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THE LIFE AND TIMES OF LEGAL EDUCATION IN ALABAMA, 1819-1897: BAR ADMISSIONS, LAW SCHOOLS, AND THE PROFESSION

*Paul M. Pruitt, Jr.**

I. INTRODUCTION: LEGAL TRAINING AND THE FRONTIER BAR

For decades after its founding in 1819, Alabama was a frontier state. Its leaders were occupied with typical problems of rapid population growth, Indian relations, and the establishment of social, religious, economic, and political institutions. The state's court system was likewise evolving, and would settle into structural maturity—including a supreme court, circuit courts, chancery courts, and county courts—only by the end of the 1830s.¹ The bar of the new state, which consisted originally of a few dozen practitioners, was equally in a state of flux. The legal profession would grow explosively during the 1830s, but would take decades to develop a strong corporate identity. Lawyers were prominent among Alabama's founding fathers and would continue to be a strong presence in the legislature and on the boards of fiscal and educational institutions. Yet Toqueville's

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1. See generally WILLIAM WARREN ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 67-224 (1994); MALCOLM COOK McMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 40-41 (1955); PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 7-10 (1995). For Alabama's appropriation of common law see JOHN G. AIKIN, A DIGEST OF THE LAW OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE 107 (1833) [hereinafter AIKIN]. For the court system, see 1 THOMAS M. OWEN, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 230 (1921); 2 OWEN 815 (1921); AIKIN, 236-53; ALEXANDER B. MEEK, A SUPPLEMENT TO AIKIN'S DIGEST OF THE LAWS OF THE STATE OF ALABAMA 61-65 (1841).

image of the lawyer as republican aristocrat applied chiefly to a small corps of elite attorneys.²

Legal education was not an issue in the early years of Alabama statehood. Most lawyers were immigrants from older states and brought their professional knowledge with them. The great majority of them had "read law" or clerked in the office of an established attorney. In time, a number of lawyers or judges set themselves up as part-time legal educators; Eli Shortridge of Tuscaloosa was apparently an outstanding teacher, as was Nimrod E. Benson of Montgomery.³ Eventually, too, the names of would-be lawyers from Alabama began to appear on the rolls of the Litchfield Law School, the University of Virginia, the Cumberland School of Law, and other law schools in the East and upper South. For many years, however, school-trained lawyers were a tiny minority of the state bar.⁴

At their best, the scholarly attorneys and professors of the time taught that the law was a "science of principles," as much a matter for observation and deduction as the natural sciences. A true jurisprudence, they believed, consisted of a number of principles derived from natural law, fitted to particular physical and cultural settings and set forth by judges. Young men who wished to understand the history and philosophy of the law must study

2. DUNBAR ROWLAND, COURTS, LAWYERS, AND JUDGES OF MISSISSIPPI, 1798-1935, at 45-75 (1935) (listing 200 lawyers admitted into the Mississippi Territory (from which Alabama was formed) prior to 1819; it is difficult to say how many practiced in Alabama); J. MILLS THORNTON III, POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA, 1800-1860, at 64-65, 119-22 (1978); 1 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 272-75, 285 (New York, Knopf 1994) (1835, 1840). For the elite status and small number of practitioners before the Federal bar of early Alabama, see TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1994, at 12-13, 26-28 (1995).

3. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 256-57, 266 (1950); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S *passim* (1983). For judges as law teachers see WILLIAM GARRETT, REMINISCENCES OF PUBLIC MEN IN ALABAMA, FOR THIRTY YEARS, WITH AN APPENDIX 228-29, 266-67, 614-15 (Reprint co. ed., 1975) (1872); WILLIS BREWER, ALABAMA: HER HISTORY, RESOURCES, WAR RECORD, AND PUBLIC MEN 488-536 (Tuscaloosa, Ala., Willo ed., 1964) (1872) (discussing the influence of Benson and Shortridge).

4. THE LITCHFIELD LAW SCHOOL: REPRINT OF 1900, at 25 (1900); W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA, 1779-1979: A BIOGRAPHICAL APPROACH 764, 774 (1982); DAVID J. LANGUM & HOWARD P. WALTHALL, FROM MAVERICK TO MAINSTREAM: CUMBERLAND SCHOOL OF LAW, 1847-1997, at 18, 56 (1997); HURST, *supra* note 3, at 259-60.

leading cases and read Coke, Blackstone, or their American expositors. On a less exalted level, antebellum legal educators viewed the intricacies of actual practice, the bewildering array of common law actions and pleadings, as something best mastered by apprenticeship in a law office—perhaps with the help of some of the technical manuals and treatises which had already begun to appear. Reading, working, and observing attorneys, a young man might acquire the knowledge, expertise, and ethical self-control which would fit him for a place in the profession.⁵

But as bar leaders in Alabama and elsewhere were only too well aware, legal education did not always deliver what it promised. Many teaching attorneys were too busy to take pains with their pupils, who received chiefly a mechanical practice in copying out forms. Most law schools (even Litchfield and Harvard) used a combination of readings, lecture and recitation which encouraged parrot-like answers and placed little intellectual pressure on students.⁶ Such were the educational options of the youthful attorneys portrayed in Joseph Glover Baldwin's *Flush Times of Alabama and Mississippi*—needy adventurers who descended upon the southwest to ride the circuits and compete for legal business.⁷

Lawmakers were no help, especially in the newly settled territories, where the trend was to celebrate the equality of all (white male) citizens by removing all statutory qualifications for the practice of law.⁸ From territorial days, Alabama law defined an attorney as a person of good character who could produce a valid license to practice. An 1819 statute required applicants to stand an unspecified examination before the Supreme Court. Two years later, the legislature decreed that “any two” circuit judges could license a candidate “to practise in the circuit or county courts.”⁹ The latter provision implied, but did not re-

5. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 29-44, 46 (1994); Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 222 *passim* (1995); WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES xii (1978).

6. LAPIANA, *supra* note 5, at 23-24, 48-54; JOHNSON, *supra* note 5, at 44-49.

7. JOSEPH GLOVER BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES *passim* (Gloucester, Mass., Peter Smith, 1974) (1853). For information on circuit-riding see BARDAGLIO, *supra* note 1, at 18.

8. HURST, *supra* note 3, at 250.

9. 9 HARRY TOULMIN, DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CON-

quire, an examination. Thereafter, trial court judges oversaw most examinations, though the high court retained control over its own admissions.¹⁰

In some cases, the judges may have imposed strict and valid tests; Benjamin F. Porter, who had read law in South Carolina, went to be examined in Alabama "after a most careful reading of Blackstone, Chitty's *Pleadings*, and Harry Toulmin's *Digest of Alabama Laws*."¹¹ Other judges, however, took the attitude of a Mississippi official who examined Joseph Glover Baldwin, "in a manner which shall ever inspire gratitude—he asked not a single legal question."¹² Even the Supreme Court admitted, in 1839, that it had been "indulgent" in admitting applicants, and promised that "in future, examinations conducted under its eye will be thorough, and well calculated to test . . . professional attainments."¹³

To be sure, the low standard of legal education was perceived as a problem nationwide by concerned practitioners, judges, and businessmen.¹⁴ Yet nowhere were the dangers of an ignorant, undisciplined, or unethical bar greater than in Alabama and other states of the Old Southwest, where lawyers faced complex questions of land titles, Indian rights, and contract law during the "Flush Times" of the 1830s. Later, in the aftermath of the Panic of 1837, attorneys faced the shattered image of the region's former prosperity in the form of endless

TAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY 1823, at 27 (1823).

10. *Id.* at 22-23, 26-27; AIKIN, *supra* note 1, at 45; C.C. CLAY, DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING ALL THE STATUTES OF A PUBLIC AND GENERAL NATURE, IN FORCE AT THE CLOSE OF THE SESSION OF THE GENERAL ASSEMBLY IN FEBRUARY, 1843, at 64-66 (1843); 2 OWEN, *supra* note 1, at 859-60. Specifications as to age, gender, and race would be added later, *see infra* note 46.

11. BENJAMIN F. PORTER, REMINISCENCES OF MEN AND THINGS IN ALABAMA 33 (1983). For biographical information on Porter, see GARRETT, *supra* note 3, at 310-11.

12. BALDWIN, *supra* note 7, at 37. *See also* RUTH NUERMBERGER, THE CLAYS OF ALABAMA: A PLANTER-LAWYER-POLITICIAN FAMILY 78 (1958)(describing a father setting his son a strict preliminary examination).

13. ALA. CODE app. at 713 (1852).

14. 2 ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 94 (1965); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 163-65 (1985); BARDAGLIO, *supra* note 1, at 16. *But see* WILLIAM H. BRANTLEY, CHIEF JUSTICE STONE OF ALABAMA 39 (1943) (describing a meeting of exceptionally bright young lawyers in a frontier town); *see also* HENRY S. FOOTE, THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST 5-11 (1876) (praising several Alabama lawyers).

attachments, bankruptcies, and foreclosures.¹⁵

Under such trying circumstances, poorly trained lawyers were forced to muddle through cases, even when their hearts were "running down like a jack-screw under a heavy wagon."¹⁶ In civil matters, which tended to become contests of sharp pleading, their clients faced only a loss of money. In criminal proceedings the result might be fatal—and courts tended to appoint novice attorneys to represent indigent defendants.¹⁷ In an 1835 murder case in Mobile, such an attorney failed to make objections before the grand jury in a timely fashion.¹⁸ In the end his client was executed, arguably because of the incompetence of counsel.¹⁹

Most established lawyers viewed such errors with scorn and disgust; others probably shared the sardonic vision of Baldwin and other literary humorists. All were aware, though, that incompetent attorneys threatened both the image and the larger role of the legal profession. Looking back on a long career, former Alabama lawyer Henry S. Foote would write that attorneys had a special "commission" to make the law "intelligible" to ordinary citizens—to exercise leadership in a just and honorable system.²⁰ Failure to do so would hasten the rise of "disorder and anarchical lawlessness."²¹ In the 1840s, in particular, the specter of chaos was never far from the minds of thoughtful conservatives. That decade saw the collapse (with attendant political scandals) of the Bank of Alabama, as well as growing public frustration with the judicial system—the latter taking the form of demands for an elective judiciary.²²

15. For a sardonic summary of the situation facing Southwestern lawyers in the 1830s, see BALDWIN, *supra* note 7, at 34-51, 163-82; FREYER & DIXON, *supra* note 2, at 30, 42. For several decades there were no well-developed ethical canons for lawyers. Rather, judges were given power to detect and try attorney "malpractice." See, e.g., AIKIN, *supra* note 1, at 44; CLAY, *supra* note 10, at 65.

16. BALDWIN, *supra* note 7, at 21.

17. *Id.* at 21, 39-40; GARRETT, *supra* note 3, at 540; LAPIANA, *supra* note 5, at 40.

18. Paul M. Pruitt, Jr. & Robert Bond Higgins, *Crime and Punishment in Antebellum Mobile: The Long Story of Charles R.S. Boyington*, 11 GULF COAST HIST. REV. 7-40 (1996).

