The University of Kansas Law Review

Legal Education for the People: Populism and Civic Virtue

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Introduction: Populism, 1894

The University of Kansas embodies the ""aristocracy and the exclusiveness of [a] clique in power."" Its professors are ""puffed up with their own importance."" The town of Lawrence has been ""toady ing' to the University too long."" It should ""set down on [the] snobs."

Indeed, the time is not far distant when the people of [Kansas] will find themselves compelled to take the University in hand and put it back in its proper place. It was intended to be an institution under the control of the State, for the benefit of the youth of the State; but it [has acquired] the airs of an aristocratic dictator, independent of the people, above them, aspiring to rule them. The appropriations to the University each year are enormous, and constantly increasing. The well-paid faculty are constantly scheming for an increase in their salaries. They are allowed [many] thousands of dollars every year to go on wild goose chases, pleasure outings, and to waste in humbug experiments.

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2. Id.
3. Id.
4. Id.
"Members of the legislature, under the influence of the aristocracy of the University, [are] ready to sacrifice their party, and would . . . betray[] Jesus Christ, in order to gain additional favors and power for the University. It is high time the people [of Kansas] were looking to this matter."5

All those words and more of the same were penned by Kansas editors. They expressed the sentiments of many Kansans a century ago in 1894. Only a few years before, in 1887, another editorialist had complained even more bluntly that in Lawrence young people

"learn a smattering of law and Latin, part their hair in the middle, wear tight pants and gain other emblems of greatness [while] the yahoos who live out in the border counties crawl out of their dugouts and haul corn 40 miles and sell it for 15 cents a bushel to help foot the bill."6

Not long after these harsh words were uttered, the Populist Party elected a Governor of Kansas and gained control of both houses of the legislature. With but few dissenting votes, savage cuts were imposed on the University budget.7 The Chancellor and the dean of the law school took twenty percent pay cuts; other faculty took cuts of at least ten percent.8

When the legislature imposed these cuts, the University was not yet three decades old,9 and the law school less than two.10 What could they have done in so short a time to earn such enmity? Not much, really. Those hostile Kansans of a century ago were merely expressing a sentiment widely shared since the early days of the republic.

The purpose of those who established the University was not entirely clear.11 Other western states were creating universities, and Congress, through the Morrill Act of 1862,12 encouraged this movement by conferring land grants to be used as endowments for state universities.13 Most of those state universities were quick to establish law departments. Kansas, like many other western states, seems to have gone with the flow. But why go with the flow? What could a college do for the price of corn unless perhaps it was an agricultural college?

At the time the University was established, a college education generally afforded the student a survey of classical literature and often little else. Although the early American colleges were established to

5. Id. at 89 (quoting Solomon Miller, Editorial, KANSAS CHIEF (Troy), June 13, 1895).
6. Id. (quoting Editorial, CLOUD COUNTY KANSAN (Jamestown), Jan. 1, 1887).
7. Id. at 189-90.
8. Id. at 190.
9. Id. at 27.
10. Id. at 170.
11. Id. at 2-3.
13. Id.
train clergymen, they were also recognized as suitably monastic venues for the sons of New England mercantilists and southern planters, where privileged boys could spend some potentially destructive adolescent years harmlessly, or at least with less risk of harm to their families and neighbors. Those who promoted such institutions presented them as places where young men could acquire "mental discipline" by mastering the forms of Greek verbs. In 1828, the Yale faculty spoke for many educators in renewing their pledge to pursue classical education with full rigor.

Undoubtedly, the reading of Homer enriched the lives of those who absorbed his immortal work. Yet few Americans of the generation coming to Lawrence to fight for free soil in the 1850s regarded a university education of the sort Yale provided as a matter of importance. My New England ancestor, buried in Lawrence's boot hill, was a typical example of those migrating west. He came to Kansas with a Bible, a gun and a purpose—to fight slavery—but very little formal education and little visible interest in providing it for others.

Because Homer was perceived to be no more useful to the taxpaying public than violin lessons, the democratic governments of the northeastern states were disinclined to use scarce public revenue to support colleges. When states were created from the Northwest Territory in the early decades of the nineteenth century, land was set aside to endow state universities, but this was as much a reflection of the low value of the land as of any widely shared impulse to provide higher education for larger numbers of citizens.

The prevailing view north of the Potomac was expressed by a Maryland veteran of the Revolutionary War, who questioned: "Is [the establishment of a university] not assisting and invigorating that dangerous effort in civil society to aggrandize the few, and depress the many?" The same feeling was expressed by a Presbyterian minister who strongly favored public education for the many, but not for the few afflicted with pretensions of intellectual superiority. He argued that "[i]n all ages, it has been the policy of those governments that existed by the slavish ignorance of the people to establish one or two sumptuously endowed schools for the sons of fortune and affluence . .

15. Id. at 24.
16. Reports on the Course of Instruction in Yale College by a Committee of the Corporation and the Academic Faculty, 15 AM. J. SCI. & ARTS 297 (1829).
. leaving . . . the ignorant herd, to live and die, [as] . . . the despised, enslaved and stupid multitude.  

In the early nineteenth century, most Americans described such sentiments as "Jacobin." That word associated such reverse class bias with the French Revolution, that outburst of aristocratic blood-letting echoing our own less embittered Revolution. The carnage in France reverberated in the culture of our eastern states. Thus, the Kansas Populists of 1894 would have been called Jacobins by the Federalists of 1794.  

Even learned Americans who were not Jacobins or Populists were often unprepared to defend public expenditures for traditional higher education. Thomas Jefferson, probably the most learned of the Revolutionaries, was a leader among those few who hoped to propagate higher learning. He proposed radical changes to make university education more useful to the Commonwealth and thus worthy of public financial support. Even Jefferson, however, achieved only limited success and the University of Virginia could not implement his ideas. Similar thinking, reflecting the influence of Jeremy Bentham, led to the establishment of the University of London in 1828. New York University was also established to pursue a more applied approach to higher education, but was soon financially embarrassed. In the 1840s, Francis Wayland, the president of Brown University, campaigned for higher education relating more directly to the future lives of students. The Morrill Act, formalizing the conception of land grant colleges, was in part a response to Wayland's work. Nevertheless, it remained true that as late as 1870, academic credentials had almost no correlation to vocational opportunities or anything else that engaged the

19. Id. at 173 (citation omitted). This comment is unusual in that the Presbyterian clergy were the founders of many American colleges, both public and private. FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY 10, 54, 57 (1962).  

20. See BERNARD FAY, THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA 221 (1927) (citation omitted).  


23. See NEW YORK UNIVERSITY, 1832-1932, at 6 (Theodore F. Jones ed., 1933) (citation omitted).  

24. Id. at 6-7.  

25. See id. at 46-47.  


27. Morrill Act, ch. 130, 12 Stat. 503 (1862).
attention of adults in a rural, subsistence culture. Many students who came to public colleges acquired little more than knowledge of fashion in dress and grooming and other "emblems of their greatness." The Jacobin sentiments of 1794 were therefore not wholly misdirected when they were voiced by the Populist Kansans of 1894.

Patriotic Elitism

Fear of Jacobin sentiments was one source of the efforts of our elite revolutionaries to establish our national government and our Constitution. Related fears motivated those who established university legal education in America. Central among Jefferson’s hopes was to use colleges to train secular as well as clerical leaders. Although in many ways the premier democrat of his time, Jefferson shared the feeling of mistrust that many corevolutionaries had for the untutored political judgment of the semiliterate farmers who constituted the core of the electorate. Along with Montesquieu, Jefferson noted the disintegration of all earlier republics and supposed that classism and other forms of factionalism would also infect America’s democratic politics and destroy it unless wise and virtuous leadership could be developed. As Governor of Virginia in 1779, Jefferson secured the appointment of George Wythe as professor of law and politics at the College of William and Mary in order to train democratic leadership. For the same reason, Jefferson later fostered legal education at the University of Virginia.

Others of Jefferson’s generation had the same idea. Hugh Henry Brackenridge, a Jeffersonian and a Justice of the Supreme Court of Pennsylvania, published a widely read novel satirizing the idea that unlettered frontiersmen could make sensible political judgments and celebrating the need for lawyers as a political elite. Jefferson’s adversary, Alexander Hamilton, joined in promoting the appointment of Professor James Kent at Columbia for the purpose of training new

28. See generally GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981) (illuminating how Madison and Hamilton were able to find common ground in establishing the United States Constitution and federal government).
31. Peeler, supra note 21, at 79-80.
32. HUGH H. BRACKENRIDGE, MODERN CHIVALRY (1937). This work was first published serially beginning in 1792.
lawyers. Similar thinking influenced many other early colleges to teach law as well as classics. Indeed, the idea was to teach law to an elite as the implement of classical civic virtue, the Athenian tradition calling on citizens to make political judgments disinterestedly for the benefit of the whole community.

Wythe’s teachings, following this tradition, were perpetuated by later professors in the law department of Transylvania University in Kentucky, an institution of signal importance in antebellum times. Henry Clay, the leader of the Whig party, was a one-time student of Wythe’s and was closely associated with Transylvania during his long and distinguished career. The early colleges in Ohio and Indiana taught law with the same purpose in mind, of creating a corps of potential leaders appreciative of the need for self-restraint in the practice of democratic self-government.

The major theorist of antebellum legal education was Francis Lieber. A German emigre and a political follower of Clay (not Jackson), Lieber elaborated the traits to be nurtured in democratic political leaders. They resembled the qualities revered in classical times as “civic virtue.” Today, we might call the sum of those traits “disinterested prudence.” Lieber called them “patriotism.”

