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Legal Profession in America

Roscoe Pound

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IV
THE LEGAL PROFESSION IN AMERICA

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LAWYERS IN THE COLONIES

Law depends upon lawyers and law and lawyers are little needed until there is a considerable economic development. Hence, there was little in the way of law in the American colonies in the greater part of the seventeenth century and lawyers were few, untrained, and of little influence. Many things concurred to hold back the development of lawyers in the seventeenth and early part of the eighteenth century.

(1) The fourth year of James I (1606) is often taken as the date of colonization. At that time, the common law was still in the stage of the strict law. The equity jurisdiction of the Court of Chancery became established in the seventeenth century, and the seventeenth and eighteenth centuries are the era of equity and natural law in our system, as they are also in the modern Roman law. But the common law as the first colonists knew of it was the law of the age of Coke, not the law of the age of Mansfield. To the plain Puritan who emigrated to America it seemed "a dark and knavish business." Its records were in Latin and in reports in Law French—a barbarous jargon in which the reporter's ignorance of French was eked out by Gallicized Latin, Gallicized English, and off-hand analogies. Also, it was heavily burdened with the formalism of the strict law, and its ideals were those of the relationally organized society of the Middle Ages, and so not in accord with those of pioneers opening up the wilderness. In addition, it was hard on the dissenters, who were colonizing America because it spoke from an era of organization while the colonists represented an oncoming age of individualism.

(2) Lawyers as a class were very unpopular in the colonies. The era of the Puritan Revolution was hostile to lawyers in England, and this hostility was exaggerated in the colonies.
In many of them, an attorney was forbidden to receive any fee. Some colonies would not permit them at all. Where they were permitted, the restrictions as to fees and procedure were very rigid. It must be remembered that, in the era of colonization, education and discipline in the Inns of Court were in decay. The attorneys were being excluded from the Inns and left to themselves. But it was the attorneys with whom the public came chiefly in contact.

(3) Law books were few even in England. Little printed information as to English law was available in the colonies. Coke's Institutes were published between 1628 and 1644. Those who came to America at the end of the sixteenth and in the first half of the seventeenth century had little to which they could turn when they sought to learn the law. The first American law book, a reprint of Magna Carta and the great common law statutes and of the Pennsylvania charter, was printed in 1687.

(4) The supremacy of the clergy in the magistracy and so in the tribunals, especially in New England, must also be considered. The clergy were the men of learning in the colonies in the seventeenth century, and were looked to as guides where the public looked to lawyers in the nineteenth century. The Word of God was their standard, and in New England they struggled hard for two generations to govern their communities from the Bible and their individual sense of justice.

(5) Where the Puritan polity did not obtain, the royal governors frequently interfered with the administration of justice so as to make it a personal justice rather than a justice according to law. This went on more or less down to the Revolution. In England, in the seventeenth century, the courts and the crown were engaged in a long and severe contest which ended only in 1688. When a bar arose in the colonies in the eighteenth century, it was in a contest with royal or proprietary governors quite analogous to that which had gone on between the lawyers and the crown in seventeenth-century England. The Stuart Kings regularly removed judges who would not decide as the King dictated, and royal colonial governors often proceeded in imitation of their masters. There could be but little legal development under such a system.

Although in legal theory the colonists brought the common
law with them and, as it is said, the common law is an inheritance from England, in fact our reception of the common law as a law for America was much later. It begins in the eighteenth century, with the setting up of courts and judicial justice in place of executive and legislative justice, and is not complete at the Revolution. Indeed, it is only complete at the end of the first third of the nineteenth century.

Need for lawyers came with the economic development of the colonies and the rise of trade and commerce in the eighteenth century. In New England, there begins to be something like a trained bar in the third decade of that century. In Maryland, there was perhaps the earliest development of lawyers. They appear of record almost from the beginning. Yet there were still very few at the time of the Revolution. Virginia regulated fees as early as 1642-1648, and strict legislation continued through the seventeenth century. But the attorneys were untrained agents for litigation and seem to have been men of little character or influence. A few seventeenth-century lawyers in Virginia had been trained in the Inns of Court. In the next generation there were many so trained. Much the same may be said of New York, New Jersey, and Pennsylvania.

