

## TOCQUEVILLE'S ARISTOCRACY IN MINNESOTA

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### I. INTRODUCTION: EARLY VISIONS OF AN AMERICAN LEGAL PROFESSION

Thomas Jefferson's Declaration of Independence expressed at least two political principles of enduring and pervasive significance to the legal profession. One was that citizens have rights that even our government is legally bound to respect; the other was that our government can lawfully act only with our consent. Both propositions were confirmed by the ratification of state and federal constitutions elevating the legal profession to power over governors and officials and affirming the requirement of the consent of the governed, a requirement subordinating the empowered profession to the will of the people. This simultaneous elevation and subordination denotes a tension inhering between the idea of democratic law and the political role of the legal profession. From the beginning, many American lawyers have been prone to

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celebrate individual rights associated with their elevation and to demean the communitarian rights to self-government that are associated with their subordination.

Those who signed the Declaration, waged the Revolution, and drafted and ratified the state and federal constitutions were aware of the tension. All were mindful that the profession would play an important role in the social and political structure they were erecting. All knew that the legal profession as they had known it in colonial times was in disarray as a result of the departures of many of its pretentious members who had been loyal to the Crown. The profession would have to be reconstructed. Most, but not all, revolutionaries understood that the old colonial profession was an unsuitable model for a profession playing the political role envisioned by the Declaration and by the constitutions. The departures of the Tory lawyers and judges were not a cause for widespread regret. The profession they had led had been erected on the English tradition in which law was a preserve for a small number of second sons of lords who trained over dinner at the Inns of Court and who steadfastly eschewed a role in the politics of the kingdom. Such a profession was obviously unsuited to a sensitive political role.

At least three different visions of the sort of profession needed to replace the Tories were formed. Some of the most luminous members of the revolutionary generation were reluctant to stray far from that colonial model. Most extreme in its Anglophilia was the tradition developed by the Litchfield Law School, an institution created as a substitute for the apprenticeships required for admission to the bar in Connecticut and other states. Tapping Reeve, the founder of Litchfield, was an ardent member of the Federalist party who so despised Jefferson that he favored the secession of New England from the Union. His school had numerous imitators, including the earliest iterations of the Harvard and Yale Law Schools. He attracted to his school the sons of wealthy merchants and Southern slave owners who shared social pretensions. His curriculum centered on such arcane topics as conveyancing and common law pleading. He appears to have had no interest in preparing his students for a role in the governance of the Republic. His students might be political leaders and many, including John Calhoun of South Carolina, were, but their political careers would develop on a separate track from their careers as lawyers providing services to private clients.

A second vision was that of Jefferson and others who affirmed a need to train the legal profession for political leadership. Their program for developing a legal profession was first expressed in the work of George Wythe, the most important law teacher of all time. Wythe was not only the mentor and "second father" of Jefferson, but also law teacher to John Marshall and mentor to Henry Clay. He taught Jefferson the values expressed in the Declaration (of which he was co-signer); he shared with Marshall the idea that courts ought refuse to enforce unconstitutional legislation; and he impressed on Clay the importance of holding the Union together. In 1779, a decade before Tapping Reeve opened his school, Wythe was appointed professor of law and politics at the College of William and Mary at the behest of Governor Jefferson.

Wythe taught his students five topics: constitutional law, international law, Roman law, common law, and political economy. The model for his work was the membership of the House of Burgesses of the colonial Commonwealth, a group of landowners who had for over a century advised the Crown on the government of Virginia. Henry Adams of the Massachusetts clan, later reviewing the work of the Burgesses, rated them "men of the first class," "equal to any standard of excellence known to history." These were men of status, but men who affirmed as primary their Periclean duty to serve the governed, paternally to be sure, but with direct concern for the interests of those doing the Republic's work and bearing its children. Wythe was himself an exemplar of a dutiful public lawyer and he required his students to participate in a moot legislature conducted in the former chamber of the House of Burgesses.

While Jefferson and Wythe were identified as Democratic Republicans, many Federalists likewise had in mind a new profession that would attend to its public duty. Its members would be recruited from the American gentry as were those at Litchfield, but they would be trained to marshal the assent of the ignorant and unwashed, much as the House of Lords had in its better days served England. This Anglicized vision of a political elite was very close to that of Jefferson and Wythe. John Adams, Alexander Hamilton, John Marshall, and James Kent shared this vision. When Kent began to teach law at Columbia in 1790, he aimed to train members of such a profession. While his primary interest was New York property law, he did not, as did his co-Federalist, Judge Reeve, disdain to instruct his students and readers on international,

constitutional, and comparative law, subjects he deemed suitable for study by those responsible for the fate of the Republic.

Wythe's aims were most vigorously pursued at Transylvania University in Kentucky, where in 1799 five of Wythe's former students, including Clay, established a law department. That department was likely the most consequential educational program in America in the antebellum years. Of the fifty U.S. Senators who voted on the great Compromise of 1850, seven were its alumni who represented seven different states west of the mountains and were leaders in both national political parties. All of them were personally loyal to Clay and had been taught in law school that the salvation of the Union was a matter of paramount importance and was their personal responsibility. Their presence may have been the marginal element enabling the Republic to stand for one more decade before it convulsed in war. Had the South seceded in 1850, there would have been no war and the nation would almost surely have been permanently divided.

A third and Anglophobic vision of the profession was held by revolutionaries who opposed ratification of the Constitution and were identified as anti-federalists. To persons of this persuasion, we owe the constitutional limitations on federal powers set forth in Article III and the first ten amendments to the Constitution. Of those celebrated amendments, the one most cherished by anti-federalists was the right to jury trial in civil cases in federal courts guaranteed by the Seventh Amendment. Anti-federalists mistrusted any new legal elite who might presume to take over where the despised British judges had left off, and they trusted local juries to protect local interests from the predatory behavior of creditors, foreign and domestic. Some anti-federalists were extreme in their anti-professional reverse class bias. Justice Dudley, a farmer elected to the Supreme Court of New Hampshire, openly proclaimed that he had no regard for lawyers or even law books and would simply do justice.

Other anti-federalists were less extreme than Justice Dudley. Among them were many members of the Society of Friends, or Quakers, who were generally well educated and did a lot of the serious thinking of that time. Quakers were strict egalitarians; it was their ideology that formed the core ideas in the Declaration. They had no clergy and regarded one man's (or one woman's!) interpretation of sacred texts as being about as good as the next and each Quaker was told to follow his or her own Inner Light.

Less given to Quaker egalitarian extremes were the offspring of New England Congregationalists, whose faith underwent a revival while moving west that moderated their fatalistic Calvinism and drastically reduced their clergy's previously omnipotent influence. Persons of these religious persuasions affirmed the necessity of law to govern the Republic, but tended to disown the elitist pretensions of the legal profession. They affirmed that American law belongs to every man. For them, America would be governed from the bottom up and not from the top down.

## II. JACKSONIAN DEMOCRACY: THE ERA OF AN OPEN ARISTOCRACY

This anti-federalist, Anglophobic, anti-professional sentiment substantially prevailed through most of America during much of the nineteenth century. It dominated political thinking in some of the former colonies and in all frontier territories and states. Most extreme, the Indiana constitution of 1832, in the spirit of Justice Dudley, conferred on every citizen of good character the right to practice law. The New York constitution of 1846 did not go so far, but did strip the judiciary of the power to control admission to the bar, as did the Michigan constitution of 1850. Under the pressure of such democratic sentiments, most bar organizations existing in the eighteenth century disappeared.

State constitutions such as those mentioned were expressions of the Jacksonian Democratic politics that displaced the earlier anti-federalism. Such politics celebrated the interests and virtues of self-reliant small farmers. Because law belonged to every man, it ought be codified in simple and familiar terms so as to accommodate universal understanding. Heavy reliance ought be placed on juries in state as well as federal courts. Judges ought to be accountable to the people for their administration of the law and should enjoy the elevated status derived from direct election. All charters and licenses were suspect as appropriations of public interest for the benefit of special interest, as President Jackson affirmed in his celebrated bank veto message of 1832.

