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YALE LAW SCHOOL COMMENCEMENT 2013 REMARKS OF PROFESSOR ANNE L. ALSTOTT

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YALE LAW SCHOOL
COMMENCEMENT 2013
REMARKS OF PROFESSOR ANNE L. ALSTOTT

As I look out at you, the Class of 2013, my heart leaps up.¹ On this Commencement Day, I am delighted for you, I am thrilled for your families, and I am hopeful for the world.

As I look out at you, I see so many faces I know, and I recall so many conversations. I have taught most of you -- 162, to be exact, or 78%. You will remain in my mind and in my heart, and I wish you the greatest good fortune as you leave our halls.

Looking ahead, the future is so bright. You will be great lawyers, without doubt, and you will argue landmark cases. You will become judges and agency officials and elected officials too. Some of you will return to the academy as professors. Some of you will start businesses that innovate for the benefit of all. And some of you will found nonprofit enterprises that advance the interests of the disadvantaged.

I have the sense that we stand atop floodgates that are about to set free a gigantic wave of talent, energy, and dedication.

You have reached this moment of celebration thanks to a combination of choice and chance. You are each endowed with talents and with virtues, and you have chosen, time and time again, to work hard, to devote yourself to matters beyond yourself. You are, at the same time, as am I, beneficiaries of luck. The good luck that gave you parents and guardians and other family members to guide you, support you, and love you. At the same time, many of you have weathered misfortune and have found within yourselves the strength to persevere.

For our part, we, as a faculty, have made choices and reaped the fruits of chance. When we read your admissions files four years ago, we made the sound choice to admit you! Our choice, in turn, granted us the good fortune to spend three years in your company. I hope that we have helped you gain a firm foothold in the law. I know that you have pushed us to be our best, to think hard about the problems facing our society and the global community. Still, we know that we have played only a minor role, a bit part, in making you what you are.

My heart leaps up, too, because today marks a rite of passage, a moment of generational transition. As of this moment, you are students no more. You are lawyers. And, as lawyers, you have stepped up to a new responsibility -- responsibility for the shape of the law.

Now, technically, I suppose that the bar examiners of the several states might take issue with my calling you "lawyers." So I will add the caveat that your diploma does not

¹ William Wordsworth, My Heart Leaps Up (1807).

authorize you to practice law just yet. But permit me, one last time, to make a signature Yale Law School move. In addressing you as lawyers today, I will pass lightly over the actual rules in order to make a larger point.

So I want to speak to you now, lawyer to lawyer, peer to peer. And I hope that we can reflect, together, on what it means to be a lawyer and to take responsibility for the shape of the law.

For me, the starting point is that the law plays a central role in distributing resources and opportunities in our society. As lawyers, we have access to the hidden structures that shape choice and chance for us and for our fellow citizens. And, as lawyers, we have an obligation to use the law to advance the cause of justice.

Today, I want to focus on the situation of the millions of young Americans who, like you, are taking part in a generational transition. Throughout this month of May, more than four million young Americans will celebrate their own rites of passage, leaving high school or college or graduate school for the world of employment and family life. I hope that each of these celebrations is no less joyous than ours, and yet, many of these young people face limited choices -- and sobering consequences if their luck in this American economy turns sour.

We might talk at length about all the features of law that shape the choices open to the new generation. But in the time that we have, I want to focus on just three -- three features of society, shaped by law, that open up bright vistas for some young people but leave others facing futures that seem cloudy or even dark.

First, consider the inequality that blights American education from preschool through college. Your presence here today reflects the culmination of a path that you have walked for decades now, and the same is true of all young Americans. But too many children have been denied a decent education, beginning in preschool and extending through college.