After the Revolution of 1688, for a time there ceased to be trouble with the crown, and as peace between England and France ensued later, the colonies began to grow rapidly in population and in wealth. This called for law, and, although the bench down to the Revolution continued to be untrained and mediocre, there came to be a few good lawyers. In Massachusetts, they were first recognized as a profession in 1701-1702, when all attorneys practising in the courts were required to take an oath. But as late as 1758, when John Adams came to the bar, he tells us he “found the practice of law grasped into the hands of deputy sheriffs, pettifoggers, and constables, who filled all the writs upon bonds, promissory notes and accounts, and received the fees established for lawyers and stirred up many unnecessary suits.” At first, Massachusetts required no special qualifications and no definite terms of study. But in 1761, the bar formed an association and prescribed seven years of training—three of preliminary study, two of practice as an attorney in an inferior court, and two of practice as an attorney in the Superior Court. It also
prescribed what are now called professional ethics. At this time, a distinction was taken between attorneys and barristers, and in 1781, the Supreme Court of Massachusetts made a rule of court governing admission of barristers. In the other New England states, the bar is substantially post-Revolutionary.

In Maryland, there are two great names at the colonial bar, Daniel Dulaney, Sr., a barrister of Grey's Inn, admitted to the bar of the Provincial Court in 1710, and later Attorney General of the Province, and Daniel Dulaney, Jr., educated in the Temple, admitted to the bar in 1747, and one of the outstanding lawyers of his generation. He and some of his contemporaries took part in the contests which led up to the Revolution. In Virginia, from 1750 to the Revolution, there was an exceptionally strong group, largely educated in the Inns of Court. George Wythe, Thomas Jefferson, George Mason, and Patrick Henry, are names every American lawyer ought to know. But there were no prescribed requirements of admission to practice.

New York had few lawyers of much consequence under the colony. There was a bar association in 1748, and much admiralty business grew up under the Navigation Acts and led to an admiralty bar of some strength. But as late as 1785, there were but forty lawyers in New York City. In Pennsylvania, Andrew Hamilton, a barrister and bencher of Gray's Inn, came to Philadelphia in 1682, and was Attorney General of the Province and judge of the Vice Admiral's Court. He is best known for his defense of Zenger in 1733, the pioneer American case on liberty of the press. Between 1742 and 1776, seventy-six lawyers were admitted to practice in the Supreme Court. Few had much training, but just before the Revolution a strong group came to the bar which made “Philadelphia lawyer” a byword for an acute legal practitioner. A large proportion of them had been trained in the Inns of Court. In New Jersey, in 1755, the Supreme Court instituted an order of serjeants to be recommended by the judges and appointed by the Governor by writ. Also in 1767, a distinction was made between attorney and barrister (called counsellor). Counsellors were appointed by the Governor on recommendation of the judges.

In North Carolina, early in the eighteenth century, advo-
cates and attorneys, by rule of court were to be licensed by the Chief Justice and judges. It was ordered that no sheriff, under-sheriff, or clerk, should act as an attorney at law. Here, also, there came to be many trained in the Inns of Court. In South Carolina, there were few lawyers before the Revolution, but a large proportion, larger than in any other colony, were trained in England. One of them, John Rutledge, became a barrister of the Inner Temple in 1761 and was the leader of the provincial bar. He took the lead in opposition to the Stamp Act, and after the Revolution was Chief Justice of the State and in 1791 became Chief Justice of the United States. The history of the Georgia bar is post-Revolutionary.

Looking back over the colonial period, it is evident that great progress was made in the eighteenth century. The courts were not well manned. But lay courts can do much when aided by good lawyers. An increasing proportion of the lawyers were trained in England, and, even allowing for the decadence of education in the Inns of Court, this meant much. Moreover, an ever larger proportion were college educated. Beside the two seventeenth-century colleges, Harvard (1636) and William and Mary (1692) there came to be many in the eighteenth century before the Revolution—Yale (1700), College of New Jersey, now Princeton (1746), King's, now Columbia (1754), Philadelphia, now Pennsylvania (1756), Brown, (1764), Queens, now Rutgers (1766), Dartmouth (1769). For a time, the majority of the lawyers came from these colleges.