19. *Id.*

20. FOOTE, *supra* note 14, at 13-14.

21. *Id.*

22. ROGERS ET AL., *supra* note 1, at 79-80, 83, 119, 140-45, 147-48; McMILLAN,

In response to these threats, leaders of the bench and bar sought ways to raise the educational level of the profession—their assumption being that the personal discipline necessary to acquire learning would go far toward assuring competence and moral stature. Eventually, bar reformers would turn to the legislature, to code commissioners, or (much later) to the Alabama State Bar Association. First, however, a corporal's guard of well-placed practitioners turned to the University of Alabama, and in so doing participated in a national trend—namely, that of founding law schools.²³ At least twenty-one such schools were in existence by 1860, most of them attached to universities. According to one scholar, the growth of law schools in the mid-nineteenth century reflected “the desires of a growing middle class for a more structured environment” as well as the for more skilled lawyers.²⁴

II. FIRST ATTEMPT TO FOUND A LAW SCHOOL AT THE UNIVERSITY OF ALABAMA

In operation since 1831, the University of Alabama was located at Tuscaloosa. It had survived the early antics of rowdy, poorly prepared students and by the mid-1840s enjoyed a strong faculty and a growing reputation under the leadership of President Basil Manly. Standing behind Manly was a board of trustees dominated by a distinguished group of lawyers and judges, including Alabama Supreme Court justices John J. Ormond and Henry Goldthwaite. Ormond, especially, would keep up a lively interest in the modernization of Alabama law.²⁵ It was no secret to such men that other schools were offering instruction in the law, or that the rise of law schools was in some sense a response to dissatisfaction with law-office training.²⁶

There is some evidence of public sentiment in favor of a law

supra note 1, at 64-65; BARDAGLIO, *supra* note 1, at 19.

23. STEVENS, *supra* note 3, at 5, 20-22; BARDAGLIO, *supra* note 1, at 14, 293 n.7; JOHNSON, *supra* note 5, at xii.

24. STEVENS, *supra* note 3, at 5, 20-22.

25. SUZANNE RAU WOLFE, THE UNIVERSITY OF ALABAMA: A PICTORIAL HISTORY 14-31 (1983); JAMES B. SELLERS, HISTORY OF THE UNIVERSITY OF ALABAMA 67-97 (1953); GARRETT, *supra* note 3, at 267-77, 792, 794-96.

26. HURST, *supra* note 3, at 259-60; STEVENS, *supra* note 3, at 5, 21-22, 51-52.

school. The Selma Free Press editorialized upon the subject in October 1845, and a meeting of university students held in December urged the trustees to create a professorship of law.²⁷ Yet the chief instigator of legal education at Alabama was trustee Benjamin F. Porter, a prominent lawyer, legal author, and former Supreme Court reporter who was chairman of the board's Executive Committee. Porter had himself in mind as professor of law—and as a legal authority and law reformer his qualifications were formidable. As a legislator he had supported humane revision of the state's penal laws, spearheaded the creation of a state penitentiary, and worked for abolition of the death penalty and the expansion of women's rights.²⁸ Still, he viewed the court system with profound respect, as the agency which "dispenses reason and justice to the community: thus regulating every conflicting interest of the social system by the calm, but powerful test of legal principle."²⁹

Porter was appointed Professor of Law during the winter of 1845-1846, and the University's 1846 catalog shows that he planned to operate a fairly typical antebellum law school.³⁰ He intended for the law course to last two years, during which students would read "the most important elementary works" and listen to "[i]llustrations and explanations."³¹ In addition, Porter promised frequent "Moot Courts . . . in which the investigation of the principles of law, and the Practice and Pleading of Courts, will exercise the minds of the students."³² Students who completed the course "and passed the proper examinations" would be awarded the LL.B. degree.³³ A thorough-going idealist, Porter expected to make a positive impact upon budding lawyers; but he also hoped to publish his lectures. According to one

27. TUSCALOOSA INDEPENDENT MONITOR, Dec. 10, 1845.

28. TUSCALOOSA INDEPENDENT MONITOR, Apr. 2, Oct. 1 (quoting the SELMA FREE PRESS), Oct. 22, Dec. 10, 1845; SELLERS, *supra* note 25, at 160; GARRETT, *supra* note 3, at 310-18, 792; Paul M. Pruitt, Jr., *An Antebellum Law Reformer: Passages in the Life of Benjamin F. Porter*, 11 GULF COAST HIST. REV., 22 (1995).

29. Preface, 6 Port. v, vi (1837-1838).

30. *Id.*

31. Catalogue of Officers and Students of the University of the State of Alabama: 1846 *The Law School* (Tuscaloosa: M.D.J. Slade, 1846) [hereinafter UA Catalog with appropriate dates].

32. *Id.*

33. *Id.*

source he dreamed of being ranked with Blackstone, Chancellor James Kent, and other great synthesizers.³⁴

It is quite possible that Porter, who was a fine advocate and orator, would have been a distinguished teacher. Yet regulations imposed by the Trustees effectively killed the fledgling school. Undergraduates were not allowed to take law courses. Law students were subject to dismissal by the regular faculty, but could not use University dormitories or dining facilities. Porter was not even allowed to teach on campus! As was true of other law schools at the time, the law department was expected to be self-supporting; Porter was supposed to collect tuition from law students himself.³⁵

These self-defeating regulations may indicate a certain distaste—originating with the faculty, President Manly, or individual trustees—for grafting a professional school onto a liberal arts curriculum. Or they may reflect the fact that Porter, who had done a great deal of legal work for the University, had something of a genius for making enemies. Perhaps board members resented his campaign for a professorial post, but saw no justification for a making a flat denial. In any case, no pupils showed up for classes (so much for student petitions!).³⁶ Porter went on about his career, and the University's first experiment in legal education came to an abrupt close.³⁷

III. CODE REFORM AND THE LEGAL PROFESSION

The years surrounding the failure of Porter's law school saw a series of constitutional changes in Alabama, some of which would have an impact upon the legal profession, and indirectly, upon legal education. Popular disgust with state government

34. GARRETT, *supra* note 3, at 317; *see also* HURST, *supra* note 3, at 257-58 (describing the influence of Blackstone and Kent). Porter's interest in examinations was evidently somewhat unusual. *Cf.* LAPIANA, *supra* note 5, at 8, 88-89. To compare Porter's plans with the early curriculum and work at the Cumberland School of Law, *see* LANGUM & WALTHALL, *supra* note 4, at 1-48.

35. SELLERS, *supra* note 24, at 160-61; STEVENS, *supra* note 3, at 4-5.

36. SELLERS, *supra* note 25, at 160.

37. *Id.* at 160-61; *see also* GARRETT, *supra* note 3, at 317 (describing attitudes toward Porter); PORTER, *supra* note 11, at 18 (describing the extent of Porter's work for the University). For the view that hostility to professional education was not the norm, *see* JOHNSON, *supra* note 5, at xii.

contributed to the success, in 1845-1846, of movements to change from annual to biennial sessions of the legislature and to move the capital south from Tuscaloosa (eventually to Montgomery). Two years later, the people voted to institute popular elections of county and circuit judges—a change which derived both from Jacksonian ideology and from displeasure with the “log-rolling” methods used by legislators to elect judges. Bar leaders feared that an elective judiciary would be less competent and even more politicized, its members no more discerning than the least disciplined members of the profession.³⁸

Urged on by Governor Henry W. Collier, a former chief justice of the Alabama Supreme Court, the legislature of 1849-1850 decided to codify the laws of Alabama. Their idea was to make a fresh start—to remove inconsistencies and flaws built up over thirty years of statehood. They chose to do so through a code commission, whose members included Collier’s highly-regarded colleague John J. Ormond and circuit judge George Goldthwaite (brother of former justice Henry Goldthwaite). The enabling legislation gave these men extraordinary power to reorganize and edit statutes and to write new laws to make up for “legislative omissions.”³⁹ In addition, they were to revise the rules of pleading, “simplifying and regulating the practice in the several courts of this state.”⁴⁰ Their work would become Alabama’s 1852 Code.⁴¹

It seems likely that legislators and commissioners were influenced by New York’s celebrated “Field” code of 1848.⁴² Elite lawyers though they were, the commissioners were determined to follow New York’s example (and their own instructions) by writing a code which would make both public and private business simpler and more rational. According to one commentator, they altered the law of real property as well as that of evidence, and felt free to “engraft” court decisions upon statutes.⁴³

38. McMILLAN, *supra* note 1, at 147-50. See also THORNTON, *supra* note 2, at 59-80 (discussing Jacksonian ideology and distrust of the legislature).

39. 1849 Ala. Acts 44.

40. *Id.*

41. 1 OWEN, *supra* note 1, at 293-94; GARRETT, *supra* note 3, at 205-08, 267-77, 549, 718-20.

42. FRIEDMAN, *supra* note 14, at 340-47, 351-52; MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 59-90 (1976); 1 OWEN, *supra* note 1, at 293.

43. Owen, *supra* note 1, at 294.

Their most dramatic change, and the one most in keeping with public opinion in Alabama, was to replace common law pleading with a code which insisted upon brevity and required that "the facts . . . be put in issue in an intelligible form."⁴⁴ Similarly (though with less fanfare), the commissioners turned their attention to the questions of lawyer qualification and admission to the practice of law.

When they were through, state law prescribed—for the first time—minimum standards of knowledge for would-be attorneys. Specifically, the 1852 Code required an examination of candidates in defined fields: Real Property and Personal Property, Pleading and Evidence, Commercial, Criminal, and Chancery Law, and Alabama Statutes.⁴⁵ In addition, the code required new lawyers to swear "not to violate" a list of ethical "duties," which (again for the first time) included specific instructions to be honest in court, courteous to opponents, and friendly to the "cause of the defenseless or oppressed."⁴⁶ There seems little doubt that these requirements, general as they were, represented an effort to enhance the quality and status of the bar. Ormond and the commissioners had put into the hands of judges tools with which they could more precisely shape the future of the profession.

In the future, however, most of the judges in question would be trial court judges; the 1852 Code simplified admissions policy by allowing any circuit or chancery judge to issue licenses to practice in trial courts.⁴⁷ Perhaps the commissioners were simply rounding out the power of the new, elected circuit judiciary—though the new admissions procedure probably had much to do with the difficulty of tracking down two judges (as some candidates were required to do under the statute of 1821). In any event, the real question was whether the judges were now willing to exert their power over the bar. The answer seems to have been that they were not. In fact, the custom at the circuit court

44. Martin Leigh Harrison, *Reform of Alabama Pleading*, 6 ALA. L. REV. 28-35 (1953); 1 OWEN, *supra* note 1, at 294; ALA. CODE § 2227 (1852).

45. ALA. CODE § 733 (1852).

46. ALA. CODE §§ 733, 735-36, 738 (1852). The 1852 Code also specified that lawyer candidates must be white men, aged twenty-one or older. *See* ALA. CODE § 731 (1852).

47. ALA. CODE § 730 (1852).

level seems to have been for judges to appoint examining committees from among the attorneys who happened to be in court when applicants appeared. Moreover, an 1858 statute gave the Supreme Court power to conduct its own examinations by means of similar committees.⁴⁸

IV. SECOND ATTEMPT TO FOUND A UNIVERSITY OF ALABAMA SCHOOL OF LAW

Such committees had the legislature's 1852 standards to guide them. But as both judges and legislators knew, examining attorneys were also likely to be guided by local customs, or by personal feelings. Thus, when another opportunity came about to confer the state's prestige upon a promising law school, elite lawyers and former judges in the legislature stood ready to do what they could. In the late 1850s, opportunity took the form of Wade Keyes' Montgomery Law School. Keyes, a legal scholar who had been chancellor of the state's southern district equity courts, lamented the fact that lawyers were so often licensed without knowledge of the "ancient learning" of the law. On the other hand, he believed that attorneys should be aggressive in defense of their clients, making use of all the "reasons" allowed by law. His plans included junior, senior, and "moot" classes to be offered in fall and spring terms.⁴⁹

Former Alabama Supreme Court chief justice Samuel F. Rice was a member of the 1859-1860 legislature. A restless and versatile man, Rice probably viewed Keyes' school as an opportu-

48. ALA. CODE §§ 733, 735-36, 738 (1852). For recollections of the manner in which panels of lawyers conducted examinations, see 1890 PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 139 [hereinafter ALA. STATE BAR PROCEEDINGS with appropriate dates for volume]; 1894 Ala. State Bar Proceedings 87-90 (recollecting the manner in which pannels of lawyers conducted examinations). See also ALA. CODE § 868 (1867) (providing 1858 law); BLOOMFIELD, *supra* note 39, at 274 (describing a Texas examining committee in the 1840s). Whatever their intent, the Alabama laws of 1852 and 1858 probably had the effect of localizing control over entry into the bar.

