

Wisconsin's Legal Tradition

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UPON RECEIVING THE
BRAZEAU PROFESSORSHIP

Introduction

Speaking for everyone at the Law School, I want to thank Mrs. Mary Virginia Brazeau for the generous gift of the professorship. I also want to thank my colleagues for nominating me for this great honor.

Dean Bernstine has asked me to talk about the Law School, considering issues that might interest both alumni and faculty. The most significant development at the Law School is that the faculty is changing rapidly. In the past five years, seven senior faculty members have retired and one has died. Two more will retire at the end of this year. Six more are in their sixties and could retire within a few years. These are experienced and talented people. In addition, seven extraordinary faculty members have left over the same period to teach at such places as Columbia, Princeton and Yale.

We have appointed many excellent new faculty members, and we will appoint more soon. Alumni who have been practicing for some time will have to look hard to find people at the Law School who taught them during their student years. Sweeping changes in the faculty could make us better, as new people bring new

ideas and energy, but drastic change also involves risks. I don't have to tell members of this Law School community that Wisconsin is not just a generic state law school. It long has been something special in American legal education. In a time of great change of the faculty, can Wisconsin continue to be something special?

To keep our tradition alive, we must understand it. Our merit does not rest on those indirect indicators of quality so beloved by U.S. News & World Report. In terms of return on investment, Wisconsin must be one of the world's greatest law schools. As is true of so many things in Wisconsin, dedicated people, working above and beyond the call of duty, have overcome resource constraints. Wisconsin law professors have drafted path-breaking statutes that have become models for other states. They have answered calls for help from legislators and the staff of administrative agencies. They have served on local, state, national and international committees and boards. Many have responded to a steady flow of questions about their areas from practicing lawyers. They have produced innovative teaching materials and done highly original research. As law school enrollment has increased, they have taught students in large classes, small seminars and clinical programs. Many have done a great deal of one-on-one teaching. At a time when professor-bashing is a popular indoor sport, I must call attention to the contributions to the state and the nation of so many of my colleagues.

Another part of the Law School's tradition is our "law in action" approach to

issues. This is recognized nationally and internationally, and it is something that we cannot afford to lose. We are one of the few state law schools that want to be more than a version of Harvard or Yale.

I'll try to sketch important elements of this Wisconsin tradition by looking at three great faculty members who served here during the period 1929 to 1981: Nate Feinsinger, Jake Beuscher and Willard Hurst. All three were teaching here when I joined the faculty 37 years ago, so I'll draw on my own memories as well as those of others. In addition, I'll quote excerpts from tributes that appeared in the Wisconsin Law Review.

Three Sketches:

Nate Feinsinger served at the Law School from 1929 to 1973. He was one of the inventors of modern labor law. He was the permanent umpire under several important collective bargaining contracts. But we are more likely to remember that he was called many times when major strikes created great social problems. Willard Wirtz said:

Leaving to less adventurous counsel and judges the arguing and deciding of cases in court, where there were rules to go by, he chose emergency situations that developed so fast that a sometimes rough frontier justice had to be improvised to put out flames that were spreading. (1)

Nate had a photograph on his wall that showed him with President Truman at the White House. Nate said that he had told President Truman that as president he had the power to seize the steel mills that had

been closed by a strike during the Korean conflict. The Supreme Court, of course, disagreed much later in a famous case defining the limits of presidential power in wartime. Nevertheless, by the time the decision was announced, the emergency was over. Nate had solved the immediate problem even if he hadn't gotten the doctrine just right.

One way or another, Nate could get contending parties to sign an agreement. Douglas Soutar, a corporate vice president in charge of labor relations, commented:

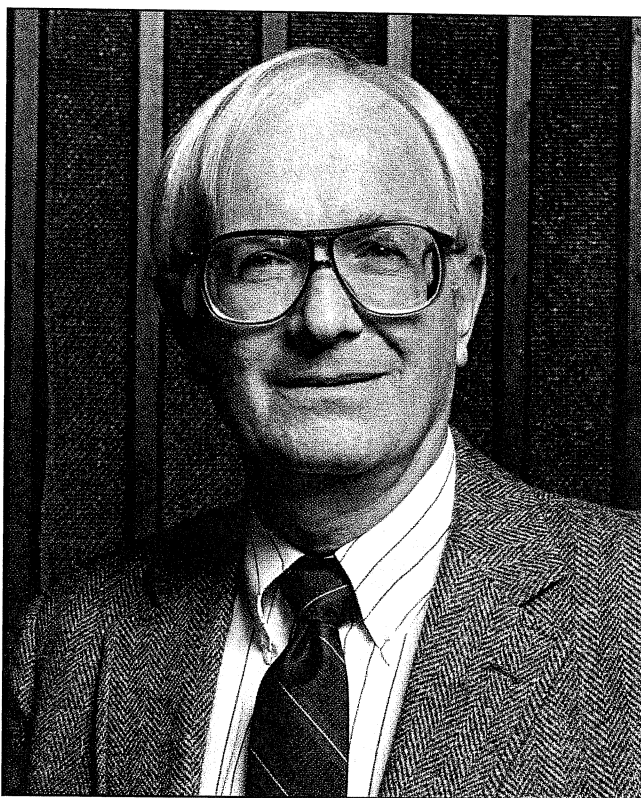
Such was his charm, wit, finesse, and genius in difficult situations that even those occasionally on the losing end were not always immediately aware of their condition, accepting the results in good humor and the realization that at least they had been in the hands of a master. (2)

I know just what Mr. Soutar meant. Nate often "mediated faculty meetings," and we'd be back in our offices before we realized what we'd voted for as a result of Nate's maneuvers. Often I was annoyed that we hadn't resolved an issue. However, I must admit that often Nate pushed us to reach an acceptable solution so that we could get on with the business of the Law School rather than debate endlessly.

I once met the chief executive officer of a major Wisconsin corporation at a large family party. This CEO was one of the founding members of the John Birch Society. His firm had faced several very bitter strikes, and Nate had settled them while serving as mediator. The CEO said that he didn't have much use for Nate's "socialistic" views. (Nate, after all, thought that labor unions were not the work of the devil.) However, the CEO then talked at length about what a wonderful human being Nate Feinsinger was.

Nate brought his wide experience to his students in many ways. Corporate lawyer Edward B. Miller recalled:

It was Nate's excitement about labor and labor law that started so many of us



Prof. Stewart Macaulay: "To keep our tradition alive we must understand it."

on a career path in the labor relations field. Nate insisted that we probe into the economic, the legal, and the practical foundations of every fundamental labor law concept. (3)

Nate founded a Center for Teaching and Research on Dispute Resolution where he applied lessons learned in labor disputes to other problems as well. A high spot of his seminars and classes was the parade of important visitors who had made a great deal of American labor law. My office was next to Nate's. One week I'd bump into Jimmy Hoffa, the next Walter Reuther. And if I had known them by sight, I would have recognized Vice Presidents in Charge of Labor Relations from many of America's major corporations.

In sum, then, Nate Feinsinger was involved with national and local problems, carrying forward the University of Wisconsin's tradition of public service. He was one of the first to focus on dispute resolution. He brought this experience to his students in a vivid way. Also, he often exhibited great courage in the face of hos-

tile public opinion. In 1994, it is hard to remember how controversial labor unions and collective bargaining were during Nate's professional career. Nonetheless, he won over many of his critics, and most people held him in high regard. The State of Hawaii even declared a Nathan P. Feinsinger day in appreciation for his work in settling a bitter prolonged dock workers strike.

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Jake Beuscher served at the Law School from 1934 to 1967. Jake was the country lawyer from Yale. He loved to talk as if he lacked sophistication, but, he was a brilliant and well-educated man. Jake knew the writings of the legal realists, and he never tired of pointing to Eugen Ehrlich's work on "the living law." (4) Ehrlich's living law was:

... in contrast to that which is in force merely in the courts and with the officials. The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law.

Jake, his colleagues and students conducted empirical research on actual practices related to property doctrine. He was the one who labeled this approach "law in action research." (5) Jake transformed property doctrine into areas of law and practice that mattered to people in their daily lives. He developed a course in farm law. The topic might not thrill Jake's former colleagues at Yale, but in Wisconsin it is central to our economy, and it taught Jake and his students much about the law in action. Jake taught land-use planning before it became fashionable. He was concerned about the ability of people to use property as security to gaining financing. He saw threats to the environment

before environmental protection became a popular cause, and he taught students about these problems and worked hard for reform in this area.

This University has long boasted that the boundaries of the campus are the boundaries of the state. Jake looked to the nation and the world as well. He was one of the Law School's first internationalists. He started a tradition that has given this school a tremendous reputation abroad.