Jacksonians understood that the legal profession is in America a political institution. They contended that it should, like the law itself, be open to every man. Many understood that some learning was needed by those in positions of political leadership, but the requisite learning could, they believed, be acquired by earnest, untutored study. They saw apprenticeship and other credential requirements as exploitative. Indeed, many Jacksonians opposed

public higher education as an instrument of anti-democratic exclusivity. Yet others acknowledged that formal schooling was not without use. Numerous programs of law study were established by Jacksonians to prepare future political leaders who would share their persuasion. For example, those who founded the law department of New York University in 1837 were Jacksonians seeking to open the profession and promote democratic law reform. Many such institutions (like others established by Whigs) foundered for lack of students. One that did not was the University of Michigan Law Department established by Thomas Cooley and his colleagues in 1858. That institution was open to all and charged no tuition. Students were attracted by the hundreds from all over the Midwest. Many of them went on to public careers on the benches and in the legislatures, or as advocates for the disadvantaged or the downtrodden. Among the latter was the immortal Clarence Darrow.

The legal profession's political importance as acknowledged by all these diverse groups was confirmed when every person elected President of the United States before 1920 was a lawyer save three successful generals: George Washington, Zachary Taylor, and Ulysses Grant. Tocqueville visited America in the 1830s during Jackson's presidency and in his *Democracy in America*, observed that the legal profession was performing the political function of the feudal aristocracies of Europe. They were in their origins men of diverse social standing and thus were able to represent a wide range of interests to their more elite co-citizens, while their professional standing made them in some sense part of the governing class reassuring to the constituencies from which they came. Thus, like feudal lords, they could mediate between the diverse elements of the relatively classless American polity. They were the stewards of democracy.

Tocqueville's principal American informant was Francis Lieber, a highly educated German immigrant teaching law and politics at South Carolina. Tocqueville's work was soon followed by two books by Lieber: *Political Ethics* in 1837 and *Legal Hermeneutics* in 1838. Lieber's work was in part a reaction to the more radical Jacksonian ideas about the legal profession. In analyzing the ethical duties of those governing a Republic, he was cautioning his readers that politics is or ought to be a learned profession. He drew on protestant theology to emphasize that legal texts expressing the consent of the governed cannot be taken to mean

anything a layperson following his or her Inner Light might wish them to mean. Their meanings are informed by history and social context. If such texts are to mean the same to all, as elementary principles of equality require, construction and interpretation is a professional discipline to be practiced by those who share a commitment to public service. He encapsulated his teaching in a slogan: "No rights, no duties; no duties, no rights." Many Jacksonians, including Thomas Cooley at Michigan, admired Lieber's work and sought to nurture a profession imbued with the appropriate sense of duty and equipped with the requisite knowledge.

Despite Lieber's wise caution, the more radical vision of deprofessionalized law spread with the frontier. Abraham Lincoln was not only the premier political leader of the nineteenth century, but also one of the premier private lawyers in Illinois and he was entirely self-educated. His example instilled widespread confidence in this mode of learning.

There were other examples of extraordinary self-development. Thomas Cooley had only three years in school and a year's work in a law office during his early teens, yet he was revered not only as a teacher, but as a Justice of the Michigan Supreme Court, and especially as the author of scholarly books. One of his books was almost certainly the best law book written by an American in the nineteenth century. He was also the founding chair of the Interstate Commerce Commission and thus the founder of American administrative law. Theodore Dwight, Cooley's contemporary and later Lieber's colleague at Columbia University and an enormously successful law teacher, had more formal training than Cooley, but not in law. The same was also true of John Norton Pomeroy, another contemporary of Cooley who was the first legal educator in California and author of numerous, admirable scholarly works. In the upper Midwest, Roujet Marshall in Wisconsin, William Mitchell in Minnesota, and John Forrest Dillon in Iowa were renowned for their sensible professional judgment and literacy as judges despite the fact that they were largely self-trained in law. And Dillon wrote two highly valued legal treatises.

The openness of the profession in the Jacksonian era was not without adverse consequences. Admirable lawyers such as those mentioned were working in an environment in which there were many inadequately self-educated lawyers who were far short of

competent. Sensible lawyers such as those named were often appalled by the ignorance and irresponsibility of lawyers they encountered in the practice. There was the comfort that incompetent lawyers generally did not attract many clients and were seldom paid much by those few whom they purported to serve.

### III. RACIAL DIVERSITY: 1900

A positive consequence of the profession's openness under the Jacksonian regime was the advent of what today we would describe as diversity. Despite the ease of entry into the profession, there were only 35,000 lawyers in the United States in 1860, but the number was increasing rapidly in the decades following the Civil War, and the profession was becoming diverse with respect to both race and gender.

While many states in 1860 excluded African-Americans from admission to the bar, such legal exclusions did not survive the Fourteenth Amendment. By 1868, many doors were at least formally open to black citizens. Here and there, white lawyers undertook to train young black lawyers as apprentices. State university law departments in the west, such as Michigan, Iowa, and Kansas admitted black applicants as freely as white. So did the eastern private institutions—Harvard, Columbia, and Yale. In those days, academic rigor was virtually unknown. Law was generally still a course of study for two academic years of only five months each, and there were generally no final examinations! Training black lawyers was a national policy of the Grant administration manifested by establishment of a federally-funded law school at Howard University under the leadership of John Mercer Langston, an African-American lawyer, an Oberlin graduate and a person of formidable intellect. At least one black lawyer was trained at the University of South Carolina during the Reconstruction.

There were, however, very substantial impediments to the creation of an African-American bar. One was the dearth of academic preparation. In the South, where the slaves and most of the freemen lived, there had been no public education and indeed almost no education at all that was available to blacks. Literacy was rare and limited, as Langston discovered when he met the first law students enrolled at Howard. On this account, a law school established at Raleigh for emancipated students lowered its sights



and trained its students as office assistants to white lawyers.

Secondly, especially in the South, resentments of war had not diminished the racism associated with slavery. Indeed, racism was elevated everywhere by a wave of sentiment encircling the globe in the mid-nineteenth century. Even in Europe, where tribal racism had long been moderated by the influences of the Roman Empire and the Catholic Church, there was a renewal of faith in biological determinism. Such "science" captured the thinking even of such gentle humanists as Emerson and Whitman. A consequence of this rampant racism was to excuse impediments to the training of black citizens, and to their practice of law. Expressing racism and defying the Fourteenth Amendment, some Southern communities excluded black lawyers. Almost everywhere, the first black lawyers were required to be courageous, for in many areas, they were at personal risk. Even securing access to the law library could be a problem.

A third impediment to African-American lawyers was economic. Aside from the direct consequences of racism, they were less likely to attract clients. Other black citizens had few resources to spend on legal services, and were seldom engaged in controversies with high stakes justifying substantial fees. Those who did employ counsel might reasonably suppose themselves better served by white counsel. While some black lawyers could attract some white clients, the financial rewards were modest for those blacks with the fortitude and energy to overcome all the impediments. Many did not remain long in the practice. Health was also a factor. In 1900, the life expectancy of black American males was 33.

Despite these many obstacles, a beginning was made. African-Americans, like their white counterparts, were attracted to the idea of professional status and were willing to invest the energy and take the risks required to become lawyers and enter an aristocracy. In 1868, Chief Justice Salmon Chase, a former anti-slavery lawyer from Cincinnati, presided over the admission of the first black to the bar of the Supreme Court with the ghosts, it was said, of Roger Brooke Taney and Dred Scott "flitting round the room."

Massachusetts was the state most receptive to black lawyers. Edward Garrison Walker was elected to the Massachusetts legislature in 1866. Maryland, a former slave state, was less receptive. The Fourteenth Amendment notwithstanding, the Maryland Court of Appeals in 1877 denied the admission of a black

applicant on the basis of his color. A black minister organized the Colored Equal Rights League to protest. The group found a second black applicant, who was denied admission for reasons other than race, but prevailed in 1885 on the third attempt, with the admission of Everett Waring. Waring promptly accepted the brief of a black woman challenging the Maryland Bastardy Act, which allowed white women, but not black, to secure financial support from the fathers of their illegitimate children. He lost, and he lost again a few years later when he appeared in the Supreme Court of the United States on an appeal from a capital sentence imposed on three black men. Despite these defeats, Waring's career gave heart to others, and by 1900 Baltimore had numerous black lawyers.