49. E. David Haigler, *The First Law Class of the University of Alabama*, 40 ALA. LAW. 369, 371-73 (1979); WADE KEYES, INTRODUCTORY LECTURE DELIVERED MARCH, 1860, BEFORE THE CLASS OF THE MONTGOMERY LAW SCHOOL 12-13 (Montgomery, Barrett, Wimbish & Co. 1860); MONTGOMERY WEEKLY ADVERTISER, Mar. 7, 1860; 3 OWEN, *supra* note 1, at 974; see also GARRETT, *supra* note 3, at 592-93, 779 (discussing Keyes' life).

nity to nurture an improved high court bar. Accordingly, his idea was to attract bright students by dangling special privileges before them, a technique which had been used in other states.⁵⁰ Upon Rice's initiative, the legislature passed a bill authorizing Keyes to grant degrees and giving his graduates the "diploma privilege"—the right to practice without standing an examination.⁵¹ The same bill placed the Montgomery Law School under the joint trusteeship of the justices of the Supreme Court and the University's board of trustees; Rice was missing no bets.⁵² Yet the new school was a victim of turbulent times, as Keyes awarded diplomas to only one class of five or six members before the Civil War intervened.⁵³ The conflict brought with it a virtual suspension of conventional legal business; military service claimed lawyers, litigants, and law students alike. Keyes himself left Alabama to become assistant attorney general of the Confederacy; his school ceased operation.⁵⁴ Another effort to mold the bar from the top down had failed—though of course the nature and functions of legal practice had gone on changing of their own accord since Porter's failure in the 1840s.

V. MIDCENTURY THREATS AND OPPORTUNITIES: THE LEGAL PROFESSION FROM SLAVERY TO RECONSTRUCTION

By the middle of the nineteenth century, the population of Alabama had passed three-quarters of a million persons, and the economic and social institutions of slave society were maturing. The legal profession had likewise grown up with the country; over six hundred lawyers were practicing in Alabama by

50. 4 OWEN, *supra* note 1, at 1435; 1859-1860 H.J. ALA. 120, 188-89.

51. 1859-1860 Ala. Acts 343, § 4.

52. For the legislation, see 1859-1860 Ala. Acts 342 §§ 2-6, 10. For discussions of nineteenth-century diploma privilege, see JOHNSON, *supra* note 5, at 55-56; LAPIANA, *supra* note 5, at 82-83, 86-88. Rice or another partisan of the new school may have gone so far as to attack other law schools. *See also* LANGUM & WALTHALL, *supra* note 4, at 22 (documenting a letter hostile to Cumberland professor Nathan Green, Sr.).

53. Haigler, *supra* note 49, at 374, 376.

54. *Id.* at 374, 376; GARRETT, *supra* note 3, at 553, 592-93; *see also* BLOOMFIELD, *supra* note 42, at 271-301 (describing the Civil War from the perspective of a confederate lawyer, William P. Bellinger).

1845.⁵⁵ These attorneys were most concentrated in the "Black Belt" (and other plantation districts) and in larger towns such as Mobile, Montgomery, Tuscaloosa, and Huntsville. Lawyers had always been prominent among officeholders; now more than ever they were involved as industrial promoters, trustees of schools, and advocates of temperance and other religious or cultural reforms.⁵⁶ Yet their sense of professional identity remained relatively weak. Circuit-riding had once provided lawyers with opportunities for fellowship. By mid-century, improvements in transportation may have undermined the fraternal element of classical circuit-riding, well before the development of meaningful bar associations.⁵⁷

The Civil War interrupted the life of the bar in Alabama but did not destroy it. Indeed, apart from the destruction of war, lawyers' prospects were bright. The rise of railroad corporations, for example, was a factor of increasing significance (nationwide and in Alabama) even before the conflict. Soon, railroad development and industrialization would elevate the importance of corporation law and make lawyering, in the words of one historian, "a boom industry."⁵⁸ The latter half of the century would see the growth of larger law firms whose partners were not so much conventional advocates as guardians of big business. In

55. GARRETT, *supra* note 3, at 380-91.

56. BREWER, *supra* note 3, at 58 (noting that 425,000 white persons lived in Alabama at that time); see also ROGERS ET AL., *supra* note 1, at 93-135 (discussing economic and social conditions in early 19th century Alabama). See also GARRETT, *supra* note 3, at 780-91 (noting especially the number of attorneys listed as living in such Black Belt counties as Dallas, Greene, and Sumter). See generally THORNTON, *supra* note 2, at 41, 64-66. For reformist and benevolent activity by many citizens, including lawyers, see John W. Quist, *Social and Moral Reform in the Old North and the Old South: Washtenaw County, Michigan, and Tuscaloosa County, Alabama, 1820-1860 passim* (1922) (unpublished Ph.D. dissertation, University of Michigan) (on file in the Hoole Special Collections Library, University of Alabama).

57. BRANTLEY, *supra* note 14, at 39, 192; GARRETT, *supra* note 3, at 633-35. See an account of a literary banquet attended by many lawyers in the TUSCALOOSA INDEPENDENT MONITOR, December 28, 1842; see also *Tuscaloosa Independent Monitor*, Mar. 19, 1845, for resolutions by the "Bar of Tuscaloosa." [sic] For incorporation of bar associations in Eufaula and Dallas County, see 1845-1846 Ala. Acts 97; 1847-1848 Ala. Acts 181; 1866-1867 Ala. Acts 103-04 (providing for the incorporation of bar associations in Eufalla and Dallas counties); BARDAGLIO, *supra* note 1, at 18; DANIEL H. CALHOUN, *PROFESSIONAL LIVES IN AMERICA: STRUCTURE AND ASPIRATION: 1750-1850*, at 60-66, 70-71, 80 (1965) (discussing the nature and decline of circuit-riding in neighboring Tennessee).

58. STEVENS, *supra* note 3, at 22.

Alabama, large numbers of lawyers would settle or relocate in Birmingham and other manufacturing centers.⁵⁹

At its most intense, the new legal practice reproduced the frantic optimism of frontier boom times. However, there was a growing demand for well-trained lawyers; and at this time university-based law schools truly began to thrive. Nationally, the most prominent teacher of the 1860s was Theodore W. Dwight of Columbia, who prescribed traditional lectures, recitations, and moot courts in a system that has been described as "exposition in the grand manner."⁶⁰ In all, the rise of the law schools corresponded with a movement toward further "professionalization" in the American bar, a development that included, once again, "the urge to raise standards and so make the bar more competent and more exclusive."⁶¹

The latter objective was certainly on the minds of Alabama lawyers during Reconstruction. More than any other professional group, lawyers were caught up in the changes and day-to-day dramas of the time. Almost immediately the independence of the state's judicial system came to an end; by the summer of 1865, state judges and magistrates were acting chiefly as "judicial agents" of the Freedmen's Bureau. The Bureau's Assistant Commissioner, Wager Swayne, was sensitive to the wishes of the white population, yet he insisted that black citizens be accorded basic civil rights—including the previously illegal right to testify against white people. Eventually, following the downfall of the state's "Provisional" government, Republican officeholders controlled the state, and black people began to serve on juries and to vote. Worse, from the native white point of view, a handful of black lawyers began to practice in Alabama by the early 1870s.⁶²

59. For the varied developments see FRIEDMAN, *supra* note 14, at 446-54, 468-69, 471, 477-80; HURST, *supra* note 3, at 295-301; ROGERS ET AL., *supra* note 1, at 177-79, 252-54, 321-22, 348-49, 351-61. For the concentration of lawyers in urban areas, see ALEX TROY, A LIST OF LAWYERS AT THE BAR IN ALABAMA, (1887) (showing then Birmingham (Jefferson County) had 110 of the state's 787 lawyers).

60. STEVENS, *supra* note 3, at 24.

61. *Id.* at 23-25. See also BLOOMFIELD, *supra* note 39, at 137-60 (discussing contemporary efforts to improve the profession's image, and to promote an image of lawyers as a technically proficient meritocracy); JOHNSON, *supra* note 5, at xiii-xiv (discussing the rise of law schools and bar associations).

62. See WALTER L. FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA 391-406, 514-30, 735-70 *passim* (Spartanburg, S.C., Reprint Co. 1978) (1905); SARAH W.

It is impossible to say how many lawyers took part in the Ku Klux Klan or other terrorist groups. Some white attorneys were so imbued with the ethics of legal culture that they represented black clients vigorously, sometimes braving dangers to do so. Others served local power structures. Human nature being what it is, most "native" white lawyers probably approved of the political and professional wars waged against Republicans. As early as 1866, former chief justice George Washington Stone joined other notable Selma attorneys to form a bar association.⁶³ Their purpose, according to Stone's biographer, was to "control the bar of Dallas County" in the face of an "influx of northern hypocrites purporting to be attorneys."⁶⁴

So much for the Carpetbaggers. White Democratic lawyers may well have reserved their hottest political wrath and their coldest professional shoulder for "Scalawag" attorneys—those of their number who cooperated politically with the Republicans. By the early 1870s, a number of well-known lawyers, including former governor Lewis E. Parsons, former congressman Alexander White, and former supreme court justice Samuel Rice had crossed that line. Indeed, from July 1868 through June 1873, the

WIGGINS, *THE SCALAWAG IN ALABAMA POLITICS, 1865-1881*, 61-62, 65-69, 83, 92 *passim* (1991). For the legal rights of blacks, see DONALD NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868*, 17-19, 24, 202-03 (1979); PETER KOLCHIN, *FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION* 5, 66-67 (1972). Some lawyers feared that the mere presence of blacks as citizens would corrupt the bar. See John A. Foster's remarks in 1884 *ALA. STATE BAR PROCEEDINGS* 128 (noting "changed conditions of our society" and the "large increase of ignorant and dishonest clients demanding the services of the sycophant who can crawl around the footstool of partisan power."). For the first black lawyers in Alabama, see J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 271-75 (1993). Compare *ALA. CODE* § 863 (1867) which limits practice to "[a]ny white male" aged twenty-one years, with *ALA. CODE* § 782 (1876) which uses the language "any male." See generally GEROLDINE SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* (1983); WALTER J. LEONARD, *BLACK LAWYERS: TRAINING AND RESULTS, THEN AND NOW* (1977).

63. BRANTLEY, *supra* note 14, at 192.

64. *Id.* at 191-92; NIEMAN, *supra* note 62, at 125, 130-31. For an 1870 investigation conducted by attorney Lewis E. Parsons into the Ku Klux Klan murders at Patona, see GENE L. HOWARD, *DEATH AT CROSS PLAINS: AN ALABAMA RECONSTRUCTION TRAGEDY* 93-110 (1984). For evidence that attorneys in Mississippi (and to some extent in Alabama) made conscientious efforts to defend black clients, see Christopher Waldrep, *Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court*, 82 *J. AM. HIST.* 1425, 1425-51 (1996).

Supreme Court itself was headed by a "Scalawag" Republican, Elijah Woolsey Peck. Formerly a Whig, Peck was a Unionist during the war, and prior to his election to the high court had been a member of the "Radical" constitutional convention of 1867.⁶⁵

Even so, Peck's demeanor on the bench was notably conciliatory. At the start of the January term of 1869 he reminded Democratic lawyers that "the old foundations have been broken up,"⁶⁶ but declared that he was ready to work with them in professional harmony. The speech was taken as an "offer of the olive branch."⁶⁷ According to one commentator, it began the judicial Reconstruction of the state "long before the political department had ceased to be oppressive."⁶⁸ In such an atmosphere it was increasingly possible for lawyers and officials to form personal friendships without descending to partisan bitterness. It was also possible for attorneys to revive earlier discussions over qualifications for admission to the bar. Peck's court, for its part, sought to encourage formal legal education by waiving examination for any person holding "a diploma of any respectable law school."⁶⁹

VI. THIRD TIME LUCKY: FOUNDING THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

The University of Alabama was an obvious possible forum for "respectable" legal training; yet education was at least as

65. FLEMING, *supra* note 62, at 350, 353, 751, 755; WIGGINS, *supra* note 62, at 50-53, 82; BREWER, *supra* note 3, at 560; NORTHERN ALABAMA: HISTORICAL AND BIOGRAPHICAL 522-23 (1888) [hereinafter NORTHERN ALABAMA].