Jake Beuscher's career suggests several things: Jake saw theory as vital, but Jake demanded that theory be grounded in experience. Following Eugen Ehrlich, Jake dealt with "the living law." Jake worked with engineers and natural and social scientists comfortably. He wanted to solve problems, and he was impatient with turf wars. Late in his career, he turned to problems of land tenure in third world countries. However, he did not see this project as Americans as experts bringing enlightenment to "backward" nations. Rather he knew that he would learn as much as he taught. As the Land Tenure Center's publications list shows, that is just what happened.

Jake was an institution-builder, interested in developing the careers of younger scholars. He was a remarkable grant-getter. He pushed deans and university presidents to pursue new opportunities. He did not always succeed in gaining the resources and starting the programs that he advocated. Nonetheless, he continued to champion new ideas as long as he served on the faculty.

Finally, Jake worked with the legislature and administrative agencies, drafting and advocating innovative proposals in many fields. Former Governor Gaylord Nelson said:

Jake Beuscher was one of those rare educators who could perform as brilliantly in the governmental and political area as in the halls of the university. It is difficult to see how a democratic system based upon intelligent decisions involving difficult problems could survive without men like him. (6)

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Willard Hurst served at the Law School from 1937 to 1981. He created a new kind

of legal history. Instead of focusing on the origins of legal doctrine, Willard asked what roles law had played in Wisconsin's development. Early settlers used the law for practical ends. It served to "release energy" so the pioneers could exploit the resources found here. Hurst was also one of the first scholars to look seriously at the part lawyers had played in the story. For example, he describes how lawyers "contrived or adapted institutions (the corporation), tools (the railroad equipment trust certificate), and patterns of action (the reorganization of corporate financial structure or the fashioning of a price structure for a national market)." (7) These social inventions made possible the growth of railroads. In turn, this provoked the expansion of markets. Nineteenth-century Americans moved from buying and selling within the reach of a horse and wagon to regional and then national opportunities to market what was produced on farms and in factories. It could not have happened without structures that allowed entrepreneurs to pay to lay track and buy equipment, and these structures were lawyers' inventions.

Hurst saw law as a system of ideas about managing affairs, and he developed some of the first analyses of what today we call the legal culture, those attitudes and assumptions held by Americans about what is acceptable, necessary and just. What we see as common sense colors our statutes and judicial decisions and what they mean in practice. As part of this project, Willard developed a command of history, social theory, social science and realist legal thought. He also commanded the facts. If there was a small-town newspaper in the state, you could safely bet that Willard had read it. One university press found it appropriate to publish two versions of one of his major works: One had the major text standing almost alone with relatively few references; the other added the vast body of his footnotes reflecting his explorations and excavations in the raw material of this history.

Hurst saw that new courses were needed to train Wisconsin lawyers to play their social roles, and he created them. With several colleagues in the late 1930s, he fashioned a legal process course that

focused on the development of worker's compensation. He arrived here in the middle of the New Deal, and he proposed developing a course on legislation. Dean Garrison agreed with the young man's innovative idea, but Willard was still an assistant professor and had to pay a price. The Dean assigned Hurst to teach personal property. I've always wondered what he did with such a course. My guess is that he made a desert bloom.

Willard crusaded throughout his career for the Law School to play its part in the university. Thorstein Veblen said, "The law school belongs in the modern university no more than a school of fencing or dancing." (8) Willard would not accept such a dismissal. He saw the mission of a university law school as more than training lawyers in the dance steps of a narrow received tradition. Rather, a university law school had to develop knowledge about law and society so that it could train lawyers to play their actual social roles.

He saw that our Law School trains those who staff local, state and national executive, legislative and administrative bodies. All of us who have taught here for some time recognize, often with a smile, that we are governed by our former students. The Governor and his opponent in the next election are both loyal alumni of this institution. So is the Mayor of Madison. Our graduates serve as elected officials, on legislative and executive staffs and even on the Board of Regents of this university. Many, if not most of the judges in the state once sat in our classrooms.

Hurst was a highly successful and popular teacher. Lawrence Friedman commented:

Some rare teachers . . . set off explosions in peoples' minds. They break old habits of thought. Anyone who has had contact with Willard Hurst, who has listened to him or discussed things with him, recognizes him as this kind of teacher. (9)

What do we learn from Willard Hurst's career at Wisconsin? He asked fundamental questions about the functions of law, but he tested theories against the detail of everyday experience. Rather than studying the great cases, which by definition are atypical, he preferred to look for general patterns in the flow of ordinary ones.