Circumstances were most intimidating in the former Confederate states. Black lawyers appeared there during the Reconstruction, but were subject to harassment, humiliation and abuse. But even in post-Reconstruction Mississippi, there were moments of success. Josiah Settle was elected to the Mississippi legislature in 1883. In 1892, Willis Mollison served for a time as the prosecutor in Vicksburg. Cornelius Jones appeared before the Supreme Court of the United States in 1895 to challenge the racial exclusion of blacks from a Mississippi grand jury. The same day, Wilford Smith of Greenville, Mississippi, appeared in that Court to challenge a conviction of a black defendant by an all-white jury sitting in a county with a predominantly black population.

Alabama seems to have been the state in which the least progress was made by black lawyers. Several were driven away by lynch mobs. Yet William Francis Crockett, an 1888 graduate of the University of Michigan Law School, practiced in Montgomery for a decade before moving to Hawaii, where he was later elected to the territorial legislature and served as a judge. Crockett was not alone among Southern black lawyers in having a pioneering instinct. Joseph H. Stuart graduated from the University of South Carolina in 1877 and headed for Colorado. In 1893, he was elected to the Colorado legislature, and played a role in state politics for a decade.

Among formerly Confederate states, Texas was the least inhospitable to black lawyers. There was a black county attorney in western Texas in 1876 and Joseph Wiley maintained a prosperous practice in Dallas in the 1880s. A black middle class emerged in Galveston, the major seaport and the largest city in the state. The

few black lawyers practicing in that community were sometimes harassed because of their color, but were not intimidated and sometimes found support among white lawyers. Their black clients were not reluctant to use the courts to defend their rights. In 1900, Wilford Smith, formerly of Mississippi, but then a member of the Galveston bar, took a second case to the Supreme Court of the United States and won reversal of a conviction of a client because he had been accused by a grand jury from which blacks had been excluded. Smith became the attorney of Booker T. Washington, who sought his advice in developing a strategy to challenge Alabama's voting laws. He was thus a forebear of the National Association for the Advancement of Colored People.

The Census of 1900 found 728 black lawyers in America. They were distributed across the country; there was, improbably, even one in North Dakota. In 1903, there was a black member of the second class to graduate from one of the schools that was a forerunner to the William Mitchell College of Law. In 1904, William T. Francis graduated and commenced a career representing the few black Minnesotans in civil rights causes. He was employed by a railroad as a stenographer, but was promoted into professional work before taking over the practice of a deceased lawyer. He lobbied for anti-lynching legislation and won several cases for black clients seeking protection of their civil rights and civil liberties. He concluded his career as the United States Ambassador to Liberia. Rufus Skinner, another civil rights leader in Minnesota, was a 1915 graduate of another forerunner to William Mitchell College of Law. Lena Olive Smith graduated from the same school in 1921 to become a solo practitioner devoted to the cause of civil rights for over four decades, serving the Urban League and the NAACP. While the number of such men and women remained small, their number in the early years of the twentieth century reflected a substantial social change as well as heroism on the part of black citizens who made themselves lawyers. This was a substantial cultural achievement and it resulted in part from the openness of the profession created by those of the Jacksonian persuasion.

#### IV. WOMEN IN LAW: 1900

The impediments to the entry of women into the legal profession were quite different. Most American women were as literate or more literate than their spouses. Most American men,

from Wythe to Lincoln, were educated by their mothers. While there must always have been American men who lacked confidence in the capacity of women for professional roles and public life, few of those engaged in the legal profession expressed such opinions. Harriet Martineau found numerous American men who treated her as an intellectual equal; especially noted were Joseph Story and John Marshall; Henry Clay was "a personal friend" of Martineau; and so was James Madison.

Gender roles were the major influence on the lives of American women in the nineteenth century, not merely because such roles had been important to women since the beginning of time, but also because gender roles were functional in a preindustrial society. Mary Wollstonecraft, the early apostle of equal rights for women, was carefully read by men such as Kent and Lieber, as well as by many American women, but her message was premature and she had meager influence in America.

High fertility rates are perhaps everywhere a characteristic of agrarian life styles. At the time of the Revolution, median life expectancy at birth was fewer than forty years and it increased at no more than a glacial rate in the nineteenth century. To raise three children to adulthood required many pregnancies. Faced with enormous uncertainties of life, most mothers, with the encouragement of their parents as well as their spouses, wanted a few extra children, not only to assure family continuity, but to provide care for the aged who survived the many hazards likely to shorten life. The burdens of child-care thus fully occupied most adult women.

In the days before public education, the automobile, and the media, motherhood was indeed a high calling because the influence of mothers on future generations was nearly total. American mothers generally were not apolitical; most were ardent patriots as revolutionary as their husbands and sons, and mindful that they had a continent to populate. The Declaration of Independence may fairly be regarded as the handiwork of George Wythe's Quaker mother who in fact rocked a cradle that rocked the world. In these very important respects, nineteenth century American women were not oppressed as African-Americans, or as some militant feminists might have us believe. It was the men who went to raucous political rallies and made speeches, but few of them voted for things if their mothers, wives, and daughters sternly disapproved.

Public education first appeared in the 1820s. The initial purpose had been to prepare men to participate in government, but the need to educate future mothers was almost everywhere acknowledged. Tocqueville observed that: "In the United States, the doctrines of Protestantism are combined with great political freedom and a most democratic state of society; and nowhere are young women surrendered so early and so completely to their own guidance. "Yet *higher* education, scarce for men because of its traditional linkage to training for the clergy, did not exist for women until Oberlin College was formed as a co-educational institution in 1835.

Even at Oberlin, gender roles were emphasized; its "attitude was that women's high calling was to be the mothers of the race, and that they should stay within their special sphere in order that future generations should not suffer want of devoted and undistracted mother care." All Oberlin students were required to perform manual labor for the college, but for the women the work assigned was to clean the rooms of Oberlin men, and a leading member of the faculty proclaimed that a woman holding public office was "too unnatural to be dreamed of." He was not entirely wrong to perceive nineteenth century politics as a surrogate for a riot; one did not send one's womenfolk to riots. Indeed, few antebellum women sought entry into the violent world of politics and law.

The Civil War had strong bearing on these matters. The shock of the enormous loss of life radiated throughout the culture. Unsurprisingly, the war elevated the status of motherhood as a means to renewal and stability, momentarily setting back the cause of public participation by women. Yet, at the same time, the absence of males who had been killed or maimed in the war left vacancies for women. Many young women stepped forward to seek higher education and pursue new roles. Moreover, the Civil War Amendments to the Constitution elevated women's interest in exercising the same political rights conferred on freemen. Oberlin alumnae, among many others, were deeply offended when the Fifteenth Amendment did not confer on women a right to vote.

The influence of gender roles on the careers of women was reinforced by characteristics of the practice of law in the nineteenth century that have since, quite happily, disappeared. Lawyering was a form of political participation that carried risks of its own. If a political rally is a surrogate for a riot, a lawsuit is a

surrogate for a knife fight. Violence was often associated with litigation, as the frequency of duels in antebellum times attested. Also, in most areas, lawyers traveled with the court from one rural village to the next. This travel, too, was risky and accommodations were so spare that travelers often slept two or three to a bed. A woman to ride circuit with other lawyers, sharing accommodations as Clay and Lincoln for example did, was unthinkable. Truly exceptional was Almeda Hitchcock, Michigan '86, who practiced law in Hilo, Hawaii. She went to Hawaii as an immigrant to a kingdom that became a territory; she rode horseback as much as 100 miles to argue a motion, and was for a time the sheriff of the Big Island.

Despite well-placed resistance, most states had by 1885 licensed women to practice law even if they had not provided for female suffrage. Myra Bradwell was, like many nineteenth century women choosing the legal profession, the wife of a lawyer. She was denied admission in Illinois even though the state court conceded that she was fully qualified; it concluded that the controlling legislation made no provision for admitting women. Its decision was affirmed by the Supreme Court of the United States, which held that the Fourteenth Amendment assured equal rights for blacks, but not for women. Justice Bradley published a concurring opinion celebrating the importance of motherhood and its incongruity with the practice of law. The Illinois legislature, at Bradwell's request, rejected Justice Bradley's advice and promptly enacted legislation providing that "No person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex." Instead of practicing law, Bradwell chose to publish and edit *Chicago Legal News*, making herself one of the most forceful law reformers of her time.