66. 43 Ala. 9 (1869) (citing address of Peck in introducing a portion of this volume).

67. NORTHERN ALABAMA, *supra* note 65, at 523.

68. *Id.*

69. Minutes of the First Meeting of the Court, 43 Ala. 7-8 (1869) (listing rules adopted by the Alabama Supreme Court at beginning of January term, 1869). See *also id.* at 7-10 (providing minutes of the last meeting of the Alabama Supreme Court, rules adopted, and address of Chief Justice Peck for January term, 1869); NORTHERN ALABAMA, *supra* note 65, at 523; GARRETT, *supra* note 3, at 635. For an example of Peck and his fellow justices refusing to involve themselves in politics, see the TUSCALOOSA TIMES, Feb. 21, 1872. See *also* S.W. John, *Two Lawyers—Two Chief Justices*, in 1902 ALA. STATE BAR PROCEEDINGS 126-27 (describing Peck as a judge who rose above partisan pleasures).

difficult to reconstruct as the judiciary. The University had closed after Federal troops burned it in April 1865. During Reconstruction, it was reopened under control of the State Board of Education, which acted as "Regents" for the University. Efforts of this body to install a Carpetbag faculty and administration were unsuccessful. Few students attended, and they, like the faculty, were subject to a mixture of heckling, threats, and physical danger. Tuscaloosa editor Ryland Randolph, a vehement Ku Klux Klansman, made faculty and administrators his special target. By the 1870-1871 academic year, the University was all but defunct.⁷⁰

Those were years of turbulence throughout the state, as Democrats battled Republicans at every level of civic life. The Regents, however, came to terms as their university fell into disarray. In the summer of 1871, they met with alumni groups and decided to reconstitute the school—with the understanding that scholars acceptable to Democratic public opinion would be added to the faculty. Prominent among the local men who worked with the Regents was the future founder of the University School of Law, Henderson Middleton Somerville, an attorney whose interests and experience fitted him for the work of rebuilding.⁷¹

The son of a physician, Henderson Somerville came with his family from Virginia to Alabama in 1837, the year of his birth. He received a good education, graduating from the University of Alabama in 1856 and going on to obtain an LL.B. (1859) at Cumberland Law School in Tennessee. Subsequently, he practiced law in Memphis and edited the *Memphis Appeal*. When that city was captured by Union forces, he returned to the University and taught mathematics and classics. When his alma mater was reduced to ashes, Somerville reentered the practice of law in partnership with former supreme court justice John J. Ormond, that veteran of legal policy-making, who may have

70. SELLERS, *supra* note 24, at 281-88, 291-308; FLEMING, *supra* note 62, at 611-15; A.B. MOORE, HISTORY OF ALABAMA 517-18 (1951).

71. FLEMING, *supra* note 62, at 750-52, 793-801 *passim*; JOURNAL OF THE BOARD OF EDUCATION AND BOARD OF REGENTS OF THE STATE OF ALABAMA 4 (June 15, 1871) (Montgomery, W.W. Screws 1871). *See also* SELLERS, *supra* note 25, at 309-10, 319 (discussing efforts to rebuild the school and noting that after 1876 the University was governed by a Board of Trustees).

pushed his partner's interests in the direction of professional education.⁷²

Somerville's career was soon tangled in the legal and political issues of Reconstruction. His practice attracted many clients, including Ryland Randolph, who was tried in 1868 "before a military commission in Selma, on the charge of intimidating colored citizens."⁷³ Somerville's defense of Randolph won the admiration of Democrats without fatally offending Republicans. A fine speaker, he was active in county politics and during the 1870s served on the Democratic State Executive Committee.⁷⁴ Like many of his white contemporaries, he was determined to regain control of the state; yet he was reasonable where Randolph and his ilk were blustery, law-abiding where they were violent. The Regents understood Somerville's merits. In 1871 they had decided that the reorganized University would have four schools or "departments," the third of which would be devoted to "Professional Education."⁷⁵ They planned for the latter to include a law school but failed to flesh out the details until December 1872—by which time the University had begun to regain its stability. At that meeting they showed more wisdom than the trustees of an earlier day, since they declared that the Professor of Law would receive a salary (\$500) as well as tuition collected from his students. In addition, they decided to use the incumbent as University attorney and to pay "reasonable" fees for legal work. Somerville was their choice; he was to start in the spring term of 1873.⁷⁶

72. NORTHERN ALABAMA, *supra* note 65, at 521-22; 2 MEMORIAL RECORD OF ALABAMA: A CONCISE ACCOUNT OF THE STATE'S POLITICAL, MILITARY, PROFESSIONAL AND INDUSTRIAL PROGRESS 745-46 (Spartanburg, S.C., Reprint Co. 1976) (1893) [hereinafter MEMORIAL RECORD]. Somerville's partnership with Ormond was short-lived, since Ormond died in 1866. See 4 OWEN, *supra* note 1, at 1303.

73. NORTHERN ALABAMA, *supra* note 65, at 522.

74. *Id.* at 522; 2 MEMORIAL RECORD, *supra* note 72, at 746; TUSCALOOSA TIMES, May 15, 1872; S.A.M. Wood, *Henderson M. Somerville, LL.D.*, 1 SOUTHERN L.J. & REP. 246, 252 (1883) (photocopy on file in Henderson M. Somerville file, Special Collections Department, University of Alabama School of Law Library).

75. JOURNAL OF THE BOARD OF EDUCATION AND BOARD OF REGENTS OF THE STATE OF ALABAMA 8-9 (June 19, 1871) (Montgomery, W.W. Screws 1871).

76. *Id.* at 8-9, 10 (June 19, 1871) (Montgomery, W.W. Screws 1871); JOURNAL OF THE BOARD OF EDUCATION AND BOARD OF REGENTS, SESSION COMMENCING NOVEMBER 25, 1872, at 33-34 (Dec. 5, 1872) (Montgomery, Arthur Bingham 1873); TUSCALOOSA TIMES, Jan. 17, Dec. 11, 1872.

The *Tuscaloosa Times* was almost excessively pleased with Somerville's appointment, calling attention to his "profound and varied knowledge of law" as well as his "easy and flowing elocution," and predicting great things to come.⁷⁷ Somerville, who must have known that he would start with a mere handful of pupils, was probably more realistic. Still, he had firm ideas about the materials he would teach, the methods he would use, and the value of law school education both to individual students and to the bar of Alabama. Whether he had any inkling that he would be teaching for the better part of two decades is impossible to say.

VII. SOMERVILLE'S EARLY YEARS: NATIONAL AND LOCAL CONTEXTS

While Somerville was beginning the University of Alabama Law School, far-reaching changes were taking place in American legal education. Harvard, during the deanship of Christopher C. Langdell (1870-1895), emerged as the leading school; and Langdell's "case" method steadily overcame opposition to replace older patterns of lecture and recitation. Students under the new order were expected to derive basic principles of law from the study of significant decisions printed in "casebooks." Interaction between student and professor was marked, as often as not, by a species of Socratic confrontation. The ideal product of such training was a young man capable of applying broad concepts to either side of a question—but constrained by his devotion to law as a science. Legal instruction at Alabama would incorporate the case method slowly and gradually. Somerville's ideas were more traditional than Langdell's and his control of students and resources more limited.⁷⁸

The new school's initial curriculum was designed to teach students the subjects required for admission to the bar. In part,

77. TUSCALOOSA TIMES, Dec. 11, 1872. See also UNIVERSITY OF ALABAMA LAW SCHOOL DIRECTORY OF GRADUATES, 1872-1970, at 21-23 (1970) (listing first law school classes) [hereinafter DIRECTORY OF GRADUATES].

78. STEVENS, *supra* note 3, at 35-41, 52-56, 60-61; FRIEDMAN, *supra* note 14, at 530-37; LAPIANA, *supra* note 5, *passim*. Concerning awareness at Alabama Law School of the case method, see the remarks by A.C. Hargrove, 1887 ALA. STATE BAR PROCEEDINGS 105.

Somerville expected his pupils to “read” law for him. In addition to specific volumes on pleading, equity, contracts, criminal law, evidence, and mercantile law, he prescribed readings from Blackstone, Kent’s *Commentaries*, and the Alabama Code (of the latter, probably the sections on pleading). Otherwise, his methods embraced lectures, recitations, and moot courts; early catalogs made no mention of formal examinations. Somerville was evidently a good classroom teacher, “wonderfully gifted in evolving principles from abstruse questions of law, and in deducing truth from confusion of facts.”⁷⁹ Thus, like Porter and Keyes before him, he aspired to the best antebellum standards of legal scholarship.⁸⁰

Somerville originally planned for students to finish the LL.B. in one and one-half years; Harvard prescribed a two-year course at this time. But Alabama students, some of whom had probably read law in an office, apparently could not wait for even three semesters; and admission to the bar was still so easy that Somerville was not in a position to insist. The school’s 1875-1876 catalog entry promised that graduates would be “ready-armed gladiator[s] for the pursuits of business or the forum” and stressed the future value of friendships made in law school.⁸¹ Yet it also noted that diligent students could finish the law course in nine months. Evidently, even the proud announcement that the Supreme Court had (in July 1875) granted University law graduates the diploma privilege did not give Somerville much additional leverage over his pupils.⁸²

However, reducing the time required for completion of law school did not mean cutting back the curriculum. On the con-

79. NORTHERN ALABAMA, *supra* note 65, at 522.

80. 1872-1873 UA Catalog 20, 32-33; 1875-1876 UA Catalog 25. Books listed for 1872-1873 include Stephens on Pleading, Greenleaf’s Evidence, Adams’ Equity, Parsons on Contracts, Parsons’ Mercantile Law, and Roscoe’s Criminal Evidence. These readings, combined with lectures, were not at all the Langdellian style of instruction. See LAPIANA, *supra* note 5, at 23-28; see also HURST, *supra* note 3, at 264-65.

81. 1875-1876 UA Catalog 25.

82. 1875-1876 UA Catalog 25; 1872-1873 UA Catalog, 20; 1875 Code, 154 (note), 156 (Supreme Court Rule 16). Harvard’s program was “expanded from eighteen months to two years” in 1871; from 1876 to 1899 students were “encouraged” to study for three years, and in 1899 the three-year course was made compulsory. STEVENS, *supra* note 3, at 36-37. For a comparison with conditions at Somerville’s alma mater, see LANGUM & WALTHALL, *supra* note 4, at 75-77.

trary, in 1875-1876 Somerville assumed the title of "Professor of Statute and Common Law" and welcomed John Mason Martin, son of former governor Joshua L. Martin and a respected practitioner, to the faculty as "Professor of Equity-Jurisprudence."⁸³ On the practical side, students could now take a greater part in moot chancery proceedings—taking depositions, learning terminology and rules, and acting as mock Registers in Chancery. In moot court exercises, Martin would write, students learn to "strike hard blows, because retreat is impossible."⁸⁴

On the theoretical side, Martin (like Langdell) believed that students learned more from their own reasoning upon a subject than from lectures. Hence, he favored "exhaustive" question and recitation sessions that must have approximated the Socratic method. Something of his classroom manner emerges in a catalog entry describing Equity as "a beautiful system, characterized by great simplicity in matters of detail."⁸⁵ For tracing elaborate legal doctrines, Martin evidently favored a method by which "an analysis . . . [is] thrown upon the board in the presence of the class. This being done, the members of the class are called upon for their criticisms, after which the teacher completes the analysis, if aught has been omitted."⁸⁶

In addition to their work in the classroom, Somerville and Martin were among the leaders of a significant new organization—which from its beginning would have friendly ties to the Law School. Founded in Montgomery in December 1878, the Alabama State Bar Association began as a coalition of about forty attorneys, several of whom were comparatively young, and many of whom practiced with a growing urban or corporate bar. Like the rise of law schools, bar association activity was part of the process by which the upper reaches of the legal profession closed ranks. Motives behind such organizations included the fraternal impulses of an increasingly specialized profession, a certain amount of professional snobbery, political ambitions, and

83. 1875-1876 UA Catalog.