Poor children are least likely to attend preschool. Too often, these same children find themselves in public school systems that are not adequately funded to meet their students' needs. Children from families of modest means are less likely to graduate from high school, less likely to enroll in college, and less likely to complete college than students from higher-income families. Even when low-income students beat the odds and achieve at a high level, they can still find themselves shut out of the opportunities that high-income students take for granted.²

Second, consider the high cost of college, which leaves some young Americans outside the ivy walls and exacts a heavy price from those who enter. I don't need to tell you that the burden of university tuition and expenses has risen to daunting heights. Today, the

² http://www.brookings.edu/~media/projects/bpea/spring%202013/2013a_hoxby.pdf

average four-year college costs \$22,000 per year³ -- or a staggering 44% of median family income.⁴

With tuition outpacing inflation and the price tag of a bachelor's degree now approaching \$100,000 on average, student debt has continued to balloon, even during the Great Recession.⁵ Today's college graduates feel, with good reason, that they have mortgaged their futures. And the strain of college debt affects the generational transition for older generations too: many parents whose thoughts have turned to retirement must, instead, struggle to repay money they have borrowed to finance a child's education.

Third, consider the still-grim outlook for young Americans in the job market. In 2012, the unemployment picture improved for most workers, with the overall rate at 8%. But the unemployment rate for workers in their early-to-mid-twenties remained at near-record levels at more than 13%.⁶ New graduates confront even worse numbers, I am sorry to say. As of 2012, new high school graduates faced a 31% unemployment rate. Even new college graduates faced a 9% unemployment rate.⁷ And these data understate the gravity of the employment situation for many young people, who take part-time jobs or jobs for which they are overqualified simply in order to earn some kind of paycheck.

This dismal employment picture is neither natural nor inevitable, even in a Great Recession. Young people in the United States today face a worse unemployment picture than do young people in Germany, Japan, Australia, and Canada.⁸

And youth unemployment, like high college costs, has ripple effects on generational transitions later in the life course. Today, an unusually large percentage of people aged 65 and older remain in the labor force.⁹ Some of these older workers enjoy good health and interesting jobs, and they have elected to delay retirement. But others find themselves unable to retire. And when older workers remain in the labor force, the pipeline of jobs narrows for younger workers.

These are sobering facts, and yet, it would take more to conclude that the situation is not just unfortunate but unjust. The question of intergenerational justice -- what one generation owes another -- is contested, with different thinkers taking different views. My own view, which I have only begun to sketch here, is that we as a society are

³ <http://nces.ed.gov/fastfacts/display.asp?id=76>

⁴ http://www.census.gov/newsroom/releases/archives/income_wealth/cb12-172.html

⁵ <http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf> (Table 12).

⁶ <http://www.bls.gov/cps/cpsaat03.pdf>. See also <http://stateofworkingamerica.org/chart/swa-jobs-table-5-2-labor-force-share-unemployment/>.

⁷ <http://www.epi.org/publication/bp340-labor-market-young-graduates/> See also <http://www.bls.gov/opub/mlr/2013/02/art1full.pdf>

⁸ In 2011, the unemployment rate for young people aged 20-24 was 15% in the United States, 8% in Australia, 11% in Canada, 8% in Germany, and 8% in Japan. <http://stats.oecd.org>

⁹ http://www.bls.gov/emp/ep_table_303.htm.

engaged in injustice -- that we are failing to provide the rising generation with its fair share of opportunities and resources.

You may think I'm right -- or you may not. You may wonder whether I have exaggerated the detriment of the new generation. After all, they benefit from technological advances that have improved our lives immeasurably in the last generation. Or you might think that instead of focusing on the distribution of existing resources, we should focus on the problem of generating more resources -- that our best hope for justice for everyone of all ages is to help the economy grow.

But, whatever your view, I hope we can concur on one point, and that is that *law* lies at the heart of the problem of generational transition.

Take elementary and secondary education. Education law and family law play a role in shaping children's readiness for education -- and what happens to them once they reach school. When the law treats preschool as a private obligation, something to be funded by families out of their wages, the law consigns poor children to second-class status. And American education is also shaped by the property rules, voting rules, political boundaries, and tax policies that perpetuate segregation and link school funding to local property taxes.

The path to educational equality might take many routes. We can -- and should -- debate solutions from charter schools to tax reform to redrawing school districts. We most likely will not agree on the right answer, but we should understand that we are "doing law" as we diagnose causes and debate solutions. For instance, some of you might argue the best way to reform education is to promote greater liberty and choice -- for parents, for teachers, for students. I might be more inclined to statist solutions, and yet you and I are in fundamental agreement on the core point. Liberty requires law. The law creates the preconditions for freedom. And even the minimal state of Robert Nozick depends on law to protect freedom and to prevent illicit regulation.