Women could of course read law much as men did, often in the offices of their fathers or husbands, who could move their admission to practice before local courts. Some entered law schools. Cooley's law department was prompt in graduating a woman in 1871. Women law students reportedly felt welcomed by their Michigan classmates and by the faculty at the Law School. One of the first wrote years later: "The generous interest of [Judges Campbell and Cooley] will never be forgotten by the grateful women who were treated not only as students who were welcome there, but as friends whom they were glad to aid in their work." An 1880 graduate reported that the presence of women in the law

school was treated as an event of no significance; she took her place beside her classmates "as if no lengthy discussion had even been held in regard to the fitness of co-education." Michigan women later, at the suggestion of Dean Hutchins, organized the Equity Club, a group fostering mutual support among women in the profession.

Matters were not different at Iowa. In 1872, its first year as a university law school, Iowa admitted women. We are told that "women in society" in Dubuque promptly enrolled in order to give "countenance" to the younger women studying law. In California, Clara Shortridge Foltz found it necessary to sue the governing board in order to secure her admission to the state's law school, but she was already a lawyer and successfully argued her own case. Kate Pier and her daughter graduated together in 1887 from the University of Wisconsin Law School and practiced together in Milwaukee, forming the first female law firm. Lemma Barkaloo, denied admission at Columbia, enrolled at Washington University in St. Louis, graduated and went on to an eventful career. Northwestern University acquired a stake in the law school in Chicago from which Myra Bradwell had graduated; it remained open to women and Bessie Bradwell, her daughter, was elected class orator in 1883. Carrie Burnham Kilgore was admitted to the University of Pennsylvania in 1881, although she had been rejected in 1876. Although there were dire warnings about the treatment she would receive from students, she was received with courtesy by almost all. The newer universities, such as Cornell, Stanford and the University of Chicago were from their beginnings in the 1890s open to women, as were their law schools. New York University, led by Dean Clarence Ashley, admitted women in 1890, and soon displaced Michigan as the place most congenial to them.

While women thus did not face obstacles comparable to those encountered by African-Americans, there were impediments enough. Older private institutions, resistant to changes in their traditions, were slow to admit them. In 1885, Dean Wayland admitted a woman to the Yale Law School; she was allowed to graduate, but he was chastised by the Yale governing board and forbidden to repeat his misdeed. The Harvard Law faculty voted to admit a woman in 1899 (although she would be formally enrolled in Radcliffe and would receive a Radcliffe degree), but they were defeated by vote of the Corporation. The only law faculty to take an institutional position against the admission of women was that at

Columbia, which became the law school of George Washington University; it resisted the admission of women in 1883, but soon rescinded its action.

Although by 1885 legal education was almost as accessible to women as men and although a license to practice law was easily secured, few women pursued legal careers. In 1900, there were about 500 women lawyers, or about two-thirds the number of African-American lawyers. Many women did not pursue law careers because of their own sense of suitable gender roles, but there was another compelling reason that more women did not enter the profession. It remained, if possible, even harder for women than for black men to attract a clientele. This was largely a reflection of the perception of clients as to the proper role for women, and also a perception of the adversarial and sometimes even violent element in professional legal work. All but a few men who were practicing law in 1900 were self-employed. There were very, very few firms of size and the number of lawyers on the payrolls of institutions public or private was very small. Women lawyers were therefore often dependent on their lawyer-husbands' or lawyer-fathers' willingness to employ them. Accordingly, inadequate and uncertain compensation in the legal profession made the less hazardous and less demanding careers in education, social work, and libraries relatively more attractive to women, especially those hoping and expecting to be mothers.

#### V. THE ADVENT OF ACADEMIC STANDARDS

By 1900, there were 116,000 lawyers in the United States, roughly triple the number in 1870. Striking is the fact that over half had never attended any college or professional school. While many had some training from older lawyers, many were substantially self-educated. They had read the law, or at least made a plausible claim to have done so.

Beginning with the emergence of the law schools at Michigan and Columbia in the 1860s, there was a steady growth in formal legal education. A boom in higher education including legal education commenced about 1890. A major cause of change was industrialization. The secondary effects of industrialization included increasing complexity in the transactions and institutions to which American law would be applied and a growing belief that technical specialization was the key to competence. Among the tertiary effects was an environment favoring the development of



technocratic, apolitical law and an expansion of the number and prosperity of lawyers devoted to advancing private interests.

The decades after 1890 were in America a time for establishing credential requirements for all manner of professions and trades. The new professions dominated by women, such as education, social work, nursing and library work emerged despite the absence in each of those instances of any body of useful specialized learning needed to perform the employments that those professions sought to monopolize. Jacksonian ideas about educational self-reliance and the oppressiveness of licensing laws were in full retreat.

There can be no doubt that some credentialization was necessary. Social Darwinism was the spirit of the day and the robber barons who amassed wealth would have exploited their technician-assistants including their lawyers, just as they exploited unorganized non-technical workers had they not organized to resist. Moreover, in the emerging urban society, it was necessary to inhibit the marketing of incompetent services to otherwise uninformed consumers. Most importantly, in a society increasingly conscious of social and professional status, law required for its administration a profession that could command a reasonable measure of respect. That required credentials.

Charles Eliot, the president of Harvard, was an astute observer of his time and he foresaw that the demand for academic status would continue to rise. It was he who first perceived that a rigorous academic program in law could create a scarce certificate that would sell in the marketplace. "Build it tough and they will come," he told Christopher Columbus Langdell when in 1870 he appointed Langdell dean of the Harvard Law School. And so this namesake Columbus discovered the American law school as it would be known in the ensuing century. He elevated Harvard's admission standards to require an undergraduate degree. He extended the curriculum from two years of five months each to three years of nine months each. Following Litchfield, he emphasized instruction in private law. He dropped constitutional law from the curriculum, disdaining that subject as mere politics unworthy of study by real professionals. He invented the case method as a means of challenging his students. And he introduced tough grading standards that would exclude as many as one-third of the students.

Langdell's students often complained bitterly. Many left after two years, finding the curriculum unbearably repetitive. Langdell's

more distinguished colleagues, James Bradley Thayer and John Chipman Gray, disdained Langdell's theories, but they adopted the case method. They used it as a means of encouraging intellectual self-reliance and of sharing with their students the moral and political premises of democratic law, marking themselves as adherents of George Wythe rather than Tapping Reeve.

Whatever his students and colleagues thought of his reforms, Langdell's law school was a huge commercial success. He built it tough and they came. By the thousands, young men came to see if they could surmount the hurdles he created, hoping that if they could, the world would take them seriously as professional lawyers. Credentialization had come to law with a vengeance. Any university or other institution interested in legal education had to reckon on that reality.

The effort to transform law from a craft to a technocratic science met resistance in high places. Holme's reaffirmation that law is not logic but experience was intended as a repudiation of Langdell. Gray was moved to write his notable work on *The Nature and Sources of Law* as another repudiation of Langdell. Thayer insisted on teaching constitutional law to professional law students, and that was another. There was also a revival of interest in the work of Lieber, who had died in 1872. Some of the most eminent scholars of the day, including Daniel Coit Gilman, the President of Johns Hopkins, and Theodore Woolsey, the President of Yale, produced new editions of Lieber's work, presented in the 1880s not as the caution it was initially intended against the deprofessionalization of law favored by radical Jacksonians, but as a caution against excessive technocratization. These efforts to revive Lieber were the forerunner of Legal Realism, a school of thought appearing among legal academics after 1910 and affirming that law is more a political art than a technology, just as Wythe and other revolutionaries had believed.

The American Bar Association was established in 1878; its leaders at first deplored the case method, but strongly approved the rest of Langdell's reforms. Indeed, the ABA launched a program to elevate standards for the admission to the bar that has continued to the present time. It has been characteristic of the ABA's program unfailingly to support reforms that make legal education more expensive and more exclusive. One might be tempted to suppose that this has been a campaign of economic protectionism, and likely it has sometimes been just that. Antitrust

laws have been invoked against the organized bar for its efforts to control formal legal education. But concern for the social status of the profession was a more powerful impulse to the graybeards of the bar, few of whom were in any way threatened by an increase in the number of untutored lawyers.