84. 1875-1876 UA Catalog 27; 1878-1881 ALA. STATE BAR PROCEEDINGS 88. Note that the first three years of state bar association proceedings were published in one volume. For biographical information on Martin, see 4 OWEN, *supra* note 1, at 1165; BREWER, *supra* note 3, at 559-60.

85. 1875-1876 UA Catalog 27.

86. 1878-1881 ALA. STATE BAR PROCEEDINGS 87-88.

a noticeable degree of conservative reformism.⁸⁷ The Alabama Association, which viewed itself from the beginning as an elite group, quickly established a standing committee on Legal Education and Admission to the Bar. In 1879, John Mason Martin submitted the committee's first report—revealing a number of Association preoccupations.⁸⁸

He began by regretting that circuit and chancery courts should have licensed a number of "persons so little prepared for the discharge of professional duties."⁸⁹ Among the latter he included a certain number of unethical, as well as incompetent lawyers. With the ancestors of today's ambulance-chasers in mind, he deplored the fact that so many advocates had "yielded to the demoralizing tendencies of the age and been guilty of . . . 'hunting up and electioneering for business.'"⁹⁰ The remedy for these problems, Martin said, was to test candidates for admission more stringently—to insist that they should absorb both the knowledge and the disciplined attitude necessary to the practice of law. His committee's recommendation was that students devote two full years in study, spending one of them in a law office. Martin was hardly in a position to insist that law students must go to a formal school; still he set the stage for promotion of the Law School by later reformers.⁹¹

VIII. ATMOSPHERE AND ATMOSPHERIC CHANGES AT THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

Over the next few years, armed with the diploma privilege,

87. See *id.* at 3-5. Of 41 names listed or mentioned, 19 were of individuals from Mobile, Montgomery, Selma, or Tuscaloosa. See FREYER & DIXON, *supra* note 2, at 70-74; KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 214-15 (1989); FRIEDMAN, *supra* note 14, at 652-54. The American Bar Association was also founded in 1878, as was the Wisconsin State Bar Association. See HALL, *supra* note 87, at 214-16; JOHNSON, *supra* note 5, at 69-70.

88. 1879 ALA. STATE BAR PROCEEDINGS 31, 85-91. The report was read by Henderson Somerville.

89. *Id.* at 85.

90. *Id.*

91. *Id.* at 85-91, 167. For comments concerning the Law School, see *id.* at 151-62, 256-57, 267; 1883 ALA. STATE BAR PROCEEDINGS 10, 115-16; 1887 ALA. STATE BAR PROCEEDINGS 104-05. For information on similar dilemmas in Wisconsin, see JOHNSON, *supra* note 5, at 70-71.

Somerville and Martin succeeded in making the Law School an established institution within the state. From four in 1873, the number of law students had risen to twenty in 1879-1880 and would remain at that level until the mid-1890s, when more than thirty would be enrolled. Aware of the demands and temptations of legal business in "New South" Alabama, the faculty stressed both the practical and the moral aspects of the law school experience. The 1888-1889 catalog, for example, promised to "fit young men for the active duties of the office and the Court House" while giving them "an exalted idea of professional ethics, without which a knowledge of the law is dangerous to the individual and to the State."⁹²

Yet, law students were basically undergraduates, often with little academic background; training such persons had always been part of the University's mission. Thus, Somerville allowed his pupils to take courses in nonlegal subjects, including English literature and modern and ancient languages.⁹³ In 1880 University officials became determined to promote civic-mindedness among fledgling lawyers through lectures and readings in constitutional and international law. To teach these subjects (which, interestingly, were not considered "pure law" at Harvard and consequently were not taught there), the president of the University, scholarly attorney Burwell Boykin Lewis, was added to the law faculty.⁹⁴

The decision to involve Lewis in law teaching reflected the growth of the school; but it was accompanied by less favorable developments. In 1880 Somerville was appointed to the state's Supreme Court. He kept that position for ten years, and though

92. 1888-1889 UA Catalog 42; 1872-1873 UA Catalog 12; 1879-1880 UA Catalog 10; 1895-1896 UA Catalog 13; 1896-1897 UA Catalog 115. Note that there were fluctuations in enrollment in the 1870s and 1880s.

93. See 1875-1876 UA Catalog 26 for the information that law students were allowed to take courses in the "academic department" for free. See also HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 17 (1986). For evidence of a like-minded approach at the University of Chicago, see LAPIANA, *supra* note 5, at 129-30.

94. 1879-1880 UA Catalog; see 4 OWEN, *supra* note 1, at 1040. Lewis eventually taught other courses, for which he gave final exams. See his printed Examination in Common and Statutory Law (June 1885) (unpublished manuscript on file in Special Collections Department, University of Alabama School of Law Library). For opposition to international law at Harvard, see STEVENS, *supra* note 3, at 39-40.

he remained at the Law School, his attention was necessarily diverted from academic matters. J.M. Martin left teaching in 1885 after winning election to Congress.⁹⁵ Faculty brought in to fill these gaps included John David Weeden, a practitioner and former trustee who upon occasion taught "Statute and Common Law,"—and Andrew C. Hargrove, President Lewis' former law partner, a state senator, a prominent member of the state bar association and a University land agent who was a Lecturer on Equity-Jurisprudence.⁹⁶ In hiring such men the Law School availed itself of the surprising number of first-rate lawyers attached to the University. Still, the truth was that for much of the 1880's, the school had no full-time faculty.⁹⁷

Though the course of study was short and the staff was small, the Law School of the 1870s and 1880s did have its own intellectual atmosphere—one of conservative activism and cautious reform. Somerville and his colleagues were representatives of the ruling classes of "New South" Alabama, and they shared many of the assumptions of the planters, merchants, and industrial capitalists who ran society.⁹⁸ Like other men of affairs, these professors tended by training and inclination to be paternalists, inveterate meddlers in the affairs of dependents and employees—at a time when legal regulation of business and

95. NORTHERN ALABAMA, *supra* note 65, at 522; Robert H. McKenzie, *Farrah's Future: The First One Hundred Years of the University of Alabama School of Law, 1872-1972*, 25 ALA. L. REV. 121, 126-27 (1972); DIRECTORY OF GRADUATES, *supra* note 77, at 6. For relations among Somerville and President Lewis and for praise of Martin, see 1876-1888 TRUSTEE MINUTES (of the University of Alabama) 387-88 (June 18, 1885) (unpublished materials on file in the University of Alabama Archives) [hereinafter TRUSTEE MINUTES, with appropriate dates for volume and date of meeting].

96. 1885-1886 UA Catalog.

97. DIRECTORY OF GRADUATES, *supra* note 77, at 6-7; 1894 ALA. STATE BAR PROCEEDINGS 95. Weeden was "Lecturer in Statute and Common Law," 1885-1886, and "Professor of Equity Jurisprudence," 1886-1888; Hargrove was "Lecturer in Equity Jurisprudence," 1885-1886, and "Professor of Equity Jurisprudence," 1889-1895. See NORTHERN ALABAMA, *supra* note 65, at 531-32, for interesting information on Hargrove, who had read law under Elisha W. Peck. See JOHNSON, *supra* note 5, at 89-90, for information on the similarly well-connected faculty at the University of Wisconsin.

98. For the quarrelsome union of Black Belt and industrial interests which marked postbellum Alabama, see ALLEN JOHNSTON GOING, *BOURBON DEMOCRACY IN ALABAMA, 1874-1890*, at 41-48, 207-11 (Tuscaloosa, University of Alabama Press 1992) (1951); WILLIAM WARREN ROGERS, *THE ONE-GALLUSED REBELLION: AGRARIANISM IN ALABAMA, 1865-1896*, at vii-viii, 43-45, 55 (1970).

family life were increasingly accepted in the nation at large.⁹⁹ In addition, as was true of their counterparts in the Alabama State Bar Association, members of the law faculty were influenced by the ideals of the legal profession—due process, equality before the law, and impartial justice. In short, they were wedded to the existing order, but wanted it to work fairly.¹⁰⁰

Thus one of Somerville's most notable decisions from the bench, that of the 1886 *Parsons* case, ignored common law precedents to set scientific standards for prosecutions involving criminal insanity—a subject in which he took a humane interest.¹⁰¹ Hargrove, normally a most conservative politician, conferred with the celebrated prison reformer Julia Tutwiler and evidently supported her crusade to bring about improved conditions for women caught up in the the state's notorious convict lease system.¹⁰² For an extended moment in the history of the young school, students were able to profit from association with these and other "Bourbon" reformers.

Yet change was inevitable, certainly in the area of governance. Somerville had "founded" the Law School and remained an important figure through seniority and force of character. Initially, he had reported to the University president; and as early as 1875, the Regents had named president Carlos Smith as "Chancellor" of the Law School. Yet Smith, unlike other late-nineteenth-century presidents, was not a lawyer, and the title

99. See BARDAGLIO, *supra* note 1, at 115-228, *passim*, for development of this thesis.

100. FREYER & DIXON, *supra* note 2, at 70-74, 90-92. For the best statement of the Bourbon idealism of the legal profession in Alabama, see CODE OF ETHICS ADOPTED BY THE ALABAMA STATE BAR ASSOCIATION, (1887)[hereinafter CODE OF ETHICS]. For Bourbon reformism in general, see GOING, *supra* note 90, at 191-206. See also Waldrep, *supra* note 56, *passim* (discussing the power of legal culture).

101. *Parsons v. State*, 81 Ala. 577 (1886); 2 MEMORIAL RECORD, *supra* note 72, at 747-48. See BARDAGLIO, *supra* note 1, at 172, for a report of Somerville's work in another case. Somerville was less enlightened in his views on race. See *infra*, note 100.

102. See Letter from Julia S. Tutwiler to Colonel [A.C.] Hargrove (February 8, 1891) (on file with the Julia S. Tutwiler Papers, Hoole Special Collections Library, University of Alabama). On the penal system of Alabama, see GOING, *supra* note 98, at 170-90; ROGERS ET AL. *supra* note 1, at 283-84, 293-94, 388. For Hargrove as an opponent of cruelty to animals, see 1882 ALA. STATE BAR PROCEEDINGS 18. For conservative reforms as suggested by Henry D. Clayton, who would teach at the Law School as University president in the late 1880s, see 1884 ALA. STATE BAR PROCEEDINGS 104-13.

seems to have lapsed even before his departure in 1878. President Lewis' presence on the law faculty had somewhat clouded the issue of day-to-day governance, as did the absences necessitated by Somerville's court duties. Not surprisingly, these uncertainties led the trustees, many of whom were lawyers, to reevaluate the structure of the school.¹⁰³

However, they did not clarify the lines of authority until the administration of Henry D. Clayton, who was chosen president after Lewis died in 1885. President Clayton, a Confederate general who had extensive experience as a lawyer and judge, filled Lewis' old position as a teacher of international law. Clayton was in addition a vigorous administrator, and in 1886, the trustees decided that he and his successors would resume the title of Chancellor of the Law School—a decision which both simplified the school's administration and reduced its independence.¹⁰⁴

Clayton's presidency (1885-1889) witnessed important if qualified changes in Law School facilities and curriculum. In 1886-1887, the trustees founded a law library by approving the withdrawal of books from the main library. Bolstered by modest purchases (\$500 was appropriated in 1887, for example) and by gifts from the legislature, private citizens, and book-sellers, the new collection numbered twelve hundred volumes within four years. Even so, for many years the library was primarily a collection of Alabama case and statute law, with skeletal federal sources and assorted textbooks, watched over by a librarian who was usually a law student.¹⁰⁵

In the meantime, the trustees, led by lawyers such as Willis Clark and William S. Thorington, were increasingly inclined to

103. 1875-1876 UA Catalog; 4 OWEN, *supra* note 1, at 1575-76; SELLERS, *supra* note 25, at 317-24; 1876-1888 TRUSTEE MINUTES 356 (June 17, 1885), 387-88 (June 18, 1885).