From this commonplace raw material, he fashioned a brilliant description of our legal institutions and their place in our society.

He saw that law students need to be trained to play a large role in governing human affairs. Lawyers serve in all branches of government. In private practice, too, lawyers give life to the common law, legislation and regulation by helping clients comply or cope with its commands. Willard sought to train lawyers to play these public and private roles with intelligence. He was impatient with "drift" and "inertia." He wasn't satisfied with "bastard pragmatism"; that is, with short-run solutions that evaded real problems. Margo Melli points to one of his most simple lessons: Lawyers must stay abreast of current affairs, and this means that they must read newspapers. And Willard meant "newspapers," in the plural.

His legal history class was not an attempt just to give tone to an otherwise grubby and technical legal education. It definitely wasn't a fluff course. Willard stressed lawyer-like analysis in coping with policy problems. Among his many gifts, Hurst is an excellent lawyer, quite capable of holding his own with the very best fellow professionals. Any former student who once had to cope with one of his examinations can testify that no law school offered a more rigorous course than Hurst's American Legal History. Hurst did not gift-wrap grades. Students either earned high marks or they didn't get them.

What Should We Say About the Wisconsin Tradition?

The most simple generalization about the Wisconsin approach is that law must be studied in its full social context. Wisconsin professors have done research for many purposes, but they've not played a game just to amuse other professors. Wisconsin research has been a tool for criticism, seeking to transform the legal culture, the attitudes and assumptions of ordinary citizens and professionals. It has been a tool for reform, seeking to implement values through what we know about the operation of law in our society. It has been a tool for solving particular problems

of individuals within existing social structures.

However, we must remember that law in action research also plays a vital part in educating new lawyers. People sometimes criticize university professors for focusing

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on research and neglecting teaching. It can happen. However, critics often forget that a professor must have something to teach, and each professor must create her course. You can report the work of others, but the greatest teachers work with their own ideas and observations of their subject. Moreover, matters taught in universities seldom are static. A professor constantly must revise and recreate her course. Five-year-old lecture notes probably should be thrown away on principle unless the margins are richly annotated.

Of course, law schools must teach some of the body of received wisdom and lawyer skills and teach this well. Students must learn to read carefully. They must distinguish cases and construe statutes. They must fashion a legal argument and respond to one. They must draft a complaint. But this is not enough. The challenge is to prepare students to deal with the law in action during their legal careers. Rules matter, but we cannot teach our students all the rules they might have to master to practice the day they are admitted to the bar. Three years is a short time, and our graduates enter diverse legal careers. The demands of Wall Street and Main

Street differ, and government lawyers deal with different bodies of law than do small-town practitioners. Furthermore, we cannot teach our students what they will need ten to twenty years from now. Even if we could, it would not be enough.

I need not remind practicing lawyers that law is not only rules or appellate opinions. It is structures and practices in courts and administrative agency hearing rooms. It is the attempts by the Governor and the legislators to cope with emerging social problems. It is the quaint native customs of bench and bar in particular cities. It is the lawyer seeking new ways to deal with corporate take-overs or Superfund litigation in her office. It is also the not always consistent collection of ideas about law held by Wisconsin citizens.

At our best, Wisconsin professors have emphasized testing ideas in practice. To paraphrase Frank Remington, the criminal law becomes real in the front seat of a squad car. As a young professor, I borrowed Frank's idea and looked at business practices related to contract. Not surprisingly, I found that contract law becomes real when the machine is not delivered on time or when it doesn't perform exactly as promised and engineers and business executives want to do something about it.

When we focus on the law in action, often we discover important theoretical and policy problems. For example, what are we to say about a society that promises due process and offers only a deal? About a society that claims to follow the rule of law but is characterized by discretion, negotiation and cost barriers to asserting rights? Our research and teaching cannot avoid questions of justice. William G. Tappley writes mysteries featuring his lawyer-detective, Brady Coyne. In the most recent novel, Coyne reflects:

If law school doesn't make you cynical, the practice of law quickly does.

Lawyers rarely admit they're committed to justice. They never admit that to each other. We talk mostly about billable hours, sometimes about winning. Among ourselves, we call the law a business and ourselves businessmen.

But most of the lawyers I know still nurture the vestige of what got them into law in the first place. The quest for an abstraction. Justice. (10)

The Wisconsin approach at its best seeks justice. However, we know that we must look for it not only in doctrine but in police cars, courtrooms, lawyers' offices and the lives of ordinary people as well.