Most antebellum American law teachers, including Kent, Story, Lieber and those at Transylvania, were persons of moderate political persuasion who favored stability. Most were Whigs and nationalists supporting Clay. They were opposed equally to slavery and disunion and favored initiatives of the national government to build a national economy. In these preferences, they identified with the growing class of commercial and industrial interests.

On the other hand, there were also law teachers who opposed the political program of Clay’s Whigs. The heirs to the reverse class bias of the Jacobins were adherents of Andrew Jackson. The Jacksonians, wherever they gained power, dismantled the ramparts of privilege.

35. Id. at 680-84.
37. See generally 1 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS (Boston, Charles C. Little & James Brown 1838); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (St. Louis, F.H. Thomas & Co., 3d ed. 1880).
Their Jacksonian political faith opposed almost all forms of government intervention in economic matters, especially the Whig effort to establish a Bank of the United States. It was the Jacksonian belief, following Adam Smith, 39 that almost any economic initiative of the government would be quickly captured by the privileged classes and would operate against the interests of the working poor, who constituted most of the American people. Among the regulatory protections stripped away by Jacksonians were onerous licensing requirements impeding access to such aristocratic professions as medicine 40 and law. 41 In the frontier states west of the Alleghenies, the Jacobin-Jacksonian-Populists were almost completely successful in opening pretentious professions. Where they governed, all that was needed by those who desired to become a certified lawyer was a favorable introduction by a lawyer to a judge, who might, before conferring professional status on the candidate, orally examine him to see if he had read a bit of Blackstone or Kent and thus acquired the usual rudimentary knowledge of the law. 42

In such times and places, one could find more than a few lawyers "destitute of the rudiments of an . . . education." 43 It should not be assumed, however, that most frontier lawyers were ignorant men. 44 More than a few had acquired some apprenticeship training before coming west. Some of those who became certified without training taught themselves enough law to become competent 45 and some—Abraham Lincoln being the paradigm—became very competent indeed. Conversely, many who failed to become competent also failed to attract clients and soon left the law for other activities. 46 Nevertheless, there were surely some citizens who were victimized by the incompetence or venality of counsel who would not have been permitted to practice in a more controlled environment. 47 The latter risk


41. Some have written that the practice of law at this time was left to lawyers with inferior ability. See, e.g., CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 211-14 (1911); ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 177-82 (1953).

42. See W.V.N. BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI 383 (St Louis, F.H. Thomas & Co. 1878).

43. Id.


45. Id. at 96.

46. Id. at 99.

47. For an example, observe the notorious career of Simon Suggs, Jr. recounted in JOSEPH
was one that Jacksonians were willing to bear as less an evil than the consequences of public regulation. They believed that such efforts would elevate the price of services more than their quality, and would deny opportunity to the children of the working poor.

Even Jacksonian leaders who saw no need to regulate entry into the legal profession nevertheless saw a need for training lawyers to guide the electorate. Perhaps the most radical of the Jacksonians were those found in New York who wore the label "Barnburners." A leader among Barnburners was Benjamin Butler, Jackson's Attorney General. In 1837, Butler was selected as the founding dean of the law department of New York University. Butler was supported by many Democratic lions of the bar, including David Dudley Field. Field was a strong-minded author and later the advocate of sweeping procedural law reforms effected in New York in 1848. Despite his radical politics, Benjamin Butler's pedagogical aims differed little from those expressed by Francis Lieber and favored by law teachers who were Whig adherents of Clay. Men such as Butler were not anti-intellectual, but they favored learning as a source of practical wisdom, not as an ornament or credential required of those performing legal services to private citizens.

The need for practical political wisdom was nowhere more evident than on the western frontier, where the Jacksonian persuasion was most predominant. Judge Nelson Timothy Stephens was the leader of the Kansas lawyers urging the establishment of a law department at the University of Kansas. As Paul Wilson explained, Judge Stephens sought law teaching as a remedy for then-existing conditions in Kansas, to wit, that there was "no law west of Newton and no God west of Dodge." As that comment about the state of affairs in Kansas suggests, violence was so close to the surface of many relationships that

48. For an account, see Herbert D.A. Donovan, The Barnburners (1974). So called because it was said they would burn a barn to kill the rats within.
49. See id. at 21.
51. Field's role as a law reformer is told in Daun van Ee, David Dudley Field and the Reconstruction of the Law 21-56 (1974). Field, like Cooley, later moved into the Free Soil Party and then to the Republican Party of Lincoln. Id. at 129-31.
53. See id. at 14.
54. Paul E. Wilson, Centennial Footnotes, 27 Kan. L. Rev. vii, x (1979) (citing K. Stephens, Truths Back of the Uncle Jimmy Myth in a State University of the Middle West 11-12 (1924)).
55. Id.
the practice of law in the West was often violent. One could not practice law in Missouri in 1810 or 1820 if one was not willing to fight duels. At least one Kentucky lawyer owed some part of his professional success to his skill in throwing rocks at the heads of adversaries. When Stephen Field began to practice law in California in 1850, he found it necessary to acquire the "subtle art" of shooting a pistol from his pocket. If Kansas or any western state was to govern itself, prudent leadership imbued with a sense of shared responsibility of the common good would have to be nurtured. Even those most hostile to the elitist pretensions of the bars could see clearly a need for legal education that would nurture the traits of republican virtue and call young lawyers to the performance of public duty. Lawyers would be needed to speak on the Fourth of July, and to bring prudence to the councils of western towns and legislatures. Whatever could be done to elevate prudence and judgment was a public service of precious value.

*Thomas McIntyre Cooley, Exemplar*

The most illustrious teacher in the Jacksonian tradition, which was established by Butler at New York University, was Thomas McIntyre Cooley of the University of Michigan.

When statehood came to Michigan in 1837, its population was agrarian and its politics were democratic. It established a university in Ann Arbor. When the legislature failed to provide support and even tried to appropriate the University's endowment to meet current expenses, the people of Michigan in 1850 amended the state constitution to provide direct election of its governing board of regents, gave the elected board the power to collect a modest tax on land and authorized executive power for the president they selected. Jacksonian Regents were elected and they appointed as President Henry Tappan, a

56. *See id.*
57. *See H.M. BRACKENRIDGE, RECOLLECTIONS OF PERSONS AND PLACES IN THE WEST 207-08 (Philadelphia, 1868).*
58. *JAMES W. GORDON, LAWYERS IN POLITICS: MID-NINETEENTH CENTURY KENTUCKY AS A CASE STUDY 98-99 (1990).*
60. *English, supra note 44, at 122.*
62. *Id. at 17.*
63. *See id. at 31-32.*
Benthamite philosopher who had taught at New York University.64 Tappan established the law department of the University in 1859 and selected Cooley to teach.65 Cooley, alone among the three teachers appointed, moved to Ann Arbor,66 and it was he who provided its leadership for a quarter century.67

Cooley was a native of upstate New York,68 where he acquired the politics of barnburning advocated by Butler and Field.69 His schooling was limited to three years in a small academy in Attica70 and brief legal apprenticeships in Palmyra, New York and Adrian, Michigan, the town to which he migrated as a young man.71 His professional mentors were politicians and followers of Andrew Jackson. In Michigan, he transferred his allegiance to the Free Soil Party, a decision reflecting his keen opposition to the establishment of slavery in the Kansas Territory.72 He then followed Lincoln into the new Republican Party,73 from which he resigned in 1880 as a protest against the corruption of the Grant and Hayes administration.74

Cooley was a man of exceptional industry and ambition, very well read in English literature, history, and law.75 He had compiled the Michigan statutes and served as Reporter to the Supreme Court of the state.76 In 1865, Cooley was elected by a vote of the people to the Supreme Court of Michigan,77 a position he was to hold for two decades78 while continuing to serve as de facto dean of the law school.79

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64. Id. at 32-33.
65. Id. at 43.
67. James Campbell, the senior member of the founding faculty, was designated as a dean, but he never performed administrative duties. From the beginning, it was Cooley who represented the school to the Regents and to the students and it was he who received additional pay comparable to the bonus provided the dean of the medical school. See id. Cooley resigned as dean in 1884. Id. at 39.
69. See id.
70. Id. at 8-9.
71. Id. at 27.
72. See id. at 48, 66-67.
73. Id. at 66. His heroic view of Lincoln is set forth in THOMAS M. COOLEY, WASHINGTON: HIS CHARACTER AND THE LESSONS TO BE DRAWN FROM IT 5-6 (Ann Arbor, 1875).
75. JONES, supra note 68, at 9-10.
76. Id. at 67.
77. Id. at 67-68.
78. Id. at 167.
79. BROWN, supra note 66, at 36.
In 1868, Cooley published his *Constitutional Limitations*, which would prove to be the most influential, and arguably the best, American law book published in the second half of the nineteenth century. He would continue to write prodigiously and was recognized as the most substantial legal intellect of his time, with the possible exception of Oliver Wendell Holmes, Jr. He would fittingly conclude his career as founding chairman of the Interstate Commerce Commission, the regulator of the country’s interstate railroads and sometime protector of the interests of American farmers; in that role, he would establish methods of regulation later employed by other important federal regulatory agencies, and sometimes cited as a model of regulation.