104. NORTHERN ALABAMA, *supra* note 65, at 519-21; 1886-1887 UA Catalog; SELLERS, *supra* note 25, at 330-32; 1876-1888 TRUSTEE MINUTES 414 (June 23, 1886), 431-33 (June 24, 1886). For a complete account of Clayton's career, see Henry James Walker, Jr., Henry Delamar Clayton: Secessionist, Soldier, Redeemer *passim* (1995) (unpublished Ph.D. Dissertation, University of Alabama) (on file with the University of Alabama Library).

105. 1876-1888 TRUSTEE MINUTES 467 (June 23, 1887); 1886-1887 UA Catalog 38; 1889-1890 UA Catalog 43; Paul M. Pruitt, Jr. & Penny Calhoun Gibson, *John Payne's Dream: A Brief History of the University of Alabama School of Law Library, 1887-1980 With Emphasis Upon Collection-Building*, 15 J. LEGAL PROF. 5, 5-6 (1990); 1894 ALA. STATE BAR PROCEEDINGS 95.

think in terms of upgrading the Law Department—to think nationally, in fact. A trustees' committee had proposed in 1886 that the course of instruction should "conform as nearly as practicable to that pursued in the first class Law Schools in the other American States."¹⁰⁶ In 1888, on Clark's motion, the trustees asked the faculty "to revise the course of study . . . so as to make it extend over two years."¹⁰⁷ Their further suggestion was that diplomas should "hereafter be given only to students who are able to pass a satisfactory examination" on their courses—which was another bow to the Harvard manner of legal instruction.¹⁰⁸

On such questions, however, the trustees were well ahead of faculty and students. Somerville in particular, though he had originally favored a longer course of study, still feared that students would not pay for a two-year program. He believed, in the words of his younger colleague Adrian S. Van de Graaff, that curricular reform could not succeed "so long as the standard of admission set by the courts remained so low" that a legal career "remained practically open to every applicant of ordinary intelligence who would study for a period of six months or less."¹⁰⁹ The Law School, unendowed and not otherwise self-supporting, could not afford to lose students.¹¹⁰

Thanks in part to Somerville's influence, the faculty was allowed to take its own time to revise the curriculum. It was not until 1893-1894 that broad divisions ("Statute and Common Law," "Equity Jurisprudence," and "International and Constitutional Law") were replaced by more specialized courses, including Constitutional Law, International Law, Real Property, Personal Property, Pleading and Evidence, Commercial Law, Criminal Law, Equity Jurisprudence and Pleading, and Statutory Law of Alabama. While course offerings were still keyed to the admission requirements prescribed by the state code, the greater

106. 1876-1888 TRUSTEE MINUTES 433 (June 24, 1886).

107. 1876-1888 TRUSTEE MINUTES 548 (June 22, 1888).

108. *Id.* For Clark, see 3 OWEN, *supra* note 1, at 336-39; for Thorington, see DIRECTORY OF GRADUATES, *supra* note 77, at 8, 1876-1888 TRUSTEE MINUTES 387-88 (June 18, 1885); McKenzie, *supra* note 95, at 128-29. For the importance of the examination at Harvard, see LAPIANA, *supra* note 5, at 7-8, 88-89; for analogous changes at Wisconsin, see JOHNSON, *supra* note 5, at 76-82.

109. 1894 ALA. STATE BAR PROCEEDINGS 95-96.

110. *Id.*

number of courses presumably allowed more scope for technical training. On the other hand, the retention of international law echoed the school's earlier commitment to a broader education. The faculty recommended that students take two years to complete the LL.B., but admitted (once again) that the program could be completed in one.¹¹¹

For the most part these new courses would be taught by younger faculty members. Henderson Somerville had departed for good in 1890 after accepting a federal appointment; A.C. Hargrove would die in 1895. The faculty hired to replace them included (respectively) Adrian S. Van de Graaff, Hargrove's law partner and son-in-law, and Ormond Somerville, son of the founder. Obviously, both men were well-connected in Law School circles. Even so, they were different from former professors in ways that made them sympathetic to structural change.¹¹²

Van de Graaff (hired 1891) and Somerville (hired 1896) were young men, born during the years in which their predecessors launched careers. Though both practiced law and politics, each was in some sense a career academic and so more nearly fit the mold of the professional law teachers who held sway in Eastern schools.¹¹³ Finally, Van de Graaff and Ormond Somerville were both Alabama Law School graduates. Except for S.A.M. Wood, who filled in for other professors from 1889 to 1891, they were the first such to be hired.¹¹⁴ As alumni and professional educators, it was in their interest to nudge the Law School down the paths of administrative independence and elitism within the University and toward a broader influence within the legal pro-

111. For the old curriculum see 1879-1880 UA Catalog 15; for the new curriculum see 1893-1894 UA Catalog 64. For the subjects required for bar admission, see ALA. CODE § 857 (1886).

112. DIRECTORY OF GRADUATES, *supra* note 77, at 6-7; 4 OWEN, *supra* note 1, at 1602, 1703; McKenzie, *supra* note 95, at 127-28; NORTHERN ALABAMA, *supra* note 65, at 532.

113. HURST, *supra* note 3, at 264. It may be worth noting that Van de Graaff assigned his students Langdell's work on "Equity Pleading." See 1896-1897 UA Catalog 55.

114. 4 OWEN, *supra* note 1, at 1602, 1703. Van de Graaff was a member of the Law School's class of 1884 (though he had also studied law at Yale); Ormond Somerville graduated with the class of 1890. See DIRECTORY OF GRADUATES, *supra* note 77, at 7. For information on Wood (Class of 1878), see DIRECTORY OF GRADUATES, *supra* note 77, at 19; 1889-1890 UA Catalog 5; 1890-1891 UA Catalog 5; McKenzie, *supra* note 95, at 127.

fession and (to some extent) the larger society.

IX. VAN DE GRAAFF'S CRUSADE, THE STATE BAR ASSOCIATION, AND THE FABRIC OF ALABAMA SOCIETY

Van de Graaff in particular saw himself as an agent of progress; in the Alabama State Bar Association he found a useful medium for his hopes and plans. By the 1890s, the Association boasted over one hundred fifty members (roughly twenty per cent of the state bar), and as had been true since the start, several of its leaders were involved with the University.¹¹⁵ Trustees James E. Webb and William S. Thorington were active members. A long-time member, A.C. Hargrove served as Association president in 1893. Richard Channing Jones (University president, 1890-1897) was chairman of the Bar Association's Committee on Legal Education and Admission in 1892; Van de Graaff was a committeeman under him. These scholars were influential men, well aware of the social and political problems of the day and of the varied ways in which legal practice affected society. Van de Graaff, for his part, sought to turn this connection to the Law School's advantage.¹¹⁶

He was also convinced, along with a significant number of Bar Association members, that lawyers faced crises of self-discipline and public confidence.¹¹⁷ To older practitioners it must have been obvious that the profession missed the convivial associations of the old circuit-riding days.¹¹⁸ Younger men like Thomas Goode Jones (rising politician and attorney for the L & N Railroad) were only too well aware that bench and bar, subdivided into rural and urban, corporate and plaintiff's units,

115. See 1896 ALA. STATE BAR PROCEEDINGS, clxxiii-clxxvii. See also FREYER & DIXON, *supra* note 2, at 72 (discussing Bar Association membership in 1882). Comprehensive lists of Alabama attorneys are few; for one drawn up close to the time at issue, see TROY, *supra* note 59, *passim* (containing 787 entries).

116. 1891 ALA. STATE BAR PROCEEDINGS 122; 1892 ALA. STATE BAR PROCEEDINGS 84-85; 1893 ALA. STATE BAR PROCEEDINGS 3; 1896 ALA. STATE BAR PROCEEDINGS 3, i-iii, clxxvi-clxxvii.

117. See generally FREYER & DIXON, *supra* note 2, at 70-74 (describing the legal environment of Alabama during the late 1800s).

118. 2 MEMORIAL RECORD, *supra* note 72, at 141, 144-46. See also JOHNSON, *supra* note 5, at xiii, 27-29, 38-40, 58, 68 (explaining circuit riding and the abuses of justice of the peace courts by an older attorney).

lacked the ethical center once provided by peer pressure.¹¹⁹ Such men shared with Van de Graaf and other law professors a devotion to the rule of law, and were ready to condemn overt abuses at all levels of the system.¹²⁰ They were, for example, more than suspicious of the atmosphere which surrounded the operation of justice of the peace courts, in which the "fee system" dictated that officials be paid according to their volume of business—and in some of which, rings of landowners and local officials acted in collusion to send black men to labor camps.¹²¹

Association leaders were also critical of Alabama's trial courts, tending to compare them unfavorably with the federal courts. Too many Alabama lawyers, they felt, were willing to exploit friendships or close connections with judges and jurors. Too many circuit judges were willing to grant continuances which made criminal convictions difficult to obtain. Often, under such circumstances, the interests of local elites triumphed at the cost of public disgust which further undermined the stature of the legal profession.¹²²

In an even broader sense, as politically astute men like T.G. Jones and Van de Graaff knew, the failings of the legal profession were accessory in the public mind to a number of wrenching changes. Alabama's rural economy suffered during the last quarter of the nineteenth century from falling cotton prices, with serious results for small landowners, tenants, and sharecroppers, many of whom were forced irretrievably into debt.¹²³ As sheriff's sales grew more common, it must have seemed that only lawyers, bankers, and merchants were prospering. In response to these conditions, angry farmers rethought their po-

119. FREYER & DIXON, *supra* note 2, at 72-73; ROGERS ET AL., *supra* note 1, at 360.

120. FREYER & DIXON, *supra* note 2, at 70-74.

121. *Id.* at 70-74. See also PETER DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969 passim* (1973) (describing forced labor of blacks).

122. FREYER & DIXON, *supra* note 2, at 70-74. See also Thomas G. Jones, *Report of the Committee on Judicial Administration and Remedial Procedure, 1878-1881* ALA. STATE BAR PROCEEDINGS 224-241 (discussing defects of bench, bar, and pleadings in the late 1800s). It is worth noting that even as elite lawyers expressed disdain for certain of their colleagues, the supreme court adopted (in 1882) Supreme Court Rule 20, admitting to its practice trial court lawyers of two years' standing. The rule required lawyers to present a certificate of good character signed by a circuit judge or chancellor. ALA. CODE § 803 (1886).