Conclusions

This Law School faces all the challenges and risks of change. Nevertheless, we have a strong tradition that is the envy of many at other institutions. We must keep this tradition alive. It will take work; it won't just happen.

However, while we must remember our tradition, we cannot assume that it will carry us through the 1990s into the next century. We should recall that Pan American World Airways also had a great tradition, but it is just a memory today. Times changed, but Pan Am didn't change enough. Duke Ellington used to feature Johnny Hodges playing "Things Ain't What They Used to Be." We must keep that melody in mind. The world has changed from the one that Nate, Jake and Willard knew. We no longer live in the Progressive Era, the New Deal, the Fair Deal, the New Frontier or the Great Society. Rather we live in a time of trying to make do with less. And think of the bodies of law faced by lawyers today that didn't exist as recently as when Nate, Jake and Willard were teaching.

Our Wisconsin tradition itself demands that we try to anticipate and understand the new problems and new demands that will face lawyers and the legal system in the future. We cannot hope to meet the highly ranked elite law schools head-on. We've long struggled to run a first-class law school on a third-class budget. When our deans have been faced with a faculty member who has had an offer to move to, say, Yale or Columbia, it is too much like Bud Selig and Sal Bando trying to compete with the Toronto Blue Jays for Paul Molitor's services. Wisconsin law professors are well paid as compared to many

practicing lawyers and most citizens of the state. Nonetheless, there is a market for talent that sets the price, and we must scramble to come close to meeting what our best professors can command elsewhere. I remind you that in the 1993 U.S. News & World Report rating, while we ranked 23rd in overall quality, we ranked only 69th in law school resources. Give Dean Bernstine the average of the resources of all Big Ten law schools, and you would watch our national ranking soar. But this is unlikely to happen soon.

As always, this Law School must specialize and look for things that we can do better than others and things that do not demand major investments from the state budget. Thus, we need a strategy. We need to discover where law is going and get there before the traditional schools discover the destination. As we do this, we must remember our tradition: We must look at what lawyers, police officers, taxpayers, drug dealers, gang leaders, insurance adjusters, social workers and all the rest who create and recreate the living law do as well as look at what judges and statutes say.

It is clear that we need our graduates to play a major role as we look to the future. Alumni and friends have contributed much-needed resources such as the building and the Brazeau Professorship. Nevertheless, we also need intellectual contributions from our graduates and friends. If we glory in a lawyer-centered tradition of education and scholarship, we must listen to lawyers who encounter the problems of practice daily because our tradition won't work in an ivory tower. Much of my research is based on interviewing lawyers, many if not most of whom are UW graduates. Their cooperation, interest and, indeed, enthusiasm made my work possible. Our graduates also can teach the faculty about new areas of law and how lawyers are coping with them. Lawyers must face problems long before there is a line of appellate

cases to debate, and lawyers must understand the practical consequences of proposed and newly enacted regulation. Lawyers, for example, already are organizing programs to learn about how the North American Free Trade Agreement will affect their clients. Few, if any, law schools have begun to consider how NAFTA will affect teaching in courses ranging from contracts to trade regulation. I'm told that we will face this problem soon.

I'm sure that the law faculty, our students and our graduates share a great deal and can work together to keep this Law School special. One thing we share, I'm sure, is the conviction that this has been and still is a fine law school, and it ought to stay that way.

Footnotes:

1 1984 Wis.L.Rev. 282.

2 1984 Wis.L.Rev. 290.

3 1984 Wis.L.Rev. 295.

4 See E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1913, 1936); N.S. Timasheff, Ehrlich, Eugen in 4 Int'l Encyclopedia Soc. Sci. 540, 541 (David L. Sills, ed. 1968). A famous Wisconsin law professor of an earlier day, William Herbert Page, wrote an appreciation of Ehrlich's work and presented it at the Association of American Law School's Annual Meeting in 1914. It is reprinted as W. H. Page, Professor Ehrlich's Czernowitz Seminar of Living Law, in *Readings in Jurisprudence* (Jerome Hall ed. 1938).

5 The contracts teaching materials being developed at Wisconsin appear under the title: *Contracts: Law in Action*.

6 1967 Wis.L.Rev. 799.

7 J. Willard Hurst, *The Growth of American Law: The Law Makers* 337 (1950).

8 T. Veblen, *The Higher Learning in America* 211 (1918).

9 1980 Wis.L.Rev. 1121.

10 William G. Tapply, *The Snake Eater* 183-184 (1993).