As a writer on the Constitution, Cooley advocated self-restraint by both the judiciary and legislative bodies. True to his Jacksonian faith, he mistrusted the ability of either judges or legislators to sustain an identity with the working poor whom he regarded as the vital backbone of American democracy. As a judge, he was generally restrained in the exercise of power. He was especially prone to defer to the role of juries. His opinions, however, were widely heralded for their intellectual force and, on occasion, for their Jacksonian positions. His most celebrated decision was one holding that, under Michigan law, a town could not apply tax revenues to repay monies borrowed to

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81. Judge Cooley was responsible for the first five of the eight editions of this work, which was appropriately hailed as the “chiepest law book of [his] generation.” Harry B. Hutchins, *Thomas McIntyre Cooley, in 7 GREAT AMERICAN LAWYERS* 429, 479 (William D. Lewis ed., 1909). His other works included *A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS* (Chicago, Callaghan & Co. 1879); *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* (Chicago, Callaghan & Co. 1879); and *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* (Boston, Little, Brown, & Co. 1880). He also prepared new editions of earlier works by Blackstone. Hutchins, *supra*, at 479.

82. For a contrast of their origins, see *JONES, supra* note 68, at 69-71. Holmes, then unpublished, wrote Cooley shortly before publication of Holmes’ edition of the Kent treatise: “When the book comes out I shall hope to win the approval of one who has rendered such distinguished service to the law as the author of Const. Limitations.” *JONES, supra* note 68, at 139 n.48. See also his enthusiastic review of the second edition of *Constitutional Limitations* in 6 Am. L. Rev. 141-42 (1871).

83. *JONES supra* note 68, at 292.


85. *Id.* at 138 (citing COOLEY, *supra* note 80, at iv).

subsidize the construction of a railroad owned by a private corporation. 87

Jacksonian premises were manifested not only in Cooley’s lectures, but also in the structure of the Michigan program. No tuition was charged for Michigan residents, and only a modest one for the many students who came from other states. 88 Admission requirements were extremely modest—essentially, one was required to be eighteen years old and literate to study law at Michigan. 89 No racial discrimination was practiced 90 and, after 1869, no gender discrimination. 91 Students were required to attend ten lectures a week 92 for six months 93 and to sit for an “approved examination.” 94 Moot courts were required 95 and each graduate was also required to write a dissertation of at least “forty folios in length, on some legal subject selected by himself.” 96 It is not clear that the latter requirement was actually enforced, but some such papers were in fact written. 97 Few students remained the full two years; it was possible to attend all the lectures in a single term, and there was little benefit to be gained by completing the degree requirements. 98 To assist those who did not attend all the lectures and recitations, Cooley edited Blackstone to strip away the encrustation of nonessential notes written by previous editors and to add some essential contemporary American learning. 99 His edition preserved for another decade or two the tradition of becoming a lawyer by reading a book.

How can we explain this great academic lawyer’s indifference to academic standards? Surely the explanation lies in Cooley’s political faith and jurisprudence. He, like most of his predecessors in American

88. Brown, supra note 66, at 399.
89. Id. at 269.
91. A brief period of resistance was motivated by the president’s concern for the chastity of female students entrusted to his care. Id. at 235-36.
92. Brown, supra note 66, at 741.
93. Peckham, supra note 61, at 43.
94. Brown, supra note 66, at 740.
95. Id. at 191.
96. Id. at 189.
97. Id.
98. This was also the practice at Harvard, Columbia, and elsewhere. Examinations were first administered at Harvard in 1872 and were avoided by most students. See 2 Charles Warren, History of the Harvard Law School and of Early Legal Conditions in America 382 (Leonard W. Levy ed., Da Capo Press 1970) (1908).
law teaching, understood and valued the political role of American law and American lawyers.  He was, moreover, devoted to the values of the Declaration of Independence and believed that a healthy republic had to be inclusive in its politics. Therefore, given the political role of the bar, it was, in his view, important that anyone desiring legal knowledge or entry into that political role should be allowed. Moreover, Cooley agreed with Cicero that “the fruits of speculative genius in government are of little value.” Law, he held, was “untrustworthy when it expresses something different from the common thoughts of men.”

Perhaps because of the practice of open admissions, Cooley’s law students were recognized as the crudest, rowdiest students in Ann Arbor. Many, like Clarence Darrow, drifted in for a term or less and then drifted out. Many of Cooley’s students, despite or on account of their rustic beginnings, became successful politicians and members of the bench. Scores went to Congress, many of them as Senators. Some were governors. Their number even included a suffragist or two. Dozens, like Cooley, sat on state supreme courts. Two later sat on the Supreme Court of the United States. Many lawyers repeatedly urged Cooley’s appointment to that Court, but his political independence made that impossible.

Cooley has not been treated kindly by the twentieth century. One reason was his disinclination to support the movement developing in the 1870s to elevate academic standards in professional education in order to make law a more exclusive profession. Cooley was honored by

100. See Jones, supra note 68, at 207.
101. Id. at 47.
102. See id. at 46, 202-03.
103. Thomas M. Cooley, Sources of Inspiration in Legal Pursuits, 9 W. Jurist 515, 520-21 (1875).
104. A Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 95 (Cambridge, John Wilson & Son 1887).
105. Jones, supra note 68, at 125.
106. Hutchins, supra note 81, at 449.
107. In 1977, I collected a complete list of the considerable number of Michigan alumni listed in Who Was Who, but alas, the list was accidentally destroyed.
108. William Rufus Day of Ohio attended lectures in 1871-72 and served on the Court from 1903 to 1923. George Sutherland of Utah attended lectures in 1882-83 and served on the Court from 1922 to 1938.
110. See id. at 375.
111. See id. at 46, 202-03. The other reason was that his work was often cited by courts striking down labor legislation. Id. at 157.
Harvard, but he did not follow the leadership of its President Eliot and Dean Langdell in making university law study more difficult and more expensive. Late in his life, he was elected President of the American Bar Association, but he did not share in its efforts to elevate academic standards. Because he did not share in the prevailing ambitions of both the legal profession and the universities of this century, those who came later have seldom invoked his name to praise it.

Yet it was surely Cooley’s Michigan that was foremost in the minds of those who established the University of Kansas Law School in 1878, just two decades after Cooley’s beginning in Ann Arbor. In that year, Cooley was at the zenith of his epic career. In its earliest years, if Kansas was competing for law students with any other academic institution, it would have been with his law department in Ann Arbor. It is therefore unsurprising that the person selected to found the law school at Kansas should have been one who shared the politics and the educational aims of Cooley.

"Uncle Jimmy's" Law School

James Woods Green, like Cooley, was born and raised in upstate New York in a community of Barnburners. He was eighteen years junior to Cooley. Unlike Cooley, he was well-educated, having attended Phillips Exeter Academy and having graduated from Williams College in 1866. He was therefore literate in Latin and Greek.

Although resembling Yale in its classical curriculum, Williams College was not necessarily a mere bastion of privilege in the nineteenth century. It was the college of David Dudley Field, the lion of the New York bar, and his brother, Stephen Johnson Field. The younger Field, Stephen, had gone to California as a Forty-Niner,

112. See id. at 236. Cooley’s Harvard commencement address drew a response fifteen years later from Holmes, who was in attendance. Oliver W. Holmes, Address of Chief Justice Holmes at the Dedication of the Northwestern University Law School Building. Chicago, October 20, 1902, in COLLECTED LEGAL PAPERS 272, 276-77 (1920).
113. JONES, supra note 68, at 368.
114. See id. at 375.
115. J.W. Green, The History of the Law School, 12 KAN. LAW. 6, 6 (1905).
116. See JONES, supra note 68, at 125.
117. Wilson, supra note 54, at xii.
118. Id.
120. Id. at 7-8.
secured election to the Supreme Court of that state,\textsuperscript{121} and been appointed to the Supreme Court of the United States by President Lincoln,\textsuperscript{122} where he sat at the time of Green's attendance at Williams. The two Fields cast a large shadow that must have been very visible in Williamstown.\textsuperscript{123} An additional influence on the Williams community was three generations of Sedgwicks, two of whom were also leading lawyers and Barnburners.\textsuperscript{124} Stephen Field, while a student at Williams,\textsuperscript{125} had served as a research assistant to the second Theodore Sedgwick, who worked nearby. It is not unlikely that as a Williams student, Green acquired some of the younger Sedgwicks' Populist political theory and the politics of the Field brothers.\textsuperscript{126}

Green trained as an apprentice with an upstate New York lawyer before migrating to Kansas.\textsuperscript{127} He was practicing in Lawrence when he was asked by Regent Ingalls, the chairman of the committee to establish a law department, if he might be interested in the leadership role.\textsuperscript{128}