123. ROGERS, *supra* note 98, at 236-70.

litical loyalties and joined bi-racial movements such as the Greenback Labor Party, the Farmer's Alliance, and the People's Party.¹²⁴ County bosses of the Democratic Party, to which the great majority of lawyers belonged, responded in the 1890s with massive vote frauds; and in the meantime, outbreaks of lynching and mob violence challenged both the legal system and the social fabric.¹²⁵

Most Bar Association members were economic and racial conservatives. They did not expect the legal profession to right the wrongs of society; in terms of structural reform, their chief concerns were for changes in pleading and procedure, simplification of code-pleading, and expansion and restructuring of the courts.¹²⁶ In considering the role and status of bench and bar, however, they combined an Old-South yearning for honor with a New South preference for efficiency, and sought to insure that better men would practice law. Their major effort in that direction was the adoption in 1887 of a *Code of Ethics* which went well beyond the precepts of 1852. Written by Thomas Goode

124. See generally *id.* at 121-375 (discussing atmosphere of this turbulent period); MCMILLAN, *supra* note 1, at 217-32, 249-359 (discussing political atmosphere in late 19th century Alabama).

125. For information on lawyers' awareness of social problems (and the relation of bar admissions requirements to those problems) see A.B. McEachin, *Remarks at the Alabama State Bar Association Proceedings*, 1890 ALA. STATE BAR PROCEEDINGS 52-59; BARDAGLIO, *supra* note 1, at 216-22. Henderson M. Somerville and Van de Graaff each wrote about the racial conflicts of the day; each man found his paternalistic reformism stretched thin. Somerville, *Some Co-Operating Causes of Negro Lynching*, 177 NORTH AM. REV. 506, 506-12 (1903) (disapproving of mob violence but offering a sympathetic explanation of it). Earlier, Van de Graaff had argued that the freedmen have been poor farmers but good factory workers, predicting that race relations would improve as the black population moved into wage labor in the cities and into the northern states. Adrian S. Van de Graaff, *The Unaided Solution of the Southern Race Problem*, 21 THE FORUM 330, 330-45 (1896).

126. The types of changes advocated by T.G. Jones and other Association members are summarized in FREYER & DIXON, *supra* note 2, at 74, and can be easily detected by anyone reading the Alabama State Bar Association Proceedings of the 1880s. A telling example of Bar Association discussion of current crises is found in Samuel Will John, *The Impending Crisis—Our Duty* Presentation before the Alabama State Bar Association, 1892 ALA. STATE BAR PROCEEDINGS 188-96. In this paper, John condemns ballot-box stuffing, but blames black voters, saying that they were so corrupt that the state could not have honest elections until they were disfranchised. This was precisely the course Mississippi had followed in 1890; Alabama would follow suit in 1901. See also ROGERS, *supra* note 98, at 237 (discussing the disenfranchisement of blacks).

Jones, this document required advocates to maintain a cordial but professionally distant bearing toward judges, jurors, witnesses, and fellow lawyers, to speak the truth, and to avoid cheap theatrics, abuse of witnesses, and conflicts of interest.¹²⁷ Finally, Jones added to the old requirement that lawyers be friends of the "defenceless or oppressed,"¹²⁸ a new injunction to expose "corrupt or dishonest conduct in the profession."¹²⁹

Of course, the best way to improve the quality of lawyers was to establish stricter admissions standards. For years, members discussed various proposals and considered the examination policies adopted by the bars of other states. In the early 1890s, their attention centered upon New York regulations which provided for a statewide, court-appointed commission of bar examiners. In 1893, Daniel Coleman (chairman of that year's Committee on Legal Education and Admissions) drafted a similar bill for Alabama; but the Bar Association evidently lacked the unity and focus to mount a successful lobbying campaign. "So much has been said, and well said" on the subject of admissions, wrote Coleman, adding: "It would be something to report that something had been done."¹³⁰

Van de Graaff, who was chairman of the Committee on Legal Education and Admissions in 1894, believed that he saw

127. CODE OF ETHICS, *supra* note 100, at iv-vi, vii, viii, x, xi, xv, xvi, *passim*. The 1852 ethical requirements had remained unchanged; *see, e.g.*, ALA. CODE § 864 (1886).

128. CODE OF ETHICS, *supra* note 100, at iv.

129. *Id.* at vii.

130. 1893 ALA. STATE BAR PROCEEDINGS 64. For interest in other states see 1883 ALA. STATE BAR PROCEEDINGS 47-48; 1887 ALA. STATE BAR PROCEEDINGS 101; 1888 ALA. STATE BAR PROCEEDINGS 68; 1892 ALA. STATE BAR PROCEEDINGS 179-80. For interest in a New York-style commission, *see id.* at 86-87, 185-86; 1893 ALA. STATE BAR PROCEEDINGS 64, 67-69. For information on Wisconsin's bar examination board, created in 1885, *see* JOHNSON, *supra* note 5, at 72. It is interesting that the 1858 law which allowed the supreme court to appoint examiners was not mentioned during debates within the Bar Association, nor was the Court's 1882 rule admitting trial lawyers after two years' practice. *See supra* notes 44, 114. Finally, the American Bar Association also had a Committee on Legal Education. For references to its reports, *see* 1878-1881 ALA. BAR PROCEEDINGS 161; 1892 ALA. STATE BAR PROCEEDINGS 178-79, 181. For mention of an ABA survey of American and international methods of legal education, *see* 1893 ALA. STATE BAR PROCEEDINGS 58. For the founding meeting of the ABA Section on Legal Education, *see* REPORT OF THE SIXTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 15-16, 366-69, 371-409. *See also* LAPIANA, *supra* note 5, at 132-70, *passim* (discussing disputes between the ABA and the elite law schools).

an opportunity to merge the self-interest and influence of the Bar Association and the Law School. After all, if the members of the former wanted novice lawyers to be well-trained, disciplined, and gentlemanly, why not lean more heavily upon the facilities offered by the latter? As a first step, Van de Graaff sought to stimulate the Law School Trustees to further action; so in June 1894 he appeared before them to make "an interesting and forcible appeal" for "extension of the Law course to a two years term . . . and for the establishment of a full Professorship in Law."¹³¹ The trustees, who had presided over curricular reform and had pressed for a two-year program, were sympathetic. They appointed a study committee whose members consisted of William S. Thorington, James E. Webb, and Martin L. Stansel, all active members of the Bar Association.¹³²

Van de Graaff's next move was to attend the yearly convention of the Bar Association and deliver his committee's report—a ringing affirmation of the New York model of bar admissions. Like earlier chairmen, he rehearsed Alabama horror stories of inadequate examinations conducted by flurried judges or hastily chosen committees of lawyers.¹³³ He likewise deplored the state's historically undisciplined standards, which "must inevitably lower the profession, in the eyes of its members, as well as of the general public."¹³⁴ Though urgently delivered, such remarks were hardly original.

More novel in Alabama was the openness with which Van de Graaff connected the future welfare of the bar with the welfare of the Law School. The advent of written bar examinations, he said, would produce "a demand for more instruction and for better training than has heretofore either been required or offered."¹³⁵ Such training, he asserted, could best be carried out with the aid of "some direct connection or intimate relationship"

131. 1888-1895 TRUSTEE MINUTES 515 (June 20, 1894).

132. 1888-1895 TRUSTEE MINUTES 515, 518 (June 20, 1894); 1894 ALA. STATE BAR PROCEEDINGS 94-97. For the trustees' Bar Association membership, see 1896 ALA. STATE BAR PROCEEDINGS clxxvi-clxxvii; McKenzie, *supra* note 95, at 129.

133. 1894 ALA. STATE BAR PROCEEDINGS 87-88. *See also* 1893 ALA. STATE BAR PROCEEDINGS 65-66; 1891 ALA. STATE BAR PROCEEDINGS 84-85; 1890 ALA. STATE BAR PROCEEDINGS 139 (rehearing of such stories by other speakers).

134. 1894 ALA. STATE BAR PROCEEDINGS 88.

135. Adrian S. Van de Graaff, *Report of the Committee on Legal Education and Admission to the Bar*, 1894 ALA. STATE BAR PROCEEDINGS 91.

between the Law School and the Bar Association.¹³⁶ He admitted that the Law School as it existed was a frail thing, lacking sufficient funding, a full-time faculty, and a good library. He lamented that the course of instruction typically lasted only one academic year. Still he believed that the school's record was a good one, all things considered. Throughout his talk, he ignored the question of whether the diploma privilege would be affected by the proposed changes.¹³⁷

Van de Graaff did promise, however, that the University stood "ready to respond to the raising of the standard of admission to the bar" by instituting a two-year course of study, as well as other needed reforms.¹³⁸ Calling upon the image of Harvard's law school and its far-reaching influence upon American law, he invited the bar association to "at least make a beginning" by giving financial support to Alabama's law school.¹³⁹ In so doing they would make it "worthy of Alabama, and of the renown of Alabama law."¹⁴⁰ Thorington and Hargrove praised Van de Graaff's presentation, and the membership responded by voting unanimously to adopt his "general suggestions."¹⁴¹ They also gave Van de Graaff the previous year's proposal and asked him to submit a bar admissions bill.¹⁴²

X. THE BIRTH OF WRITTEN BAR EXAMINATIONS IN ALABAMA

By 1894, the Alabama Bar Association should have been quite capable of belling the legislative cat on a subject of such

136. *Id.* at 93.

137. *Id.* at 91, 93, 94-95. Van de Graaff stated that 268 men had graduated from the Law School, of whom 150 were in practice in the state. These included five judges, eleven circuit or city solicitors, one Attorney General, and one U.S. Attorney, in addition to the clerk and reporter of the supreme court. Van de Graaff may have derived his argument concerning central bar examinations and the health of the Law School from Francis Wellman, *Admission to the Bar*, 15 AM. L. REV. 295 (1881). See also JOHNSON, *supra* note 5, at 71-72 (discussing the importance placed on Wellman's article by the Wisconsin Bar Association).

138. Van de Graaff, *supra* note 135, at 96.

139. *Id.* at 97.

140. *Id.*

141. *Id.* at 10-11.

142. *Id.* at 34.

importance. Thomas Goode Jones was governor, and his colleagues (elite lawyers) might have expected to benefit from a political climate in which, all across the region, elite Democrats of the Black Belt and the cities were joining forces to maintain their power. But the truth was that the Association's lobbying mechanism was cumbersome, involving a Committee on Legislation for drafting bills and a Committee on Legislative Enactment for buttonholing legislators.¹⁴³ And for reasons unknown, Van de Graaff failed to send in a bill until too late in the 1894-1895 legislative session. From that point, the issue of bar admissions reform hung fire until the Association meeting of 1896, when the University's President Jones approached James E. Webb—who in addition to his service on the Trustees' Law School study committee, was chairman of the Bar Association's Legislation Committee.¹⁴⁴

Webb, a Birmingham practitioner with Black Belt connections, willingly undertook to prepare a bar admissions bill. In the process, he studied the relevant statutes from Mississippi—which had not come under formal discussion before the Association, but which Webb preferred to the New York regulations advanced by Van De Graaff and others. In the end, Webb submitted a bill requiring circuit and chancery courts judges to administer (and presumably, to compose) written examinations, but giving Supreme Court justices the job of grading and deciding. It is difficult to say how Webb came to choose his Mississippi model. He may have believed that legislators would prefer to follow the lead of a neighboring state, or that they would balk at creating a New York-style body of bar commissioners. It is likewise uncertain whether Webb consulted members of the judicial branch—on whom he was heaping more work. In any case, his ideas were approved by the convention and his bill sent to the Committee on Legislative Enactment.¹⁴⁵

143. See *Bylaws* 7, 9, 1896 ALA. STATE BAR PROCEEDINGS clx-clxi.

144. 1895 ALA. STATE BAR PROCEEDINGS 19-20; 1896 ALA. STATE BAR PROCEEDINGS 18, app. A, i-iii; President Jones was chairman of the Committee on Legal Education and Admission in 1896. See *id.* at clxxx.