Also there were the beginnings of bar associations, not mere social organizations but at least some of them seeking to be such societies as those in England. There were even the beginnings of a differentiation of attorneys and barristers. It should be remembered that this was not so well worked out in seventeenth-century England that a leader like Maynard would not deal directly with clients.

There seemed every prospect of development of the profession in America along traditional common-law lines when events after the Revolution set back the whole development.
LAWYERS IN THE FORMATIVE ERA

Both for American law and legal institutions and for the legal profession in America, the formative era is the period from the Revolution to the Civil War. As has been seen, the reception of the common law and reshaping it to a law of America and the development of a legal profession were well begun at the Revolution. After the Revolution a reaction set in. There were many reasons behind this. Summarily stated, they were: (1) Conservatism, characteristic of lawyers, which led some of the strongest to take the royalist side and so decimated the profession; (2) economic conditions which gave rise to widespread dissatisfaction with law and distrust of lawyers; (3) political conditions which gave rise to distrust of English law and of lawyers; (4) social conditions which gave rise to disbelief in professions and led to deprofessionalizing of all callings; and (5) geographical conditions which gave rise to an extreme decentralizing of justice and so of the bar. These were decisive in the formative era of the profession in this country.

(1) At the time of the Revolution, the old prejudice against lawyers had largely worn away. Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers, and so were thirty-one of the fifty-five members of the Constitutional Convention. Indeed, five of the latter had studied law in England. But these men were almost entirely of the generation which had come to the bar under the colonial regime. Unhappily, a large number of the older and stronger lawyers were royalists and left the country or ceased to practice. Thus one result of the Revolution was to leave or put the practice of law chiefly in the hands of lawyers of a lower type and of less ability and training. Except in a few centers of legal culture, the bulk of the profession came to be made up of men who had come from the Revolutionary armies with many bitter feelings and but scanty knowledge of the law. Alexander Hamilton's preparation for the bar was three months' reading. His less gifted contemporaries at the bar, who came before the courts with the same hasty preparation could not have been expected to have much acquaintance with the principles and doctrines of the common law. Moreover, the judges were sel-
dom better prepared. Naturally, the courts for a time resented any serious investigation of English books and sought to palliate their lack of information by a show of patriotism.

(2) After the Revolution, a deep and widespread economic depression set in. Business had been wholly deranged. The ports had been closed, and the British Navigation Acts cut off the once profitable West Indian trade. Public debts were enormous and required ruinous taxation. Those who had property were property poor. Those who had set up enterprises were unable to pay their debts. The paper money of the government was worthless. The Tories were reclaiming their property under the treaty of peace, and English creditors were seeking to recover the debts due them in spite of confiscatory legislation. Those were days of strict foreclosures and imprisonment for debt. The chief law business was collection of debts and recovery of property held under confiscatory laws. Thus the lawyers were largely debt collectors, a type that has never been of the best. While almost every one else was perforce idle, the lawyers were busy and they had a monopoly of business in the courts and would do nothing without a retainer. In consequence, there was radical legislation which undid much of the best which had been achieved in the eighteenth century, and little that was good was put in its place. For a generation after the Revolution, law and lawyers labored under the ill effects of this period of depression.

(3) Political conditions after the Revolution had an equally bad influence. Naturally, the public was very hostile to England and it was impossible for the common law to escape the odium of its English origin. The books are full of illustrations of the hostility toward English law at the end of the eighteenth and in the earlier years of the nineteenth century. Pennsylvania, New Jersey, and Kentucky legislated against citation of English decisions and there was a rule of court against such citations in New Hampshire. It is significant that almost nothing of the decided cases of the time was thought worth while to report, and that Kent, Marshall, and Story, and the great judges who presently came upon the bench found themselves without help or hindrance from reported decisions of their predecessors. This period of distrust of the common law was prolonged by the rise of Jeffersonian democracy at the begin-
ning of the nineteenth century. That large and influential party not only heartily detested things English, but looked more than favorably upon things French. There was agitation for an American code on French lines and a temporary cult of French law books. In the end, nothing came of this so far as it affected reception of the common law. But the development of a legal profession was held back.