## VI. ACADEMIC LAW COMES TO MINNESOTA

Formal legal education came to Minnesota in 1888 when William S. Pattee was appointed to the faculty of the University of Minnesota. Pattee was a graduate of Bowdoin College. He had no professional training as a lawyer, but had read law while serving as superintendent of public schools in Northfield. He had been a member of the profession for a decade and served a term in the Minnesota legislature. Like Langdell and Tapping Reeve, he had a narrow vision of the role of lawyers. His primary aim was the opening of the profession to young men and women who aspired to serve private clients. He did not teach constitutional law or even local government law.

At first, all applicants were accepted, but later those without a high school diploma were examined before admission. Pattee had difficulty attracting students, so he conducted some classes in the evening and welcomed part-time students. They could spread the two-year curriculum over four years. Many of his abler students preferred this regimen; William D. Mitchell, the son of the judge and a future Attorney General of the United States, was among them. Dean Pattee did maintain a standard of sorts, dismissing those whose influence on the school he deemed "baneful." He used an elementary form of the casebook, sometimes insisting that students memorize the volume and page number of some of the cases he assigned. He was assisted by a second full-time teacher, James Paige, a Princeton College graduate, who taught at the school for almost a half century. After 1906, the full-time faculty substantially increased. About half of the school's graduates over the twenty-three years that Pattee was in charge actually entered the profession, but many were in public service despite the narrow focus of his curriculum.

Meanwhile, in 1900, another law school opened in St. Paul. Its founder was a more luminous lawyer than Pattee. He was Hiram Stevens, a graduate of Columbia Law School who had studied with Theodore Dwight and Francis Lieber. He had participated in the founding of the Vermont Bar Association, the American Bar

Association, and the Minnesota Bar Association, and served the latter as its president. Stevens was assisted in conducting the St. Paul College of Law, as Pattee had been, by several part-time teachers. One of the first St. Paul teachers left the faculty when he was elected to the U. S. Senate.

The same year that the St. Paul College of Law was opened, the ABA created the Association of American Law Schools to elevate the standards of the profession by a form of exclusionary zoning. Only law schools spruced up to meet the Association's membership requirements could join. Partly because of the esteem in which Hiram Stevens was held, the St. Paul College was admitted to membership in 1903. But Stevens died in 1904 and the school proved unable or unwilling to keep up with the rising membership standards; it resigned in 1910. Talk arose of its possible merger with the University's evening division.

In 1911, the University of Minnesota law school underwent a rebirth. Dean Pattee died and was replaced by William Reynolds Vance, the most elegant law dean in the history of Minnesota. He came from Yale, where he had remained for only a year. Already holding a doctorate in English literature, he had studied law at Washington and Lee with Randolph Tucker, a founder and president of the ABA, and John W. Davis, the future premier Solicitor General of the United States. At thirty, Vance had been the dean of his law school. In 1903, he had moved to George Washington University, where he was promptly elevated to the deanship. In 1910, he was president of the AALS and moved to Yale before accepting the invitation to Minnesota.

Vance announced that the University Law School would train "a relatively small and select body of young men—select because of their moral and intellectual fitness—for efficient service to the state bar, on the bench, and in the legislature." In aspiring to train lawyers for public service, Vance sounded rather like George Wythe. Far from supporting the contemplated merger of the university law school with St. Paul College, Vance abolished the University's evening division. He did, however, accommodate students needing to work while studying to extend their study over four years.

Vance was a strong advocate of the case method as an especially suitable means of educating lawyers to be self-reliant and attentive to the moral premises of law. On that account, he wanted to exclude students who were not yet twenty-one, fearing that they

would lack the emotional maturity to engage in Socratic dialogue. He also sought abolition of the law entitling law school graduates to admission to the bar. Reflecting his concern for training lawyers to perform their duties as public citizens, he urged an honor system for the enforcement of student discipline. He was among the first to link his law school to the legal aid movement then just beginning its efforts to provide legal services to the poor. He was notably successful in recruiting a distinguished law faculty, so distinguished that Yale recruited three persons he had hired. In 1920, he joined the flight and returned to Yale.

Closing the University's evening division brought forth several initiatives to fill the void. George Young, a Minneapolis lawyer, established the Northwestern College of Law in 1912; it survived for a dozen years. Competing with Young was Elmer Patterson's Minnesota College of Law, founded in 1913, but turned over to George Simpson in 1918; it survived for twenty-six years. The YMCA established a third night law school in Minneapolis in 1919; this was part of a nationwide chain of professional training programs conducted by the Y as a service to impecunious but ambitious young men. It closed in 1934. St. Thomas University also operated a law department for a decade or so during the same time. Finally, the Minneapolis College of Law opened in 1925, just as the Northwestern College ceased functioning. Thus, between 1925 and 1934, there were three evening law schools in Minneapolis and two in St. Paul.

The impulse to establish and nurture these autonomous institutions in the Twin Cities and elsewhere was not profit, although here and there, an educational entrepreneur did profit from part-time legal education. Entrepreneurs mostly desired to perform public service linked to the belief that the democratic tradition in America was dependent on broad access to knowledge of the people's law and to membership in its profession. The YMCA was only the most explicit in its social aim to encourage self-improvement by young men who lacked the advantage of high birth but who sought entry to the aristocracy. If the organized bar and the higher education industry could elevate academic standards, there were those in Minnesota as elsewhere who would strive to assure that the profession remained reasonably open to those who could not make the ever larger investments in human capital required to meet those standards. The Jacksonian tradition remained alive in the evening law schools.

## VII. CONTINUING ELEVATION OF STANDARDS

Pressure to elevate the status of all professions was relentless through at least the first seven decades of the twentieth century. In the early years of the century, the medical profession sought and obtained the support of the Carnegie Foundation to raise standards. The Foundation commissioned and published the famous Flexner Report describing in exquisite detail the failings of medical education. Scores of medical schools closed in response to that report. The organized bar went to the same source for support in its parallel efforts. To its disappointment, the Reed Report, published by Carnegie in 1921, emphasized the political function of the profession in a democracy and advocated the continued operation of part-time law schools. While that report was not wholly disregarded, the ABA nevertheless continued to press for higher academic standards for entry into the profession.

The effect of these efforts was felt in Minnesota. In 1922, the legislature withdrew the diploma privilege and law school graduates would thereafter have to sit for an examination in order to gain admission to the bar. Similar developments occurred in other states as bar examiners raised their standards and failed more examinees.

Part-time schools took a still heavier blow from the Supreme Court of Minnesota in 1930. The court, like those in other states, enacted a new rule requiring two years of pre-legal higher education as a condition of admission to the bar. Students lacking that requirement could enroll in night school and study law for other purposes, but could not receive a degree and could not sit for the bar exam. The institutions were dependent on tuition revenue, and the resulting decrease in enrollment drove them to the financial wall.

Meanwhile, the University of Minnesota Law School pursued the Wythian course marked by Dean Vance. His successor was Everett Fraser, a Canadian by birth, who had studied at Harvard and like Vance had previously served as dean of the George Washington University Law School. The school established and maintained a high rate of academic failure. But its program, seemingly much influenced by Legal Realism, departed drastically from the Harvard curriculum in its ambition to train lawyers for public service.

Dean Fraser was the author of an intellectually ambitious plan extending the law curriculum to four years. The purpose of this

plan was to enrich university legal education by restoring the intellectual breadth of the programs conducted by earlier law teachers such as Wythe. Fraser declared that the "legal profession is all brakes and no engine. If our simian ancestors had been lawyers, we should still be walking on all fours." It was necessary, he argued, to instruct lawyers in the administration of justice, the organization of courts, the selection of judges, the history of law, criminology and penology and thus fill their hearts with the spirit of reform. The plan envisioned that much social science and philosophy would be taught in law school by professors holding appointments in other departments of the university. Law would again be presented more as a humane art and less as an arid technology.