145. 1896 ALA. STATE BAR PROCEEDINGS 18, 19-20, app. D at lxvi-lxvii. For details of the statutes as passed, see *id.* at 18. Compare MISS. CODE ANN. §§ 202-208 (1892). It would seem, strangely, that Webb failed to take into account the wishes of the justices of the Supreme Court (who were in fact listed in the 1896 ALA. STATE BAR PROCEEDINGS clxxii, as honorary members). For a glimpse of the judicial reac-

As it chanced, members of the 1896-1897 legislature were also quite interested in the University's discipline, internal governance, courses, and funding. To assess the needs of the institution (and to check on rumors of loose morals and religious "infidelity") a Joint Committee traveled to Tuscaloosa in January 1897; their subsequent report contained some pointed suggestions.¹⁴⁶ With regard to the law school, they must have talked to Van de Graaff, for they recommended significant changes: a two-year course of study, a full-time salaried dean, and an end to the president's role in instruction.¹⁴⁷ If University officials were waiting for a signal, this committee had sent one.

In the meantime, in December 1896, a version of Webb's bill had been introduced by Senator William Johnson Boykin, an 1891 graduate of the Law School.¹⁴⁸ On January 22, it was reported favorably by the Judiciary Committee.¹⁴⁹ On January 28 (three days after the Joint Committee report) the bill passed the Senate by a vote of more than two to one.¹⁵⁰ Its progress through the House was equally smooth, ending with passage by a vote of 53-5 on February 18.¹⁵¹ The same day the Senate concurred in a House amendment and Governor Joseph F. Johnston signed the measure into law.¹⁵²

The new law required the would-be lawyer to apply to the circuit, chancery, or city court of his home county.¹⁵³ The judge, having first passed upon the "moral character" of the applicant, was to administer a written examination on the fields of knowledge (real and personal property, pleading, evidence, commercial and criminal law, chancery law and pleading, statutes and con-

tion to Webb's system, see *infra*, note 154. For information on Webb, see 4 OWEN, *supra* note 1, at 1738.

146. 1896-1897 S.J. Ala. 323, 348, 401, 403, 515-48.

147. SELLERS, *supra* note 25, at 336-39, 365-66.

148. 1896-1897 S.J. Ala. 362; see also 3 OWEN, *supra* note 1, at 191 (discussing Boykin's biography).

149. 1896-1897 S.J. ALA. 436-37.

150. *Id.* at 612 (voting 17-6).

151. *Id.* at 765, 988, 1294.

152. 1896-1897 H.J. ALA. 1315; see also 1896 Ala. Acts 1482-86 (setting forth text of bill).

153. 1896 Ala. Acts 1483.

stitutions) required of a novice lawyer.¹⁵⁴ The judge then was obliged to send the examination to a justice of the Supreme Court, who with two of his colleagues would grade it.¹⁵⁵ If two of the three gave the paper a pass, the candidate was to be admitted.¹⁵⁶ The payoff for Van de Graaff and the University (surely no coincidence) was that the act preserved the 1876 supreme court rule which admitted Law School graduates without examination.¹⁵⁷

The bar admissions act of 1897 was a triumph for the Bar Association—a change in the law achieved after several years of discussion and maneuvering. Victory was not achieved by sheer numbers; only three of thirty-three senators and five of one hundred representatives belonged to the Association.¹⁵⁸ Rather, Association men were in positions of leadership. A.D. Sayre, a member of the Bar Association's Committee on Legislation, was Senate president;¹⁵⁹ another Association man, F.L. Pettus, was chairman of the Senate Judiciary Committee.¹⁶⁰ All five Association members in the House were members of that body's Judiciary Committee, including chairman Cecil Browne.¹⁶¹ The vote-totals indicate that such men, given the right issue, were able to work their will upon the legislature.¹⁶²

In a broader context, the new law was a turning point in

154. *Id.*

155. *Id.* at 1483-84.

156. *Id.* at 1484.

157. *Id.* at 1484-85.

158. Compare 1896 Ala. Acts 1607-11, with 1896 ALA. STATE BAR PROCEEDINGS clxxiii-clxxvii.

159. Compare 1896 Ala. Acts 1607 with 1896 ALA. STATE BAR PROCEEDINGS clxxi.

160. 1896-1897 S.J. ALA. 88.

161. 1896-1897 H.J. ALA. 79. It is entirely possible that graduates or partisans of the University or the Law School also worked effectively for the 1897 act. Thorington was a resident of Montgomery, for example. For a later instance of effective lobbying on behalf of the Law School, see TO INQUIRING FRIENDS IF ANY: AUTOBIOGRAPHY OF JOHN MCDUFFIE, FARMER, LAWYER, LEGISLATOR, JUDGE 138-45 (Mobile, Ala., Azalea Printers, Mary Margaret Flock, ed., n.d.) [hereinafter MCDUFFIE].

162. The elite lawyers may have been happy with the 1897 act, but it seems that the supreme court justices were less than happy with the increased labors they were required to perform. As early as the 1898-1899 legislative session, they backed an unsuccessful bill to create a five-man commission of bar examiners, and they continued to press for such an act. 1899 ALA. STATE BAR PROCEEDINGS 145-48; 1902 ALA. STATE BAR PROCEEDINGS 120-21. See 1902 ALA. STATE BAR PROCEEDINGS 120-121. The 1907 Code actually did provide for a three-member commission of bar examiners. See ALA. CODE § 2972 (1907).

Alabama legal history. For more than half a century, access to the bar had been marked by a kind of frontier Darwinism. An earnest young white man could become a lawyer by studying for a few months, after which he was free to prove his talent, acquire clients, and survive professionally—or not. The problems with this system were many, and gentlemen lawyers had sought to improve it by promoting law schools and setting minimum standards.¹⁶³ But it was not until the Law School and the Bar Association were in place—and functioning as interlocking agents of the legal elite in a troubled, modernizing society—that significant changes were made. For decades after 1897, graduation from the Law School was the one certain way to win the name of lawyer. In this respect, Alabama was abreast of (even ahead of) national trends.¹⁶⁴

XI. THE BIRTH OF A MODERN LAW SCHOOL

Changes at the Law School had been proceeding at a slow pace, but there was nothing slow about the trustees' response to the new conditions. At a special meeting called in March 1897, Willis Clark and James E. Webb put their names to a report largely duplicating Van de Graaff's 1894 proposal for a two-year program and a full-time dean. The full board agreed, stipulating only that a student could enter the second-year class if he passed "an approved examination" upon the first-year courses.¹⁶⁵ The trustees decided to elect a dean and "one or more instructors" at their June meeting.¹⁶⁶ They appointed a committee, whose members included Webb and Thorington, to select the dean.¹⁶⁷

The June meeting came and went without the trustees reaching a decision, except that the dean should be paid \$2500 a year. The records do not show at what point William S. Thorington became a candidate; but as a distinguished Montgomery lawyer and long-time trustee (nineteen years) his posi-

163. HALL, *supra* note 87, at 215, 257-58.

164. *Id.* at 257-58.

165. 1896-1901 TRUSTEE MINUTES 107 (Mar. 11, 1897).

166. *Id.*

167. *Id.* at 100-01, 107-08 (Mar. 11, 1897).

tion was strong. Finally, on July 8 the trustees chose Thorington as the Law School's first dean, and Ormond Somerville as assistant professor. Van de Graaff was out—possibly, as he later claimed, because he had broken ranks with the Democratic Party in the elections of 1896. Presidential participation was also a thing of the past; James K. Powers, whose term as president began the year of the Law School reorganization, was not a lawyer.¹⁶⁸

Though no one going through the confusion of change might have predicted it, the Law School was about to enter another phase of stability. Thorington and Somerville would serve together for over a decade and would become familiar figures to a generation of students. Thorington was formal, precise, and somewhat dull; his favorite ruse was to pose some point of law and ask: "If so, why so, and if not, why not?" Somerville, on the other hand, had twinkling eyes and was noted for his dry wit. In the classroom, both men relied heavily upon textbooks, lectures, and presentation of "illustrative cases." To some extent, however, they were influenced by Langdell, since it was their objective "to teach the student to think for himself and to rely upon reason and principle rather than upon memory."¹⁶⁹

The curriculum adopted during the Thorington years was more than an expanded version of previous offerings. It reflected, for the first time, a number of modern concerns. Intended to cover two academic years, the new program added offerings in the Law of Persons, Sales, Corporation Law, Contracts, Torts, and Domestic Relations to existing courses. As before, students were exposed to exercises in which they were expected to con-

168. *Id.* at 142 (June 23, 1897), 193 (July 8, 1897); DIRECTORY OF GRADUATES, *supra* note 77, at 7, 8; McKenzie, *supra* note 95, at 130. For Van de Graaff's troubles, see letter from A.S. Van de Graaff to F.M. Jackson (August 21, 1899) (Letterbook 1, 136, in the A.S. Van de Graaff Papers, Hoole Special Collections Library, University of Alabama), and A.S. Van de Graaff to W.C. Upchurch, October 4, 1899 (Letterbook 1, 174, in the A.S. Van de Graaff Papers, Hoole Special Collections Library, University of Alabama); he had supported a conservative breakaway from the Democratic Party in 1896. He would teach at the Law School again, from 1909-1911 and 1913-1915. James K. Powers was president from 1897 to 190. SELLERS, *supra* note 25, at 339-40.

169. 1900-1901 UA CATALOG 151. For descriptions of Somerville and Thorington, see DIRECTORY OF GRADUATES, *supra* note 77, at 7-8; McKenzie, *supra* note 87, at 130-31; 4 OWEN, *supra* note 1, at 1602, 1668-69; BLACK, *supra* note 93, at 17.

duct suits, draw wills, and prepare opinions. Looking toward the future careers of their students, Thorington and Somerville were flatly assertive about the pre-eminence of school-trained lawyers. Writing on the eve of national Progressivism, with its attendant regulation and litigation, they declared that "[t]he law has become so widened in its scope, so complex . . . , so important in its distinctions, and so numerous and conflicting are the authorities" that law-office education could no longer be adequate.¹⁷⁰

The program was not immediately popular among students. Enrollment in the junior class of 1897-1898 was only nine. Nonetheless demand for legal education remained high, and within two years the total enrollment was more than fifty.¹⁷¹ However, the academic record of the reconstituted Law School was mixed. While it attracted a number of bright students (including future United States Supreme Court justice Hugo Black and early woman graduate Maud McLure Kelly), it also developed a reputation as a safe haven for football players and other athletes. Nor was the school's reputation safe among legislators and high-ranking lawyers. As late as 1907, alumni and supporters in the legislature fought off an attempt to abolish the diploma privilege.¹⁷²

Still, the Law School enjoyed the support of growing numbers of influential alumni. Thanks to them, and to the legislation of 1897, the school would survive and even prosper by following increasingly the model set down by Langdell and his disciples. During the long deanship (1913-1944) of Albert J. Farrah, the law school won accreditation from the American Bar Association, thus gaining official status as a producer of the legal technicians required by twentieth-century practice. Like their counterparts elsewhere, Farrah and his faculty put novice attorneys through intense training in the science of interpreting cases and schooled them in professional ethics. Whatever else

170. 1897-1898 UA Catalog 74; 1900-1901 UA Catalog 151-52, 154; McKenzie, *supra* note 95, at 131-32; SELLERS, *supra* note 25, at 392.

171. 1897-1898 UA Catalog 100; 1899-1900 UA Catalog [120]; 1900-1901 UA Catalog 179-80, 188.

172. BLACK, *supra* note 93, at 17-18; McDUFFIE, *supra* note 161, at 137-38, 138-45; CYNTHIA NEWMAN, MAUD MCLURE KELLY: ALABAMA'S FIRST WOMAN LAWYER *passim* (1984); McKenzie, *supra* note 95, at 132-34.

they might have thought about the modern world of law, Farrah's Alabama predecessors—the scholarly attorneys of antebellum days and the reformers of the Bar Association—would have smiled to see him at work.¹⁷³

173. See Van de Graaff's statistics on the success of Law School graduates, 1894 ALA. STATE BAR PROCEEDINGS 94; McKenzie, *supra* note 95, at 132-33, 134-43.