\textsuperscript{121} Id. at 29-30.
\textsuperscript{122} Id. at 30.
\textsuperscript{123} David Dudley Field had in fact been expelled for his disorderly conduct as a student, an event not rare in antebellum times. His legal career was also checkered with misdeeds. See Frederick C. Hicks, David Dudley Field, in 6 DICTIONARY OF AMERICAN BIOGRAPHY 360, 361 (Allen Johnson & Dumas Malone eds., 1931).
\textsuperscript{124} The first Theodore Sedgwick practiced law in Pittsfield, Massachusetts in the 18th century. He sat on the Supreme Judicial Court of Massachusetts and was a founding trustee of Williams College. He was a Federalist, but represented fugitive and former slaves as early as 1787. Zechariah Chafee Jr., Theodore Sedgwick, in 15 DICTIONARY OF AMERICAN BIOGRAPHY 549, 550 (Allen Johnson & Dumas Malone eds., 1935). His son attended Yale and practiced law in Albany, but returned to Pittsfield to write PUBLIC AND PRIVATE ECONOMY (3 pts. New York, Harper & Bros. 1836-39), a work acclaimed by Jacksonians as perhaps the best expression of their dogma. Jessica H. Bridenbaugh, Theodore Sedgwick, in 16 DICTIONARY OF AMERICAN BIOGRAPHY 551, 551 (Allen Johnson & Dumas Malone eds., 1935). The grandson attended Columbia and practiced law in New York City. He was active in politics with David Dudley Field, notably in the Constitutional Convention of 1846, which abolished the apprenticeship requirements for admission to the bar. He left the practice to return to Massachusetts to write on law and politics. Among his books were A TREATISE ON THE MEASURE OF DAMAGES; OR, AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF PECUNIARY COMPENSATION AWARDED BY COURTS OF JUSTICE (6th ed. New York, Baker, Voorhis & Co. 1874) (1847) and A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW (New York, John S. Voorhis 1857). Earl L.W. Heck, Theodore Sedgwick, in 15 DICTIONARY OF AMERICAN BIOGRAPHY 551, 552 (Allen Johnson & Dumas Malone eds., 1935).
\textsuperscript{125} Carl B. Swisher, Stephen J. Field, Craftsman of the Law 16 (1930). David Dudley Field was also an apprentice in the New York law office of Henry Dwight Sedgwick. Hicks, supra note 123, at 360. This Sedgwick was a brother of the second Theodore and a Williams graduate. He was an early advocate of radical judicial law reform. See Perry Miller, THE LEGAL MIND IN AMERICA FROM INDEPENDENCE TO THE CIVIL WAR 135-46 (1962).
\textsuperscript{126} See Wilson, supra note 54, at xiv.
\textsuperscript{127} See id. at xii.
\textsuperscript{128} Griffin, supra note 1, at 133.
Perhaps it was coincidence that Ingalls was also an alumnus of Williams and knew Green from their time together at that college. It probably did not hurt that Green was the son-in-law of Judge Stephens, the leading advocate for establishing a law department, and thus also the brother-in-law of Kate Stephens who had just commenced service to the University as a professor of Greek. Green quickly accepted the tendered appointment and taught law in Lawrence for forty years.

Like Cooley, Green resisted the imposition of admission standards. As Michael Davis stated, "his soul shuddered at the idea of keeping students from his school because of what they had not done before they came." Green himself argued that "[t]his School is the people's school. It is supported by their money, and they have a right to its advantages." Admission was long open to all Kansas high school graduates and anyone else who could pass a modest literacy test. Such rigor as there was in his program lay in the recitations and moot courts. The recitations were based on the reading of textbooks, a teaching method generally described as catechetical. Academic failure was almost unknown, but the dropout rate was, like Michigan's, substantial.

The open admissions policy in some measure limited the curriculum, but less than we might suppose. Roscoe Pound, who was for a time Green's counterpart at Nebraska, took little account of his

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130. *Id.*
131. Griffin, *supra* note 1, at 56. Kate Stephens was dismissed seven years later. *Id.* at 96. After the death of Green, she published a stringent attack on Green. KATE STEPHENS, TRUTHS BACK OF THE UNCLE JIMMY MYTH IN A STATE UNIVERSITY OF THE MIDDLE WEST (1924).
135. Wilson, *supra* note 54, at xiv (citation omitted).
136. *Id.* at xix.
137. *Id.*
138. *Id.*
139. Examinations were administered in the 1880s, but it is not clear that anyone failed them. *Id.* Green made the claim that he taught so that all students could pass the examinations. Kelly, *supra* note 129, at 113. Grading came to Kansas in 1921, after the death of Green. See *Id.* at 115-16.
140. See Wilson, *supra* note 54, at xx.
141. See Griffin, *supra* note 1, at 286.
142. DAVID WIGDOR, ROSCOE POUND, PHILOSOPHER OF LAW 103-04 (1974).
students' similarly limited preparations and required them to master Roman law and jurisprudence.\textsuperscript{143} We are disposed, with writer Arthur Sutherland, to "stand in awe" of the Nebraska high school graduates who met such demands by their teacher.\textsuperscript{144} Equally severe demands were not made at Michigan or Kansas, where law study was less demanding than the standard undergraduate curriculum.\textsuperscript{145} It is not reported whether Kansas law students were as rowdy as those at Michigan, but the law school was a haven for football players looking for an easy academic program.\textsuperscript{146}

In 1884, Dean Green was the Populist-Democratic candidate for election to the Supreme Court of Kansas. Had he been elected, he would have achieved the same role in Kansas that Cooley achieved in Michigan.\textsuperscript{147} But, he was not elected. Indeed, in 1885, Cooley was defeated for re-election despite the almost universal esteem conferred on his judicial work.\textsuperscript{148} Despite his defeat, Cooley continued to defend democratic elections as the proper method for selection of the judiciary.\textsuperscript{149}

Meanwhile, in 1883, Henry Wade Rogers became Michigan's first full-time professor of law.\textsuperscript{150} In 1885, Jimmy Green, after failing of election to the court, went to the legislature and persuaded them to appropriate funds for a salary for a full-time law professor.\textsuperscript{151} He then secured the position for himself.\textsuperscript{152} He was thereafter assisted in his teaching by a young law graduate who later became the attorney for Douglas County.\textsuperscript{153} Green's Kansas followed Michigan in its development in other respects as well. In 1895, Michigan lengthened its course from two to three years.\textsuperscript{154} The very next year, Kansas lengthened its course to three years.\textsuperscript{155} In 1910, Michigan announced that after 1912 no student would be admitted who had not completed

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\textsuperscript{143} \textit{Id.} at 109.
\textsuperscript{145} See GRIFFIN, supra note 1, at 285-87.
\textsuperscript{146} See Davis, supra note 134, at 9.
\textsuperscript{147} JONES, supra note 68, at 122.
\textsuperscript{148} Cooley was defeated in a "Democratic deluge." He was opposed by Republican newspapers because of his support of Cleveland, and for personal reasons. \textit{Id.} at 280 n.107.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} PECKHAM, supra note 61, at 83.
\textsuperscript{151} GRIFFIN, supra note 1, at 133-34.
\textsuperscript{152} \textit{Id.} at 134. Green did not, however, give up his part-time practice until twice ordered to do so by the Regents and Chancellor. \textit{Id.} at 285.
\textsuperscript{153} \textit{Id.} at 287.
\textsuperscript{154} BROWN, supra note 66, at 276. Harry Burns Hutchins was by then the Michigan dean. \textit{Id.}
\textsuperscript{155} GRIFFIN, supra note 1, at 288.
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one year of college. In 1911, Green yielded to the urging of the Chancellor, and agreed to require a year of college work as a condition of admission to his law school. The actual change to the requirement of one year of college as a prerequisite to the study of law occurred simultaneously at Kansas and Michigan.

The dean of the Michigan law school explained its elevation of admission requirements as a market response. President Eliot of Harvard had recognized that, at least in America, the demand for an academic credential could be increased by making it more difficult and expensive to obtain. On this principle, he challenged Dean Langdell and others at Harvard to make their programs longer and more rigorous. It worked, with the result that Harvard passed Michigan in the number of law students it was able to attract. Indeed, by having lower standards, Michigan was losing its market appeal, especially to the more ambitious students.

Philip Kissam is among the very few who have noticed how powerful is the influence of law students on their teachers. They have the power of any audience over its performers; few who teach do not seek the approval of their students. Moreover, students vote with their feet. In our culture, at least since 1870, students have generally come to universities in search of valuable competence or a credential that will set them apart from and perhaps a little above ordinary folks. Those teachers and institutions who best provide competence are rewarded;

156. BROWN, supra note 66, at 280.
158. See BROWN, supra note 66, at 281-82.
159. In 1875, when the acceptance of Langdell’s reforms was still in question, Eliot explained an operative premise from which Langdell was presumably proceeding:

An institution which has any legal prestige and power, will make a money profit by raising its standard, and that either at once or in a very short time. Its demand for greater attainments on the part of its students will be quickly responded to, and this improved class of students will in a marvellously short time so increase the reputation and influence of the institution as to make its privileges and its rewards more valued and more valuable.

2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 397 (1908). The preoccupation of Eliot with the status effects of academic rigor was not exceptional. See THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN 98-123 (1957).

160. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, ANNUAL REVIEW OF LEGAL EDUCATION 1-12 (1918). Michigan had over 400 law students in 1870.

161. Philip C. Kissam, The Decline of Law School Professionalism, 134 U. PA. L. REV. 251, 276-80 (1986). Kissam writes of the pressures to conform to student expectations as if they were new. It is true that these expectations have been enhanced by the general decline in authority of teachers and other hierarchs in the culture and by the use of student evaluations of teaching, but few persons standing in front of an audience were indifferent to the expectations of students to acquire saleable knowledge.
those who seem to have a different agenda are in some measure deterred. In this respect, the elitism of professional education is internally driven. Those seeking to teach elite students are required to practice a measure of exclusivity. Thus, even if the bar associations had never organized, the market demand for professional status nevertheless would have caused much of the elevation of standards that has occurred in the last century.