(4) Social conditions played their part also. The idea of a profession was repugnant to the Jeffersonian era. The feeling was strong that all callings should be on the same footing; and that the footing of a business, of a money-making calling. To dignify any one calling by styling it a profession seemed undemocratic and unAmerican. Distrust of things English, pioneer distrust of specialists—for versatility is a characteristic article of the pioneer's creed—and what we must pronounce false ideas of democracy, led to general rejection of the common-law idea of an organized, responsible, self-governing profession. Some states threw the practice of law open to non-lawyers, with bad effects still manifest in our legal procedure. Some provided that any one might enter the profession with no other qualification than good character. All states made admission easy with a minimum of qualification. All attempt to differentiate the agent's function and the advocate's function was abandoned. It seemed contrary to democratic ideas of the capacity of any man to do anything. So there was a merger where differentiation had begun and elsewhere differentiation was not attempted. Also, in this undifferentiated profession, the lower branch of the profession in England was taken as the model. This had two notable bad effects. First, it had a bad effect on forensic manners and conduct. The attorney identifies himself with the client whose agent he is. Thus the attorney-advocate tends to bring into the forum the personal feelings and bitterness of his client, while the advocate, who does not deal directly with the client, keeps free of this, to the great advantage of expedition and sound results in the courts. Wrangling, the commonest of phenomena in our courts, is substantially unknown among barristers. Second, it had bad effects on discipline because the unorganized branch of the profession, with no tradition of responsible organization or responsibility for the conduct of the members, was chosen for the model. The attorney conducts something
very like a business. The advocate certainly does not, and ought not to. Much of the serious abuses in the practice of law in large cities in America today grows out of carrying on a large law office as a purely business organization in which advocates are simply employees.

(5) Geographical conditions and conditions of travel completed the process of decentralization and deprofessionalization. In a country of long distances and in a time of slow communication and expensive travel it was a prime necessity to bring the administration of justice to every man’s door. The tendency was to set up independent courts of general jurisdiction in every locality and to give to each local court its local bar; and every member of a local bar, after a certain number of years, was taken to be competent to practice in the highest court on application. This system of distinct local bars for each local court, with no more than a nominal organization, as cities grew large was subjected more and more to deprofessionalizing influences which the professional tradition inherited from England could only feebly counteract.

Bad effects were not felt at first. The influence of the strong bar in many centers on the eve of the Revolution and of those trained in the offices of those lawyers kept up a high level. Also, for a time the institution of a circuit bar, going about with the circuit judge from one county seat to another, in constant contact in court and during term time, had a good effect in maintaining standards of what is done and what is not done and in keeping alive a professional tradition. But with the rise of great urban centers and the increasing importance of client-caretaking, the circuit bars substantially disappeared in the latter part of the nineteenth century. By that time, a new differentiation of the profession had grown up—a most unfortunate one—into (1) habitual client-caretakers, (2) habitual defendant's lawyers, (3) habitual plaintiff's lawyers, and (4) habitual practitioners in criminal cases, usually ranking, at least in large cities, about in that order. The effect on practice in the courts, especially in criminal cases, was bad. Discipline by the courts was invoked only in rare and extreme cases. Effective discipline by bar associations was in the future. Loose and even bad forensic practices came to obtain, especially in the larger cities, with no real checks
upon them. Economic conditions turned the leaders of the profession more and more away from the courts. Neither the judges nor professional opinion were equal to maintaining the standards required for an effective administration of justice by court aided by counsel.

There is another side to the picture. The period from the Revolution to the Civil War is in a sense the golden age of American law. The creative legal achievements of that period will compare favorably with those of any period of growth and adjustment in legal history. In seventy-five years at most, the seventeenth-century legal materials were made over into a common law for America, which became controlling for every state but one and has largely affected the law in that state. This was the work of great judges and great lawyers practising before them, for there was a high type at the upper level of the profession throughout this period. Of ten outstanding names in the judicial history of the United States, six, Kent, Marshall, Story, Shaw, Gibson, and Ruffin, belong to this formative era. Five of these six were college graduates, and two studied under great lawyers of the period just before the Revolution.