The four-year curriculum was widely hailed, but it was emulated only at the University of Nebraska. One impediment was the lack of enthusiasm of professional students for the kind of intellectual development the plan sought to foster. While many University of Minnesota law graduates would in due course find themselves in public life and become instruments of reform, most students had shorter-term goals of passing a bar exam and selling their technocratic knowledge of the law to paying clients. Courses on penology and judicial administration were not recognized as sources of bread and butter for novitiates. Never mind more esoteric offerings in history and philosophy.

Moreover, the plan was not attractive to those who had already invested in the standard four-year undergraduate curriculum. While students could be admitted after only two years of college, the usual effect of the four-year plan was to extend the period of higher education required to secure a law degree. This was an inducement to many students to go to law school elsewhere. During the war years and the post-war era, the program could not be maintained. It reappeared in the 1950s, but was then forsaken, seemingly in response to competition from equally esteemed law schools that were conferring degrees on students who had been with them for only three years. William Prosser, the law dean at Berkeley and a former student at Minnesota parodied the Fraser plan by publishing a proposal for a ten-year curriculum.

Dean Fraser candidly expressed hope that his plan would serve to limit the number of lawyers in Minnesota. While that purpose was agreeable to the organized bar, it was not one that could be achieved in a society committed to democratic law, as the Reed

Report of 1921 affirmed. The legal profession in England, Germany, and Japan could be limited in size, but such limits were at odds with the egalitarian text of the Declaration of Independence and the popular concept that law belongs to the people. That concept has not yet been assimilated into the cultures of the countries named.

Thus, the University law school's four-year plan enlarged the opportunity for part-time legal education in Minnesota. Although the Chief Justice of Minnesota exclaimed in 1930 that the state had no need for such an institution, there were still three part-time schools functioning in the Twin Cities. The number was down to two when in 1956 the American Bar Association brokered a merger resulting in the William Mitchell College of Law. Other part-time schools survived in almost every major metropolitan area. They survived because there were a sufficient number of energetic and ambitious persons in most cities to create a demand for such institutions.

#### VIII. EFFECTS OF ELEVATED STANDARDS

Why did the organized bar and the leadership of university law schools continue to press for ever higher academic standards for admission to the bar? One reason apparently never considered by any organized bar was the reason given by Deans Vance and Fraser: better-educated lawyers make wiser legislators, governors, and judges. The organized bar continued to pursue its exclusionary policy because, like every other professional group in America, it perceived ever-higher standards to be a source of social status for their members. Novelist Sinclair Lewis was among the first to publicize as reality what Charles Eliot earlier foresaw: members of a relatively classless society are compulsive status-seekers.

Racism was for some leaders of the profession an element of their status seeking, but their mistrust was not directed at African-Americans. Some did apparently aim to exclude second-generation immigrants, especially those of the Jewish faith whose ancestors came from eastern Europe and who were therefore deemed to be socially inferior. I have encountered no report of an expression of this purpose by a Minnesotan, but the distinguished dean of the University of Wisconsin Law School while President of the Association of American Law Schools, was outspoken in his mistrust of the sons of immigrants. It is laughable to us today that anyone could have thought that they would reduce the number of Jews in



the profession by elevating the academic requirements for admission. Studious and ambitious Jewish students formed the core constituency for many law schools, both full-time and part-time. They would make themselves lawyers whether leaders of the bar liked it or not.

Catholic descendants of more recent immigrants were also sometimes scorned by those pretending to aristocratic status, and they likewise sought to become lawyers in numbers. Many Catholic colleges organized law schools to serve them in the same spirit in which the YMCA served impecunious Protestant youth. Presumably that is why St. Thomas University on several occasions manifested a desire to link to a part-time school in the Twin Cities and has continued to nurture plans for legal education.

Bar leaders explaining their persistent interest in elevating academic standards often expressed the belief that students trained in university law schools are more likely to adhere to suitable standards of professional conduct than are those trained in law offices or in part-time schools. Dean Vance voiced the party line when he explained that part-time students "being of inferior capacity and training, are strongly tempted to secure an illegitimate livelihood by unprofessional practices." There is some logic to this belief. Those who studied law with Everett Fraser for four years had a larger investment in their professional status than those who were paid apprentices for a lesser time and might therefore be more reluctant to jeopardize that status by professional misconduct. Insofar as this logic is applied to part-time students it overlooks the fact that part-time study at night is very onerous for those who earn livings at day jobs. Those engaged in such study are making an emotional investment that may in some cases be greater than that of wealthier students whose families can enable them to concentrate on law study full-time. Full-time law schools are all familiar with students who coast through with a minimal investment of energy and some of them are very likely to be moral risks.

In any case, there is scant evidence correlating the frequency of professional discipline problems with the identity of schools from which offenders graduate. The most luminous law schools graduate scoundrels, whether fewer than their cross-town competitors has not been measured. In his history of William Mitchell, former Dean Douglas Heidenreich identifies one member of the first class graduated by the St. Paul College of Law and no

fewer than four members of the first class graduated by Mitchell, as persons who were in due course disbarred. The latter number is especially impressive, but Heidenreich is extraordinarily candid in addressing the issue.

Interestingly, at least two of the scoundrels graduating from the antecedents to William Mitchell were women. A female member of the St. Paul class of 1906 was disbarred on the basis of her testimony, which the Minnesota Supreme Court described as "abounding in self-contradictions." A female member of the Northwestern College class of 1917 was disbarred after eight years in the profession, the court declaring that "there is nothing to indicate any probability of the public being safe in dealing with her" as a lawyer. As it happens, both of these women were well educated, had taught in public high schools, and had engaged in diverse good deeds when not practicing law. Years of schooling had done little to insure their integrity as lawyers. This datum tends to refute the hypothesis that a greater investment in higher education will correct moral failings.

Histories of more pretentious institutions do not tell us of their graduates who encountered disciplinary problems. I can share some incidental knowledge. Two members of the Coolidge cabinet who were implicated in the Teapot Dome scandal of the 1920s were Michigan graduates. Richard M. Nixon, the most noted graduate of the Duke University School of law, was disbarred by New York.

Empirical studies of the profession shed some light on the issue. Jerome Carlin's studies in Chicago and New York, though now dated, remain informative. Many of the lawyers whom he interviewed were in a weak position from which to resist temptations that might come their way. Their weakness was not specifically related to the schools they attended, but to the absence of financial security. It stands to reason that underemployed lawyers can in their desperation be a source of mischief. On the other hand, there is also common sense in the dictum that a town having one lawyer needs two; we tend to make work for one another. Hence, controlling the number of lawyers does not necessarily improve the financial security of those who are admitted to the profession. And it is also pertinent that lawyers who are underemployed can generally find other law-related work as the graduates of Minnesota law schools have long done.

Lawyers' ethics are often derived from their clients' ethics.

There is no evidence that rich, high-paying clients are less predatory than impecunious ones. I offer one example. William Nelson Cromwell of the New York Bar and a Harvard Law graduate earned an enormous fee from his French clients for inducing the United States to pay a spectacular price for the assets of their failed Panamanian railroad. Part of his legal service to his client was providing Theodore Roosevelt, the President of the United States, with highly questionable intelligence leading him to send the United States Marines into the territory of the Republic of Colombia, blatantly violating an international treaty, for the purpose of protecting a handful of gangsters funded by Cromwell's client who were posturing as Panamanian freedom fighters. No bar grievance committee ever considered the possibility of disciplining Cromwell. While my brief account is not sufficient to justify a belated indictment of the bar or of Cromwell, it serves to suggest that rich scoundrels are a greater menace than poor ones and less likely to be called before bar discipline committees.

Steady elevation of academic standards had no measurable effect on the number of scoundrels practicing law and very little effect on the Jewish and Catholic men seeking admission to the aristocracy, but that program was not without effect. Those who were deterred from becoming lawyers were African-Americans and women.