Further following the trend of the early twentieth century, only three years after requiring one year of college work, Michigan moved to require two years of study in college.\textsuperscript{162} This change by Michigan was not matched by Kansas until after Green’s death in 1919.\textsuperscript{163} It remained for Dean Herschel Arant in the 1920s to develop serious academic standards for the Kansas law school. During Arant’s seven-year deanship, the number of Kansas law students was cut nearly in half\textsuperscript{164} while the number of college students and graduates in Kansas was steadily rising.\textsuperscript{165}

In 1894, when the Populist editors were berating the University of Kansas for its pretensions of class, the trend in higher education was fully evident and it was running against them and against Jimmy Green. The trend was by no means limited to law. In all vocations, especially in those claiming the elevated status of professions, there was a rapidly rising demand for academic credentials\textsuperscript{166} that were becoming, as President Eliot had prescribed, increasingly burdensome to obtain and increasingly valuable as entries to gainful work. This movement had begun about 1870 and by 1894, higher education was clearly emerging as a booming industry.\textsuperscript{167} There was occasion for cynicism and men such as Thorstein Veblen expressed it;\textsuperscript{168} they accused the “captains of erudition”\textsuperscript{169} of turning colleges into factories for the making of credentials—credentials that could be likened to paste jewelry. As the Populists of Kansas so clearly saw, there was very little in this development to benefit those “yahoos” who grew corn in border counties and hauled it forty miles to sell for fifteen cents a bushel.\textsuperscript{170}

“Uncle Jimmy” Green was their kind of guy. He stood by the gate to the legal profession and held it open. So long as he was the

\textsuperscript{162} BROWN, supra note 66, at 283.
\textsuperscript{163} GRIFFIN, supra note 1, at 610.
\textsuperscript{164} Id. at 611.
\textsuperscript{165} Id. at 617.
\textsuperscript{166} See, e.g., id. at 609-10 (discussing the medical profession).
\textsuperscript{167} RUDOLPH, supra note 19, at 329-54; VESEY, supra note 14, at 173-79.
\textsuperscript{168} See generally VEBLEN, supra note 159.
\textsuperscript{169} Id. at 62.
\textsuperscript{170} GRIFFIN, supra note 1, at 89 (citation omitted).
gatekeeper, Kansas could say to the keeper of the corn patch that even yahoos, whether they be male or female, black or white, could choose to be lawyers if they would.

Of course Green, like Cooley, was not esteemed by the captains of erudition or by those seeking to redeem the elite status of the legal profession that had been substantially wrecked by the Jacksonians. Moreover, despite the vast superiority of his education, Green was no match for the energetic intellect of Cooley. While there is no evidence that Green was anti-intellectual, he was not in the least a scholar. Hence, he did not command the professional esteem of his contemporaries that Cooley did. It is therefore unsurprising that the university leadership in this century did not regard Green as much of an asset; indeed, some may have come to feel embarrassed on his account.

Nevertheless, Green possessed other qualities that enabled him to sustain his long and distinctive career. He entered the lives as well as the minds of his students, and thereby won support not only for himself but also for his law school. His alumni filled the bar of Kansas with men and women having a deep affection for him and for the institution that he had founded. That achievement is not to be belittled. In the end, however, it made no difference for the fate of Populist legal education. Cooley and Green were very different men who shared a common fate; they both supported the losing side and paid the usual price for such defeat.

Some Virtues of Populism

Winners write history, and few historians of law or of higher education have sympathized with the resistance of Cooley and Green to the elevation of standards. Richard Abel and Jerold Auerbach are two who have attacked the leaders of the American Bar Association and others striving to elevate standards as elitists and even racists. They were careful, however, not to identify themselves with nineteenth century Populists. Cooley scarcely rated mention in Robert Stevens'

171. Wilson, supra note 54, at xii.
172. See Griffin, supra note 1, at 610.
174. Griffin, supra note 1, at 284-85.
175. Id. at 284.
176. Kelly, supra note 129, at 114.
authoritative history of the modern law school, although Stevens, too, manifests skepticism about the desirability of the outcome of the struggle that Cooley and Green and other Jacksonians lost. Similarly, Morton Horowitz, in his admirable intellectual history of the profession in the nine decades following 1870, makes no reference to Populism and only glancing reference to Cooley even though in the 1880s Cooley was the towering intellect of the law.

A quarter century ago, I was invited to chair a study of the law school curriculum to be conducted under the auspices of the Association of American Law Schools. Our charge was to rethink the curriculum speculatively and to raise questions about what legal educators were doing to their students. That study was published in 1971 and is now long and wisely forgotten. An effort was made in that committee document to rethink the structure of the law school program from a perspective not far different from that of Cooley and Green. We tried to think about law school programs from a perspective external to law schools or the legal profession. We tried to suggest what a law school might look like if it took the interests of the citizenry at large as its sovereign aim.

Our report in substance suggested that Cooley and Green were not so terribly wrong that their views deserved to be ignored. There is no need here to rehearse all the arguments for higher professional standards. Those arguments have prevailed and our contemporaries are all imbued with a belief in high standards in almost every human activity. I do, however, remember a Senator from Nebraska who tried to defend the right of the mediocre to have one of their number appointed to the Supreme Court of the United States. The name of Roman Hruska is remembered for very little else than that seemingly preposterous proposition. Although I do not mean to join Senator Hruska in infamy by proclaiming the virtues of low standards, I do mean to contend that the long-term evaluation of standards in this

178. Although Cooley's name does not appear in the index, he is mentioned in one footnote. Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 86 n.23 (1982).
179. See id. at 7.
182. Id. at 96.
183. See id. at 99.
century has at times, and perhaps much of the time, elevated the interests of the members of the legal profession and of law students over the sometimes competing interests of the public we serve. Whatever sins Populists such as Cooley and Green may have committed, that is not one of them.

I do not join the harsher critics of those bar leaders who strained to raise professional standards. There was elitism, and, yes, likely a touch of racism, in what those leaders did, but we ought not "judge Moses by the standards of Sparta."185 Everywhere in America, in all professions, standards were being elevated.186 It is not imaginable that, in this culture, law could have been left to those least educated. Those trying to raise standards were therefore doing what had to be done. Today, no one, save perhaps an anachronistic follower of Chairman Mao, could seriously contend for a return to the days of 1870 when judges granted law licenses to virtually all who asked.

Moreover, I credit the leadership of the legal profession with some self-restraint. Throughout the century of rising standards, there have always been those who sounded caution. An elaborate and earnest argument against high minimum standards for entry to the bar was advanced in 1921 in the name of the Carnegie Foundation.187 In sum, the argument was that law is part of the political system that in a democracy must be as accessible as possible to the people who govern themselves. That 1921 Carnegie Report expressed the ideology of Cooley and Green, as well as the premises of the AALS 1971 report mentioned above, which celebrated the fiftieth anniversary of the 1921 Carnegie Report. Perhaps as a result of such utterances, law has not followed medicine to require four years of postgraduate study plus at least two more of apprenticeship, but has settled for a more modest commitment of time.

Many of the problems the law and those it serves face today would not be as worrisome as they are had it been possible for America to pay greater heed to the wisdom of Cooley, Green, and the 1921 Carnegie Report. Those of us who benefit from the present arrangement do so at some cost to others. If we cannot or will not embrace the Populist program of deregulation, then at least we ought to acknowledge that we have unliquidated debts to pay to those corn-raising yahoos who pay the price of our advantage. That is the burden of this paper.

187. See generally Alfred Z. Reed, Training for the Public Profession of the Law (1921).
I list six problems that might not have arisen, at least in their present form, had Cooley and Green had their way. All are long-term problems that have appeared in this century and are interrelated. The list includes: (1) the growing disjunction between legal education and scholarship and the realities of politics; (2) the seeming decline in the practical utility of academic training in law to which the movement for clinical legal education is a response; (3) the rising real cost of entry into the legal profession; (4) the decline in social mobility reflected in the demography of the legal profession; (5) the rising real cost of legal services; and (6) the rising levels of dissatisfaction of young law graduates with their employment. Perhaps if the Populists had prevailed, some of these problems would have arisen anyway as a result of a different mix of causes or perhaps we would have other problems more serious than these. I will not attempt to consider those possibilities here. Hence, my defense of legal Populism is but a partial defense.

The first problem to be noted is the academization of legal scholarship. This development traces its roots to the emergence of the legal academy as a distinct profession apart from the judiciary and the legal profession. That development was evident no later than the time of the founding of the Association of American Law Schools in 1900. Jimmy Green had himself participated in the development by creating a full-time position for himself in 1885. A more important model was James Barr Ames who was appointed in 1873 to a full-time position at Harvard immediately upon graduation and rose to the deanship without ever devoting a day of his life to a nonacademic pursuit. By 1900, the number of full-time law teachers was substantial, and some, like Ames, lacked sustained contact with what President Eliot dubbed, perhaps derisively, "real life." Since that time, the legal academy has been drifting into the academic profession and away from the legal profession, amidst growing anxiety about the mission of law teaching. As academicians, we have tended to substitute elitism and indifference to the "real world" for the values of pragmatism and commitment that were the central focus of antebellum law teachers.

188. Griffin, supra note 1, at 133-34.
189. Sutherland, supra note 144, at 184, 204.
192. See generally Carrington, supra note 36.
Like most of the problems to which I advert, there are positive benefits to the drift of law teachers toward the academic profession.\textsuperscript{193} For one, it has served to break down the empty formalism that Dean Langdell and some of his adherents sought to establish in the late nineteenth century as a scientific legal method.\textsuperscript{194} Cooley himself would have applauded this consequence of academicization. He was a published poet\textsuperscript{195} and an accomplished historian\textsuperscript{196} who concluded his academic career as a professor of history.\textsuperscript{197} He brought a wide range of intellectual interests to bear during the long period of his involvement in public affairs.\textsuperscript{198} He was thus no advocate of the formalism divorcing law from politics\textsuperscript{199} but admired the broad-ranging intellectualism of Francis Lieber.\textsuperscript{200} Yet, while not an intellectual isolationist, Cooley chose to teach law as a fundamentally simple political tool that his students would be able to use directly, according to their own lights, and subject to the limits of their quite disparate intellectual depths and attainments. No doubt he hoped that his students would, like himself, attain learning both broad and deep.