The problem of college cost is also very much a problem of law. Nominally, the private market sets tuition based on the forces of supply and demand. It might seem that there's little that law can do to command these economic tides. But you, the Class of 2013, know better. You know that the "free market" is not a black box, a machine whose workings are impenetrable to our gaze. You know that that decision to allocate the tuition burden primarily to students and their families is a *legal* decision. The student loan system is also a creation of law, and it can be changed. We can imagine a range of legal solutions, from government subsidies to income-contingent loan repayment, to greater deregulation so that colleges can truly compete to offer a cost-effective education.

And the problem of youth unemployment is very much a problem of law. Our nation's tepid response to the Great Recession reflects, in part, political and legal structures that empower wealthy and powerful interest groups to defend the status quo. Election law,

campaign finance, even the structure of the legislature hand power to interests who continue to benefit from present patterns of regulation and distribution.

At the same time, the law shapes what it means to be unemployed, and our legal system disadvantages the young. Unemployment insurance, for example, is only available to workers who have established a work history -- meaning that it is unavailable to many young workers who have yet to gain a foothold in the job market. Disability insurance, likewise, requires a substantial work history. And on the tax side, the taxes used to fund social insurance tend to fall heavily on lower-wage labor and on part-time workers, again burdening the young.

We as lawyers are uniquely privileged in our society. For many of our fellow citizens, the law is given, as immutable as stone. For them, the structures of politics, the rules of family law, the terms of unemployment insurance are beyond reach. Not so for us. We have been entrusted with the knowledge and ability to shape the law.

Perhaps all this this seems overly sanguine, even PollyAnna-ish. After all, if we have taught you anything, we have taught you to be skeptical about the relationship between law and justice. Law too often serves power at the expense of the vulnerable. Legal rules too often reinforce class divisions and bolster privilege. Legal actors too often abuse their power in order to distribute largesse to the wealthy at the expense of the public.

But as you reflect on our time together, I hope you will see that we showed you the dark side of the law to give you clarity and resolve -- not to make you cynical. We taught you to spot the hidden advantages accorded to the powerful so that you can level the playing field. We taught you to see the invisible walls that insulate privilege so that you can dismantle them. We have helped you grasp the tools of justice, and we trust you to use them. I cannot wait to see the results!

I want to end the way all speeches about economic justice should end, and that is with 19th-century nature poetry.

Oliver Wendell Holmes wrote a poem, which many of you will recognize, called "The Chambered Nautilus."¹⁰ The poem is a familiar one, but it had new resonance for me when I re-read it recently, and I hope it will for you too.

Oliver Wendell Holmes the poet was, of course, the senior Holmes, who was also a doctor. It was his son, Oliver Wendell Holmes, Junior, who is the Justice Holmes whose opinions we all know. So, in keeping with my theme of generational transition, I want to read the father's words and consider their meaning for the profession we share with his son.

¹⁰ Oliver Wendell Holmes, "The Chambered Nautilus" (1858).

The notable feature of the chambered nautilus is that it makes its own shell. As the nautilus grows, it constructs a new chamber to accommodate its larger body, and it closes off the older and smaller compartments. Holmes writes:

Build thee more stately mansions, O my soul,
As the swift seasons roll!
Leave thy low-vaulted past!
Let each new temple, nobler than the last,
Shut thee from heaven with a dome more vast,
Till thou at length art free,
Leaving thine outgrown shell by life's unresting sea!

I'm going to go out on a limb here, and say that Holmes wasn't writing to express concern about the nation's housing stock. Congress uses tax policy to nudge us all to buy McMansions, but Holmes the poet focused his gaze beyond bricks and mortar. The religious references to the soul and to the afterlife are clear enough, but I think we can also read the poem another way.

The key trait of the nautilus is that it is a builder. Bit by bit, this little creature builds a gorgeous "ship of pearl." We, as lawyers, can be builders too. And unlike the nautilus, we can build, not for ourselves alone, but for others as well. Armed with the tools of law, we build -- not a ship of pearl but the ship of state.

We can use our tools to build a society in which every member of the new generation can celebrate her graduation -- not only with joy but with well-founded hope for the future.

This, then, is my wish for you, and for all of us: As you go into the world, may you build ever greater mansions.