinary educational experience. As you continue in your careers the breadth of your learning will expand and your skills and insights will be improved as you interact with the activities and problems of your clients.

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. I see the primary role of lawyers, not in the television image of the courtroom champion, but in the image of the counselor or navigator who carefully and prudently plots the course to the client's destination or the way to attainment of the client's objective while avoiding dangerous currents, unsafe ports, penalties and unacceptable liabilities. Whether as advocates or counselors or both, I have no doubts that you, the members of the Class of 2001, will perform ably and with distinction. You will generate a tremendous volume of billable hours.

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 part of the 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 or the 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 great policy significance or practical problems faced by community hospitals and local school boards. Dean Kronman states, and I concur, that lawyers as a class have disproportionately greater wisdom and capacity for sound, prudent decision making. 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 work days, 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 interactions 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 dis-

charge 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.

I will not summarize the theme of the lawyer's duty to serve the greater public interest and the important role that the citizen-lawyer plays in our society. That theme is summarized in the person of Anita Poston, whom we thanked and honored earlier this afternoon, and in the contributions she had made in service to the profession and the public.

My third and final theme is simply a reminder of facts obvious to each member of the Class of 2001, but not so obvious to friends and family gathered here today. The Marshall-Wythe School of Law is a unique place and you have shared, in the course of your three years here, a wonderful experience. We are, and have been for decades, a caring community whose traditions feature collegiality as a shared value, friendliness as a common attribute, and helpfulness, mutual respect and toleration of differing views as expected conduct. You, in the course of your stay, have sustained and reinforced these traditions. You are united by shared experiences and values and by the bonds of companionship. When you leave, you will carry with you something of far greater personal

value than the degrees conferred on you. You will carry with you the friendship of colleagues that will sustain you for your lifetimes.

Let me close by sharing with you the Rule in Shelley's Case. As my colleagues know, I have an abiding interest in property law, but rarely have had the opportunity to teach it. I am going to do it now, even though most of you know the Rule in Shelley's Case. Who knows, Anita, they may even encounter the Rule in Shelley's Case on the bar exam. If asked to state the Rule in Shelley's case, you chant in response "If an instrument purports to create a freehold in A and a remainder in A's heirs, or the heirs of A's body, and both estates are legal, or both estates are equitable, then the remainder over is void, and A holds the remainder in fee simple or in fee tail." That is an acceptable answer. However, there is another even more acceptable answer to the question of what is the Rule in Shelley's case. It goes like this: The Rule in Shelley's Case is the same as the rule in Jones' case and the rule in Smith's case and the rule in all other cases where the facts are comparable and the issue is the same. The law is uniform and is no respecter of persons. This second Rule in Shelley's case is the essence of the common law tradition and the foundation of our devotion to the rule of law.

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. The Marshall-Wythe School of Law is counting on your success. The faculty will experience vicarious glory in your achievements. We know you will do well. Good luck and Godspeed.