In contrast to Cooley’s teaching, however, some of what now passes for legal scholarship is rarified academic discourse that is addressed to a small audience of academic readers having little involvement in the immediate cares of the world.\textsuperscript{201} That disjunction is almost certainly reflected as well in law school teaching. This is the unstated implication of the 1992 report to the American Bar Association prepared by The Task Force on Law Schools and the Profession—\textit{Narrowing the Gap}.\textsuperscript{202} The point has been made more

\textsuperscript{193} George L. Priest, \textit{The Increasing Division Between Legal Practice and Legal Education}, 37 Buff. L. Rev. 681, 683 (1988-89).
\textsuperscript{195} In his youth, his poetry was published in the \textit{Attica Democrat}. Hutchins, \textit{supra} note 81, at 435.
\textsuperscript{197} Jones, \textit{supra} note 68, at 248.
\textsuperscript{198} See \textit{id.} at 69.
\textsuperscript{199} In fact, not many were, especially in the West. See, e.g., Paul D. Carrington, \textit{The Missionary Diocese of Chicago}, 44 J. Legal Educ. (forthcoming 1994).
\textsuperscript{200} Jones, \textit{supra} note 68, at 104.
\textsuperscript{202} \textit{Legal Education and Professional Development—An Educational Continuum}, 1992 A.B.A. Sec. of Legal Educ. and Admissions to the Bar [hereinafter \textit{Legal Education and Professional Development}]. The Report, known as the MacCrate Report for its chairman, kindly approves the present efforts of law schools, but calls for many new programs without suggesting
bluntly by Harry Edwards, a United States Circuit Judge, but for many years a law teacher.\textsuperscript{203} His 1992 article\textsuperscript{204} has stirred a strong response generally validating his concern for the widening gulf between the academy and the realities of law and politics.\textsuperscript{205}

There is no need here to elaborate my own views on this concern, which are complex, indecisive and elsewhere published.\textsuperscript{206} My point here is limited to the observation that the concern is one that could scarcely have arisen in the world of Thomas Cooley and Jimmy Green. A Populist law school would not be integrated fully or comfortably with the intellectually ambitious university of the twentieth century. Populist law teachers would, as an article of faith, remain too close to the public they serve to take their subject to the high levels of abstraction favored by the academic ambience.

The academization of law teachers is related to the second problem noted, the perceived need for clinical legal education. Populist law teachers such as Green and Cooley invested much of their own energy in moot courts. At Michigan, moot courts early came to include moot trial work.\textsuperscript{207} Indeed, at William and Mary and Transylvania, students were required to participate in moot legislative work.\textsuperscript{208} Nevertheless, the forms of contemporary clinical education are alien to Populist institutions, not because of their aims, but because of their cost in time and treasure. There was less need for such programs for Cooley’s students; they were expecting to acquire worldly experience on their own. Thorough-going Populists would have resisted incurring the cost of close personal supervision in controlled clinical settings for the same reasons that they successfully opposed and indeed demolished the systems of apprenticeship existing when Jacksonians gained power. They would have seen the use of the term “clinical” as a veiled effort to make the legal profession more like the medical profession, a


\textsuperscript{203} Edwards, \textit{supra} note 191, at 34.

\textsuperscript{204} Id.


\textsuperscript{207} Trial practice instruction was introduced between the years of 1890 and 1891. Brown, \textit{supra} note 66, at 232-33.

\textsuperscript{208} For an account, see Imogene E. Brown, \textit{American Aristides: A Biography of George Wythe} 202-03 (1981); John D. Wright, Jr., \textit{Transylvania: Tutor to the West} 90 (1975). For Jefferson’s enthusiastic comment regarding moot courts and assemblies at William and Mary, see 3 \textit{The Papers of Thomas Jefferson} 507 (Julian P. Boyd ed., 1951) (letter from Thomas Jefferson to James Madison, July 26, 1780).
profession for which good Populists would have reserved their utmost disesteem as a body of shameless exploiters of the common folk.

Both the academization of law faculties and curricula and the emergence of clinical legal education are associated with the third problem to which I referred, the high cost of entry into the legal profession. The real cost of entry seems to have been steadily rising throughout this century. In the times of true Populists, the cost of becoming a lawyer was the price of a book and the time it took to read it. At the beginning of this century, the median number of years of academic study by American lawyers was zero. That is to say, more than half of the lawyers had never seen the inside of a college. As this number rose from zero to seven over a period of about seventy years, the amount of income foregone to pursue studies required of credentialed lawyers grew rapidly and steadily to approximate five years of earnings. This number should be somewhat discounted in light of the simultaneous substantial increase in life expectancy that extended the expected period of earning. The foregone income, however, has to be foregone at the outset of the attorney’s career in the hope that enlarged earnings will result later and is thus an entry cost.

The increased pricing of entry into the legal profession has been a direct consequence of elevating standards. The high price of entry has been a substantial and growing impediment to the acquisition of legal training, especially to those seeking such training for the purpose of participation in public affairs, and who often cannot foresee substantial enhancement of earnings resulting from the training. One can lessen the cost by attending a part-time school, but the consequence of doing so is to consign oneself to a subordinate status within the legal profession.

In addition, especially in the second half of the century, tuitions have risen precipitously, even in public institutions. This rise has multiple

210. See REED, supra note 187, at 411.
211. Full-time students are out of the employment market for 63 months.
215. See id. at 415.
216. In 1992, the annual fees of Michigan’s J.D. program were $9,124 for residents and $17,098 for nonresidents. See 21 U. MICH. BULL. NO. 4, 77 (1991).
causes, but the elevation of standards has been a significant one.²¹⁷ Both academization and the movement to clinical legal education have put pressure on law school teaching ratios, and have thus driven up the real cost of the training provided.²¹⁸ Full-time teachers are generally more expensive than part-time ones. Small classes, seminars and intimate clinical training are much more expensive than lectures (such as Cooley’s or Green’s) that can be provided to audiences of almost any size.²¹⁹

The continued increase in the cost of entry into the legal profession contributes in turn to adverse social consequences that are the fourth and fifth of the problems I noted. The fourth is the demography of the profession. Perhaps the connection is obvious, but let me describe it in economic terms. The elevation of standards made all American lawyers human capitalists.²²⁰ To become a lawyer, one is required to make an investment in one’s self by forbearing income and paying tuition. To make a sizeable economic investment in one’s self requires personality traits that are not evenly distributed among citizens. Those raised in families that are accustomed to investing are more prone to be human capitalists than those who are raised in families with subsistence incomes.²²¹

To diminish the exclusionary effects of high entry cost, the United States established the guaranteed student loan (GSL) program. It is, however, far from clear that the program works as it was intended. At least with respect to professional law schools, it seems to have added fuel to the fire. By enabling more students to pay more tuition, the loan programs have allowed law schools to better compete with each other through further improvements in teaching ratios, more elegant seminars and more clinical programs.²²² It seems likely that close study would confirm that the chief measurable effect of loan programs in law schools has been to enhance the tuition revenues of the schools.²²³ If this is correct, the GSL program fulfills the Populists’ worst fears about government programs—that their benefits will be gathered to the

²¹⁸. See PACKER & EHRICH, supra note 181, at 68-69.
²¹⁹. See John R. Kramer, Who Will Pay the Piper or Leave the Check on the Table for the Other Guy, 39 J. LEGAL EDUC. 655, 666 (1989).
²²⁰. The term “human capital” is Gary Becker’s. GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION I (1964).
²²¹. See id. at 79.
²²². See White, supra note 217, at 728-29.
²²³. See id. at 729.
bosoms of the wealthy and aristocratic, and will never reach the working class who are, or ought to be, the intended beneficiaries. 224

Moreover, it is not merely the offspring of the working class who are especially disadvantaged in their opportunities by high professional school tuition. Women who expect to bear children do not see themselves as likely to have a full quotient of income-earning years in order to provide a suitable return on their investment. 225 Both women and members of minorities who expect to be the objects of economic discrimination in the job market are also less likely to foresee a suitable return. Thus, the higher the entry cost, the fewer women and minorities will appear in the mix of entering law students.

To confirm the demographic effect of rising entry cost, one need only look at class pictures at schools like Michigan or Kansas. Throughout the nineteenth century, when Populist notions prevailed, there were steady numbers of minority and women graduates of such institutions. As academic standards rose during that time period and ever larger investments were required to gain entry into such schools, the flows diminished.

In 1865, the number of African-American lawyers was a small handful. In 1900, there were 728. 226 This reflected significant social change. This growth continued, but as professional standards were elevated, the rate of growth was sharply reduced. 227 In 1940, the number of male and female African-American lawyers was 1052. 228 As a percentage of the licensed bar, there was no increase in the intervening four decades. 229 Except in the South, there was little racial discrimination practiced by American law schools during that period. 230 That is a cheap claim to make, however, for the elevation of standards automatically relieved university law schools from the opportunity to help develop an African-American bar. Not only was an African-American bar not developed, but also underrepresented in the legal profession were persons of Asian or Hispanic origins and even of southern European origins. 231 In short, the elevation of standards substantially impaired social mobility in the legal profession. In law,

224. It has been suggested that this does, in fact, happen. See Marilyn V. Yarbrough, Minority Students and Debt: Limiting Limited Career Options, 39 J. LEGAL EDUC. 697, 701 (1989).
227. See id. at 6-7.
228. Id. at 635-36.
229. See id. at 624-33.
231. See Smith, supra note 226, at 637.
as in other fields, the rhetoric of universal opportunity lost its credibility for large elements of the population.