Simple economics explains this effect. As the number of years of higher education required for entry was elevated from zero to six and sometimes seven, those whose financial prospects were most limited were the ones least likely to make the requisite investment in their human capital. The two groups most obviously fitting that profile were African-Americans and women. Those advocating ever higher standards may not have intended those consequences, but in hindsight they could have been foreseen. African-Americans lacking not only funds but any tradition of investing in human capital and with the poorest prospects of gaining an adequate return to justify the investment would be the first to be discouraged by the requirement that they spend many years in school to gain entry. For women, it was equally obvious that mothers had fewer years available to invest in schooling. Women also had to anticipate lower financial returns from practice than those anticipated by their brothers and husbands. The numbers of African-Americans and women entering the profession leveled off after 1900, and the reason almost surely was that the economics of human capitalism

were not the same for them as for white males.

The National Bar Association was founded in Des Moines in 1926 as a professional guild for black lawyers. In 1930, there were slightly more than 1,000 lawyers eligible for membership in the organization, a number reflecting no growth in relation to the population since 1900 and a decline in the percentage of the membership of the bar. It is also significant that a considerable migration of African-Americans away from the former Confederate States commenced in 1917 so that fewer African-Americans were raised in extreme rural poverty where public education and health care were nominal at best so that many more might have been expected to pursue careers in law but for the elevation of barriers to entry. Very few young black men could spend the five or six years in a university required to become aristocrats of the law. A significant share of the ablest of them, including Thurgood Marshall, gathered at Howard University to study with Charles Hamilton Houston and help form the legal assault on the Jim Crow institutions of the South.

Efforts to increase the number of women lawyers were made in the first half of the twentieth century, with scant success. Two law schools organized exclusively for women survived, ultimately to become parts of universities. One of these was the Portia Law School in Boston; the other was the Washington College of Law in the District of Columbia. In addition, the University of Southern California actively recruited women law students at a time when schools generally did not recruit students of any kind. In 1912, USC offered a special first year curriculum open exclusively to women. These and other efforts found hard sledding. Not many women were interested in making the kind of investment of time and money required to make themselves lawyers. By 1940, their number had grown from five hundred to four thousand. But that number still constituted a trivial percentage of the bar or of the number of women attending and graduating from college.

The small number cannot be attributed to the unavailability of legal education. One hundred two of the 127 law schools operating in 1910 were admitting women on the same terms as men, the exceptions being law schools affiliated with single-sex colleges. There were, to be sure, incidents of sexist behavior causing pain and discomfort to women law students. Generally this took the reform of remarks by fellow students, but sometimes also by faculty members. The most common form of professorial

harassment was to call upon women students to discuss cases involving sensitive matters, such as rape. Whether these occasional acts of unkindness affected the number of women coming to law school is not clear, but it seems unlikely. They were sometimes balanced by words and actions intended to encourage women. For example, John Henry Wigmore of Northwestern University, the most luminous law professor in America at the time, made a point of refusing to attend stag social events with law students. Joseph Beale, a notably conservative law professor at Harvard, tried to start a law school for women in Cambridge in protest over the failure of the Board of Overseers to admit women to the Harvard Law School.

At no time did the University of Minnesota ever discriminate in admissions against women or African-Americans or any other identifiable group. Nor did William Mitchell or any of its antecedents. However, the President of the University of Minnesota did in 1910 express disapproval of women studying law. And there were the occasional acts of harassment. For a time, the St. Paul College had no separate rest room for women. Dean Heidenreich speculated that the trustees assumed that the seven or eight women enrolled in the school could "simply hold it through long winter evenings—or perhaps that they might sneak into the men's room when nobody else was around." In 1928, the trustees spent over four hundred dollars to resolve the problem, but it appears that none of the plumbing facilities provided to any of the students warranted particular approval.

For a half century, it was the part-time law school that chiefly served women and African Americans. In 1930, twelve of the 111 students at St. Paul were women and two were black. These proportions could have been found at many state university law schools in the late nineteenth century before academic standards were imposed. As the number of years of required resident study increased, the black and female faces almost disappeared from pictures of graduating classes at Michigan, Kansas, and Iowa. Higher academic standards and the economics of full-time study drove them out.

It bears incidental notice that the slow growth in the number of black and women law students occurred despite the facts that law school tuitions remained low everywhere throughout the first half of the twentieth century and admission was open everywhere to any student meeting the minimum requirements. Any male person

with a college degree could enroll at Harvard or Yale if he could pay a few hundred dollars of tuition. The only disincentives were the expenses of the fourth year of college that was not required by the state universities, the cost of travel and relocation, and for those who needed to generate income the difficulty of finding suitable employment in Cambridge or New Haven. Tuition at many public institutions was a trifle. Until about 1950, there was no summer employment for law students in law firms. But then there were also no law school admissions officers, no Law School Admission Test, and no Law School Admission Council to predict the law school grade point averages of prospective students and screen out aspirants with poor prospects for academic success.

While the successful efforts of the organized bar to raise academic standards raised the entry barrier for women and African-Americans but not for scoundrels, we may hope that elevating academic standards had another effect that was not in the mind of the organized bar. Raising standards may have served the benign purpose of some academicians including Deans Vance and Fraser, who followed Wythe and hoped to produce by educational means lawyers qualified to perform the political role described by Tocqueville of mediating between those Americans who enjoy wealth and power and those who do not.

Did elevating standards actually serve the purpose of providing democratic institutions with better leadership as Wythe had hoped? One might gain some insight into that hope by comparing the citizenship of graduates of the University of Minnesota Law School to those of William Mitchell and its antecedents. The University certainly produced a formidable list of distinguished alumni during the deanships of Vance and Fraser and their successors. A highly respected Vice President of the United States, Walter Mondale, was among their number, as were many who went on to distinguished careers in the legal academy. Yet, the alumni of William Mitchell and its antecedents include many important public citizens including a Chief Justice of the United States, Warren Burger. The issue raised might be framed by asking the questions: would Walter Mondale have been less admirable as a Senator and political leader if he had experienced the kind of education provided at Mitchell? Or would Warren Burger have been a more admirable Chief Justice if he had the benefit of a more expensive and more rigorous education of the kind provided by the University law school? Answers to those questions do not come easily, suggesting that

there may be more to the Jacksonian regard for the merits of self-education than many twentieth century lawyers in the organized bar and in the legal academy have been prone to believe. Even if we believe that such public servants would serve the people better if they had been more elegantly educated, the question remains whether the marginal improvement was worth the social and economic costs.

#### IX. THE ERA OF BOOMING DEMAND AND SPECIAL ADMISSIONS

In the post-World War II years, the GI Bill led to increased law school enrollments. After a brief decline, the number of law students began to increase in the 1950s and tripled by the 1980s. The number of graduates entering the profession each year was then roughly that of the entire American bar in 1860. A secondary consequence of this development was to permit the more esteemed or pretentious law schools to select their students. Charles Clark, the dean of the Yale Law School in the 1930s may have been the first to see the possibilities of selectivity. At a time when his school could attract only ninety or so entering students a year, he announced the policy of limiting the class to 100. The number of applications to Yale increased precipitously as ambitious young men sought to be certified as among the elite 100. In time, the aura thus created would cause Yale to surpass Harvard as the most esteemed law school. A pecking order was established that is today institutionalized by the U.S. News and World Report annual rankings.

Not only did law schools establish admissions offices, but they also began in the early 1960s to form placement offices. This development reflected the rapid growth of large private law firms with money to spend on recruiting lawyers. High-paying summer law jobs became available to students at the more esteemed law schools. Starting salaries in such firms rose steeply. In 1955, a Wall Street starting salary was \$4,000 a year. In 1965, it went to \$15,000 and would continue to rise at a rate far above inflation, a trend that continues in 2000. This made law schools much more attractive to human capitalists, but made service in the public sector less attractive.

In the spirit of human capitalism, the federal government began to facilitate and encourage borrowing by students to pay tuition. The purpose was to open professional careers to those who were short on cash to invest in tuition. That policy seems to have

backfired. As Andrew Jackson himself would have forecast, the additional moneys were largely appropriated for the private benefit of those not in need. They resulted in steep increases in law school tuitions. The added revenue was used to increase academic salaries, and especially to lower teaching ratios. No doubt the resulting changes made law schools more pleasant for teachers and students, but whether they contributed to any improvement in the quality of services available either to private clients or to the Republic remains to be shown. Would Walter Mondale have been a better Vice President or Warren Burger a better Chief Justice if they had attended happy, intimate law schools more like the Yale of 2000 than the much less expensive economical ones from which they graduated? I question.

Women at last began to enter the profession in numbers in 1970. In part, this reflected political developments expressed in the extension of federal civil rights legislation to protect women. That in turn reflected the declining interest of women in motherhood as it was realized that the Republic no longer had a shortage of children. It was also a response to the increased financial attractiveness of law study, and to the availability of high-paying jobs. Large law firms had a growing demand for smart, energetic women and began actively to recruit them away from public service activities such as teaching school and running public libraries. Despite occasional acts of harassment and despite working conditions in the most remunerative jobs that were inconsistent with the felt demands of motherhood or in many cases the personal values and lifestyles of more than a few women, the profession was opened to women. In 2000, there are more than 200,000 women lawyers and almost half the graduates of law schools are women.

Enrollment at William Mitchell rose rapidly, exceeding 1,000 for the first time in 1975. The rising tide of law students created demand sufficient to sustain a third law school in Minnesota. In 1974, another law school opened in Minneapolis that in 1976 became the Hamline University School of Law. At the same time, the Minnesota legislature was at last induced to provide facilities and funding to enlarge the University's law school. Young men and women were entering the legal profession at rates not previously imaginable. It may be that as we entered the new millennium there were as many as a million lawyers in America. A million-person aristocracy is a mind-boggling concept.



Nevertheless, a difficult problem was presented by the need for African-American lawyers. The Civil Rights Acts of 1964 and 1965 had confirmed the full status of African-American citizens. Yet one could, as I and my colleagues did, look around the University of Michigan Law School in 1965 and see no students of color. Not one. In 1966, several law schools including Michigan's established special admissions programs. In 1968, the University of Minnesota set aside fifteen places in the entering class for disadvantaged students, meaning black students. Half the financial aid money available to law students was consigned to that group. Virtually all American law schools in a position to select their students committed to similar programs.

Such programs attracted a much larger number of African Americans into the legal profession. In this respect, special admissions or affirmative action as it came to be known, has been a spectacular success. There are now more than 40,000 African-American lawyers and more than 30,000 lawyers of Hispanic origins. There are now many more black lawyers in America than there are *bengoshi* in Japan or barristers in England. Combining this result with similar endeavors in other fields, it is fair to say that American universities have created a large and prosperous black middle class, and in a sense confirmed that American law belongs to us all, whatever our skin pigmentation. In the bargain, students in highly selective law schools have gained the benefit of exposure to the ideas and values of minority students. Let no one belittle those achievements.

A secondary consequence of affirmative action programs in university law schools was to reduce the number of minority students at schools lower on the selectivity pecking order. Almost any black or Hispanic student seeking to make himself or herself a lawyer has in recent decades been able to draw on the resources of university financial aid offices. They did not need the part-time schools to the degree that they had needed them in the first half of the twentieth century. Today, William Francis and Lena Smith would be vigorously recruited by the most esteemed law schools.

The impulse of the organized bar and the leadership of the legal academy to elevate academic requirements for admission to the profession created the need for such affirmative action. If those requirements had not been imposed, the integration of African-American and Hispanic men and women into Tocqueville's aristocracy could have proceeded in normal course, as rapidly as

members of those groups chose to prepare themselves for professional work in the law.

As we know, affirmative action is controversial. One federal Court of Appeals held the program conducted by the University of Texas to be unconstitutionally discriminatory against white and Asian-American students. The people of California voted by referendum to abolish the program at their state university. The Governor of Florida seeks to abolish the programs in that state's universities. Those developments are regrettable, but they are less calamitous than they would have been at an earlier time. Even if all affirmative action programs were terminated, the large black and Hispanic presence would abide. Those who want to be lawyers would have to seek their academic credentials in less esteemed institutions, but their career tracks would remain much as they are.

The primary losers if all affirmative action programs were abolished would be those institutions, such as the University of Minnesota Law School, that would be in danger of becoming an exclusive club in which the offspring of favored classes gather to study law in pristine seclusion, much as some of their families reside in guarded apartments or gated neighborhoods and attend ball games only in skyboxes. Students who wanted to study law with students of diverse origins, to expose themselves to a broader range of ideas and experiences, thereby preparing themselves for the aristocratic role defined by Tocqueville, might then wisely choose to avoid the more pretentious skyboxes of the law and seek their formal education elsewhere in the general admission section of more worldly institutions. As the Jacksonians so well understood, a professional degree from an exclusive club is a kind of paste jewelry having little inherent value. Such jewelry may decorate a professional talent, but it is not its source or its substance. Moreover, public institutions thus restricted in the segments of the population they can serve will find it increasingly difficult to secure appropriations of public revenue.

## X. CONCLUSION

I conclude with two quotations. The first is a reminder of our profession's collective duty. In 1837, Timothy Walker, a contemporary of Tocqueville, opened the Cincinnati Law School with a lecture later preserved by editors as a preface to his *Introduction to American Law*, a one-volume book that went through eleven editions and was widely read in the nineteenth century,

often as a first book for students who were reading law in law offices or simply on their own as Lincoln did. Walker began with the following thought resonating with the work of Tocqueville:

We are trying the greatest political experiment the world ever witnessed; and the experience of all history warns us not to feel too secure. A voice from the tombs of all departed republics tells us that if our liberty is to be ultimately preserved, it is at the price of sleepless vigilance. I refer not to foreign aggression, for this we have nothing to fear; our only foes are those of our own household. Domestic aggression may come from two quarters. On the one hand, power [and wealth are] always tending to augmentation. Those who have some, employ it to gain more; and if not seasonably withstood, become too strong to be resisted. And on the other hand, liberty is always tending to licentiousness. The more men have, the more they are likely to want. Being free from many restraints, they would do away with all. Now when dangers threaten, from either of these quarters; when [the powerful] would trample the law under their feet, or mobs would rise to overthrow it; who are the sentinels to give the alarm? Do I assume too much in saying [those] whose profession it is to watch over the law?<sup>1</sup>

If, as I believe, Walker's words bear attention today, then the next question is how those aspiring to be lawyers can best prepare to share in performing our collective duty. Most important to public service are traits of character only marginally affected, if at all, by formal training. To be useful to the Republic, or private clients, young lawyers need to know some law, at least enough to know how to locate applicable legal texts and where to look to reckon law's social, political, historical and economic contexts. Acquiring that knowledge requires patient study over time, but the radical Jacksonians were not wrong to believe that persons with a reasonable share of natural competence and energy can acquire much information with little or no supervision. There are no secret legal texts. Teachers and law schools heavily invested in transmitting information about law are expending resources that

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1. INTRODUCTORY LECTURE ON THE DIGNITY OF THE LAW AS A PROFESSION, DELIVERED AT CINCINNATI COLLEGE ON THE FOURTH OF NOVEMBER, 1837 22-23 (1837).

could be better spent in some other way. They are chiefly engaged in manufacturing the paste jewelry of academic credentials.

While knowledge is necessary, it is not sufficient to make good lawyers. Important intellectual arts and habits may be initially acquired or strengthened in school. Once acquired, these arts and habits can and should be enhanced by constant use. The valued arts and habits are not associated with arcane learning or Olympian intellectual feats sometimes found in the skyboxes of the law. Instead, they constitute the discipline of ordinary common sense elevated to an uncommon level.

The arts and habits of uncommon common sense were elegantly stated by an anonymous eighteenth century English schoolmaster unacquainted with law. I leave you with his utterance as a statement of the ways in which law schools help Tocqueville's aristocrats perform their public mission:

At school you are not engaged so much in acquiring knowledge as in making mental efforts under criticism . . . . You go to a great school not so much for knowledge as for arts or habits; for the art of expression, for the art of entering quickly into another person's thoughts; for the art of assuming at a moment's notice a new intellectual position, for the habit of submitting to censure and refutation, for the art of indicating assent or dissent in graduated terms, for the habit of regarding minute points of accuracy, for the art of working out what is possible in a given time, for taste, for discrimination, for mental courage and mental soberness.<sup>2</sup>

A republic never can have too many citizens who have acquired those arts and habits. My awful conclusion is that we ought open our law schools and make aristocrats of us all.

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2. Michael J. Graetz & Charles H. Whitebread II, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445, 459 (1981).

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