In 1965, in order to secure minority participation in the legal profession, law schools began to engage in affirmative action with respect to admissions and financial aid. That effort has succeeded in producing a respectable and growing number of African-American lawyers, but such programs have not been without costs. Affirmative action tends to isolate its beneficiaries and reinforce their sense of caste. That sense of isolation may be the driving force behind a resegregative impulse sometimes euphemistically described as multiculturalism. True racial integration in the legal profession would have come faster and with far less grief had we not elevated professional standards when we did. In a Populist world, there was no need for affirmative action and hence less cause for today's resegregation.

In 1870, there was a mere handful of women lawyers. By 1910, the number had reached 558. By 1940, it was 4,187, a healthy increase. Female participation in higher education in general was, however, growing more rapidly. Particularly in state universities west of the Alleghenies, such as Kansas and Michigan, there were about as many women as men. One reason that the numbers of women in law schools did not rise at the same pace is that the investment required was greater for law than for the newer and rapidly feminized professions of education, social work, nursing and librarianship. As far as we know, women were completely welcome in Jimmy Green's law school. Certainly, had Jimmy Green been the gatekeeper to the American legal profession, the number of women entering the profession would have been larger in 1940.

236. Smith, supra note 226, at 618.
237. Id. at 627.
238. Id. at 636.
239. See Rudoph, supra note 19, at 319.
240. In 1895, a writer in the Kansas Lawyer expressed disappointment that there were not more women entering the legal profession. See Kelly, supra note 130, at 122.
Women at last began entering the profession in large numbers in the 1970s, not only because they were given greater legal protection against discrimination, but also partly because by that time fewer planned to devote substantial time to child bearing and child care. This development diminished the effect of elevated standards as an impediment to female entry into the profession. The timing tends to confirm the likelihood that the increase in the number of years required to study law imposed in this century by those straining to elevate standards was a major obstacle to the feminization of the profession.

The fifth problem to which I referred is the rising cost of legal services. The rising cost of entry into the profession has likely contributed to that increase. The high cost to enter the profession has certainly led to an elevation in the income expectations of lawyers. In the times of true Populists, those expectations were very low. Joseph Baldwin reports of the "flush times" in Alabama when the lawyers were all incompetent, but their failures were redeemed by the reluctance of clients to pay for their services. Neither lawyer nor client could complain in that situation. Even as recently as 1960, students coming to law school seldom expected high earnings, at least not in their first decade of practice. As the realities of human capitalism have been recognized, the buyers of legal services have come to expect to pay fees sufficient to provide a return on the investment made by the attorney while in training.

I do not contend that low earnings for all lawyers would be a social good. If high income expectations impede the distribution of services, however, that is a social ill. The national Legal Aid movement is a creature of this century. The Legal Services Corporation and Neighborhood Legal Services programs are the product of President Johnson's War on Poverty and thus of recent decades. These are beneficial, indeed essential, remedies for that social ill. Unfortunately, lawyers working in those programs are underpaid relative to their

241. Carrington, supra note 230, at 1125 (citing AMERICAN BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1991, at 67 (1992)).

242. Baldwin, supra note 47.

243. For an account of urban lawyers in the late 50s, see Jerome E. Carlin, Lawyers on Their Own: A Study of Individual Practitioners in Chicago (1962).


245. For an early evaluation of the initial efforts of the corporation, see Comptroller General of the United States, Free Legal Services for the Poor (1978).
classmates, and so few in number that they are scarcely able to meet the needs of their clientele. They are also often underappreciated by their clients, who manifest a preference for "real lawyers" whose services they buy with their own money.\textsuperscript{246}

It is not only the working poor who are affected by the price of legal services. One motive behind the movement toward alternative methods of dispute resolution (ADR) is the reduction of legal costs. While other purposes may also be served by ADR,\textsuperscript{247} an aim is to reduce the amount of expensive lawyer time invested in the resolution of disputes,\textsuperscript{248} especially those routine matters that affect the interests of individual citizens. The high price of legal services has so impaired the ability of our courts to deal with legal problems of citizens that they have been driven into a private market.

Indeed, the ADR movement is concerned not only with the routine legal costs of ordinary citizens. Even multinational corporations are interested in ADR\textsuperscript{249} or any other means of reducing their legal costs. They claim, and it seems likely, that their legal costs are many multiples of those borne by their international competitors.\textsuperscript{250} As most American labor has been prodded to higher and higher levels of productivity, the savings to industrialists have been partly offset by generally diminishing productivity in the performance of legal services. It is at least possible that some industrial job losses are influenced by the high legal costs associated with manufacturing in America.\textsuperscript{251}

These secondary consequences of high legal costs are complex and it is not my purpose to analyze them fully. I observe only that this considerable range of possible consequences would be of no concern in the world of Jimmy Green and Thomas Cooley. In their time, there was little need for legal aid or legal services programs or ADR, in part because less elaborately trained lawyers were able to serve more people at less real cost.

The sixth and final problem I noted is the growing job dissatisfaction of young lawyers, and perhaps of their employers. Its existence is

\textsuperscript{246} See Paul D. Carrington, The Right to Zealous Counsel, 1979 Duke L.J. 1291, 1302 (citing S. BraKel, Judicial 127 (1974)).


\textsuperscript{248} See id. at 300.


\textsuperscript{250} See A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (1991).

\textsuperscript{251} See id.
confirmed not only by episodic comments, but also by the unprecedented mobility of young lawyers. I suggest that the problem may be related to the others noted. Persons making large investments to secure entry into a profession have higher expectations not only of income, but also of enjoyment, than do those who qualified merely by reading a couple of books. Moreover, those who pay the salaries or legal fees necessary to provide a suitable return on the investments of the human capitalists may have rising expectations about the utility and effectiveness of the services they are buying at a higher cost. The expectations of employers and clients result in steadily rising pressures on the novices entering the profession.

The fact that the capital investment is made with borrowed money intensifies the disappointment if the expectations are not fulfilled. To continue paying interest on a loan taken to secure a job that one does not like or was unable to hold must be even more dispiriting than paying one's credit card charges for last year's vacation. Worse, the need to repay loans compels behavior motivated by concern for economic outcomes. Unfortunately, many graduates seek and secure jobs that pay more and foreseeably give less gratification in order to repay loans. Worst of all, indebtedness diminishes professional independence and may pressure lawyers into performing professional misdeeds.

In response to the problem of debt burden on students, loan-forgiveness programs were instigated. These programs are designed to encourage students hoping to use their professional talents to serve public needs. As necessary as these programs may be, they are meager palliatives. Again, in the days of Thomas Cooley and Jimmy Green, there was no need for loan forgiveness because borrowing was

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254. See Stoyva & Evans, supra note 252, at 2255.


unnecessary. Populist lawyers performed unworthy services, but they were not pressed to do so by their obligations to creditors.

A Populist Vision for 1994

The six problems I have identified did not exist in the bucolic days of Green and Cooley. They seem to have arisen, at least in part, as a consequence of our elevated professional standards. I repeat my previous acknowledgment that the pressures to elevate standards were in large measure irresistible. Even the heartiest Populists would, if realistic, accept much of what has happened as inevitable. What may have worked for them in an agrarian culture could not have been preserved in an industrial or postindustrial one.

On the other hand, it seems likely that good Populists such as Green and Cooley would perceive that we have gone farther than necessary to maintain the dignity and financial security of those who do legal work. My guess is that Cooley and Green would say that three years of college is sufficient prelaw study. Cooley, the premier legal intellect of his generation, urged his students to read broadly and he was a stunning example of what can be achieved by that means.257 He would not, however, have conditioned the involvement of any citizen in politics or the administration of justice on doing all the reading he favored, much less on their spending a fourth year of college. He knew what the nineteenth century Lawrence editorialist knew, that many undergraduates will learn in their fourth year little of greater enduring worth than how to part their hair in the middle.258

Cooley and Green would recognize the first year of law study as having a powerful and positive effect on the ability of most who experience it to comprehend and participate usefully in the resolution of public issues.259 As they did in their own time, they would wish to make that experience available to as many as want it. To facilitate that access, they would conduct the program with a high teaching ratio and a very low tuition. To encourage the basic study of law, they would be likely to grant a bachelor of law degree to students completing three years of college and perhaps a full calendar year of law school.

257. JONES, supra note 68, at 70.
258. GRIFFIN, supra note 1, at 88 (quoting Editorial, CLOUD COUNTY KANSAN (Jamestown), Jan. 1, 1887).
Green and Cooley would expect persons with such basic legal education to perform useful legal services. These people would be expected to appear in civil courts to provide representation in low-stakes matters for modest fees. They would prosecute or defend in misdemeanor cases. They would counsel and represent citizens in matters involving a thousand bureaucracies. They would, in performing such services, gain experience and enhanced judgment. In this manner, they would qualify themselves to perform more intricate and demanding legal work.

Only after students had done these things would the Populist law school of today admit them to more advanced programs. Students returning to the Populist law school for advanced study would bring realistic expectations and better assessments of their own needs. Advanced education in law would likely vary in length according to the needs and ambitions of the students; such variability was envisioned by Thomas Jefferson when he planned the law program at the University of Virginia.\(^{260}\) For the most part, advanced education would take the form of on-the-job training accompanied by part-time or continuing education to minimize the cost of foregone income. Much advanced instruction would be provided by adjunct faculty, especially judges and others with experience in the performance of public duties who would serve for modest honoraria because they had other sources of income.

Even today, a truly Populist law school would have no admissions office because admissions would be open to all candidates meeting minimal qualifications. As a result, there would be no Law School Admissions Council. The Populist law school would also have no placement office because the legal services of its baccalaureate graduates would have too little value to command a market of interviewers. Its advanced students would not need a placement office because their studies would be selected in light of employment for which they had qualified by the excellence of their work as basic lawyers. The Populist law school would have no alumni office because the school would have too little pretense about it to arouse the sentiments of class affiliation that drive such offices.

If all or most of our law schools were cast in that Populist image, there would be little or no need for affirmative action, no need for guaranteed students loans, nor for loan forgiveness, legal aid, or alternative dispute resolution and little need to provide instruction requiring intensive deployment of full-time teachers.\(^{261}\) Graduates

\(^{260}\) ADAMS, supra note 22.

\(^{261}\) Many of the most elite of today's law teachers would encounter difficulty in finding a niche in a Populist law school. I hesitate to suggest that they might seek employment elsewhere in their universities. Cf. Paul D. Carrington, Of Law and The River, 34 J. LEGAL EDUC. 222, 227
would be more content with their first jobs because they would have made no great sacrifice to secure them and would have had no great expectations. They would initially earn less, but their employers would have correspondingly lower expectations, so they would more likely be able to satisfy them. They would stay in law only as long as they enjoyed it. Not burdened by heavy debt, they would also be less likely to provide professional services that they thought unworthy of themselves.

Populist accreditation of law schools would be the opposite of that presently existing. Law schools would not be permitted to charge high prices, maintain elite admission standards, provide placement services, or lower their teaching ratios below that reasonably needed to provide a basic program. They would not be permitted to admit students to an advanced program who lacked sustained experience in the humdrum world in which most citizens spend their adult lives. They might be limited in the number of full-time teachers they would be permitted to employ, and there might be a minimum number of contact hours that such teachers would be required to meet when teaching classes of substantial size. Law schools would be otherwise unregulated, reflecting the Populist distrust of regulators, whom they believed to be the agents of wealth and power, not protectors of the public interests.

This is of course only a Populist's pipe dream. The irresistible forces that brought us to where we are would not permit any such scheme to exist. Yet I urge that this Populist dream is still worthy of your attention. It is worth knowing that the problems I have noted are in some sense problems that we have made for ourselves and for our fellow citizens by being who we are as attorneys. If we were other than as we are, if we lusted less for status and wealth and more for genuinely useful service, we could imaginably embrace a more nearly Populist program and thus solve or alleviate my six problems. Instead, we have chosen to elevate lawyers over citizens and to send the bill to our client, the public.

*A Call to Duty*

What, I ask, is the service for which the public is paying? Knowing the costs of rejecting the Populist vision, we should take care to assure

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(1984) (discussing the ethical problems of some teachers of professional law students); Correspondence, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985) (exhibiting potential job security concerns for nonmainstream faculty). There is, however, little question but that they would develop a different style or encounter unbearable resistance from Populist law students.
that we are, as a profession, adequately compensating our co-citizens for the cost to them of the benefits we confer on ourselves. Our collective obligations are great. Howard University’s great law teacher, Charles Hamilton Houston, sought to instill precisely this sense of obligation in the African-American students he taught in the 1930s. He instructed them that they were fortunate, that America, Howard, and their professors were giving them something, and they had a duty to give something back.²⁶² If black students at Howard in 1935 could be asked to make compensation, so surely can the readers of this Review. That duty was, at bottom, the Populist law teachers’ message, and it was never more needed than it is today.

This consideration of the virtues of Populist legal education calls into question the wisdom of the proposals advanced in the recent MacCrate Report of the ABA.²⁶³ That report is replete with proposals that would increase the cost of legal training. Its aim is the familiar and seemingly laudable one of elevating the skills of lawyers, an aim shared by the 1979 Cramton Report²⁶⁴ prepared under the same auspices. Unlike the previous report, however, the MacCrate Report makes no attempt at cost-benefit analysis. It recommends that we attempt any pedagogy that might elevate enumerated legal skills however uncertain, slight or temporary the elevation might be, and without regard to cost. In this respect, it follows precisely the path of the famous 1910 Flexner Report on medical education,²⁶⁵ which so effectively elevated the status of the medical profession, but at a cost to citizens that is now a national disaster.²⁶⁶ That Flexner Report can be defended despite its long-term social costs; medicine is a science and we all may possibly benefit from more technocratic health care. As the 1921 Carnegie Report emphasized, however, no such justification can be offered for the further elevation of standards in law, given the role of law in American politics.

We may be sure that Cooley and Green would have reviled that MacCrate Report in Jacksonian terms, as an effort to “make the rich richer and the potent more powerful.”²⁶⁷ If its proposals were adopted,

²⁶⁴ Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools, 1979 A.B.A. Sec. of Legal Education and Admissions to the Bar.
²⁶⁵ Abraham Flexner, Medical Education in the United States and Canada, in Carnegie Foundation for the Advancement of Teaching, Bull. 4, at 3, (1910).
²⁶⁶ The ABA leadership had hopes in 1920 that the Carnegie Foundation would do for law what it had just done for medicine. Alfred Reed’s book, supra note 187, was the outcome, and it was a great disappointment to the Bar. The story is told in Stevens, supra note 178, at 112-30.
²⁶⁷ Andrew Jackson, Veto Message (July 10, 1830), in 2 A Compilation of the Messages
the cost and price of legal education would increase and the cost of effective legal services would follow. There would be fewer seats in law schools, making the academic competition for those seats even more intense. We would need more guaranteed student loans, more loan forgiveness, more affirmative action, more legal aid, and more ADR. Many graduates would be even less content in their professional work, and there would be even more dissatisfaction with that work on the part of employers and clients who must in the end bear the cost of the so-called improvements. In the name of Uncle Jimmy Green and their heritage of prairie Populism, Kansans have a duty to oppose the American Bar Association Section on Legal Education and Admissions to the Bar when it seeks “to aggrandize the few, and depress the many.” America has no need for a legal profession more elite than the one it already has. It is our public duty to resist such change.

While Cooley and perhaps Green would have grudgingly approved of this century’s elevation of standards, they would have emphasized the public duty that accompanies the benefits derived from those elevated standards. A premier article of Cooley’s faith was a belief in the duty of those who enjoy good fortune to bear more than equal shares of the burdens of our public life. He did not declaim against the existence of the private railroads or the industrial corporations that were uprooting the agrarian culture of which he was a part. He did not oppose their wealth, but rather their arrogance, their greed and their insensitivity to public duty.

Just as Cooley extolled and practiced forbearance in the exercise of power and condemned the arrogance of wealth, so he would have called to public duty those fortunate enough to wear the ornaments of academic achievement. He would never have opposed learning or have

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AND PAPERS OF THE PRESIDENTS, 1789-1902, at 590 (James D. Richardson ed., 1903). Also compare:

There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

Id. The veto message was regarded by Jacksonians such as Cooley and Green as second only to the Declaration of Independence as a statement of their political faith. See generally MARVIN MEYERS, THE JACKSONIAN PERSUASION (1957).

268. See Richard A. Posner, Legal Scholarship Today, 45 STAN. L. REV. 1647, 1655 (1993). Judge Posner’s position favoring deregulation is not easily reconciled with his otherwise elitist positions regarding the appropriate role of interdisciplinary theory and research in the development of law and the training of lawyers. Despite his elitism, there is some similarity between his thinking and that of Cooley. For another view on the merits of deregulation, see Meredith A. Munro, Note, Deregulation of the Practice of Law: Panacea or Placebo?, 42 HASTINGS L.J. 203 (1990).

269. BRUGGER, supra note 18, at 136.
failed to encourage genuine intellectual achievement. Instead, he would have opposed arrogant learning, selfish learning that is insensitive to the obligations of the learned to the “yahoos who live out in the border counties... [who] haul corn 40 miles and sell it for 15 cents a bushel.”270 Cooley cherished both the academy and the legal profession. Yet, he recognized that they, like the courts and legislatures whom he so frequently cautioned, need to be restrained from the excesses of their overconfidence. He knew what cannot be denied—that lawyers have no intrinsic moral worth. Those who fail to give service to the community and nation are freeriders, and public opprobrium is their just dessert.

Cooley was especially attracted to the poetry of William Wordsworth.271 He was particularly fond of one of Wordsworth’s poems, Ode to Duty.272 It speaks for Cooley, Uncle Jimmy273 and other Populists as well by begging Providence to free us from vain temptation. It charges us not to seek “in the school of pride [f]or precepts over dignified.”274

If we cannot return to simpler days, we postindustrial, postmodern lawyers may nevertheless resist the temptations of vanity and seek not for ourselves still more dignity in the school of pride. We may then, for Uncle Jimmy, recite Wordsworth’s concluding stanza:

Give unto [us], made lowly wise,
The spirit of self-sacrifice;
The confidence of reason give;
And in the light of truth thy bondman let [us] live!275

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270. GRIFFIN, supra note 1, at 89 (quoting Editorial, CLOUD COUNTY KANSAN (Jamestown), Jan. 1, 1887).
271. See JONES, supra note 68, at 229 n.66.
273. Green’s sentiments were expressed in tones different from those of Cooley. On the occasion of the dedication of the first law building, he said:
   If the law school of this University should close its doors today for all time; if this beautiful building should be razed to the ground and lie in ruins, and the school existed only in memory, still would the state of Kansas be a thousand fold repaid for all its expenditures by reason of the lives and influence of its graduates, in the examples they have set as law makers and law upholders.
Green, supra note 115, at 10-11.
274. WORDSWORTH, supra note 272, at 607.
275. Id. Cooley used the same four lines to conclude The Lawyer’s Duty to the State, in PROCEEDINGS OF THE 4TH ANNUAL MEETING OF THE BAR ASSOCIATION OF TENNESSEE 91-92 (1886).