Nine great lawyers who practised in this era deserve mention also: Luther Martin (1748-1826) acknowledged leader of the American bar for two generations; William Pinkney (1764-1822); William Wirt (1772-1834); Jeremiah Mason (1768-1848); Daniel Webster (1782-1852) of counsel in almost all the great cases that made American constitutional law; Rufus Choate (1799-1859), by general consent the greatest advocate that has been at the bar in this country; James Louis Pettigrue (1789-1863); Horace Binney (1780-1875); and Reverdy Johnson (1796-1876). All of these were born before 1800 and were at the height of their careers before the Civil War. Seven of the nine great lawyers were college graduates and all were trained in the offices of lawyers who had their training in the great era of the colonial bar on the eve of the Revolution. Thus these great lawyers handed down a great tradition. They were the product of that tradition, not of the system or want of system that grew up after 1800.
The Rise of Bar Associations

After the middle of the eighteenth century, as the bar became established in the wealthier communities and an increasing number of lawyers had been trained in the Inns of Court, the lawyers began to organize, either in bar associations or as the organized bar of some court, and to establish rules fixing the requirements for study and admission to the profession. They could do this under an apprentice system by agreeing not to take any students in their offices except those having certain qualifications, and not to recommend or move the admission of any students unless they had studied a specified time. For example, in 1768, the bar at Salem, Massachusetts, adopted rules and agreed that the members should not take any student to study law with them without previously obtaining the consent of the bar; that they would not recommend any one to be admitted in the inferior court as an attorney unless he had studied three years with some barrister; that they would not recommend any one to be admitted as attorney in the Superior Court unless he had studied three years in the office of a barrister and practised at least two years in the inferior court; that they would not recommend any one to be admitted as a barrister until he had been attorney in the inferior court two years and then had practised as attorney in the Superior Court two years more; and that they would not have more than three students at one time. In 1770, the Boston bar resolved not to consent to any one being taken on as apprentice student who had not been educated at college or had an equivalent liberal education. Thus very high standards were being set up by these organizations. Requirements of local bars or bar associations of this sort survived the Revolution, and are to be found as late as 1800. But the sweep of Jeffersonian democracy over the country and legislation hostile to lawyers led to a decay of the requirements everywhere.

In Virginia, only one year’s study was required; in Maryland, three years; in Delaware, three. In North and South Carolina, no time was prescribed. Contrast with this the requirements before the Revolution: In Pennsylvania in 1788, four years’ study as a clerk and one year’s practice in the Common Pleas; in New York, at the end of the eighteenth century,
seven years—four of liberal education and three in the office of an attorney. But while one side of these associations decayed, bar associations as social organizations continued and kept a certain degree of professional organization alive until the revival of bar associations as they are today in the last quarter of the nineteenth century. Also, in the last century, the county bars often had annual meetings, with an address and a dinner, and were sometimes called specially to pass resolutions when some scandal of jury fixing or of flagrant misconduct called for exceptional action.

After the Civil War, bar associations had become social organizations, meeting for a social reunion once a year, with sometimes an address by some well known lawyer, and sometimes passing resolutions on matters of more than usual professional interest. A change began with the organization of the American Bar Association in 1878. The initiative came from the Bar Association of Connecticut at the instance of Simeon E. Baldwin, afterwards Chief Justice of that state. It is said that the idea originated with a group of lawyers who were in the habit of spending a brief summer vacation at Saratoga Springs and conceived that their annual reunion might grow into a national association of lawyers. Six hundred and seven lawyers, outstanding in their home bars, were invited, but only one hundred and eight responded, and but seventy-five attended the organization meeting. The association began on August 21, 1878, with two hundred and ninety-one members from twenty-nine states and the District of Columbia. It is significant that the subjects which it took up at the outset were legal education and law reform.

There were state bar associations in some of the states before 1878: Louisiana, 1847, reorganized 1855, but dormant till 1879; New York, 1876, but no continuous existence till after 1883; Illinois, 1877; Iowa, 1874-1881, a new association in 1895; New Hampshire, 1873-1878, a new one in 1889; Connecticut, 1875, but no proceedings of consequence till after 1910; Alabama, 1878; Wisconsin, 1878, but it did not last and a new one was formed in 1900; Nebraska, 1876-1882, the present association from 1900. Of local associations: Bar Association of the City of New York, 1871, but New York County Lawyers’ Association not till the present century; San Francisco, 1872; Cincinnati, 1872; Boston, 1877. Today there are
forty-eight state bar associations (one half, however, now merged in state bars), five dating from the 70's, nineteen from the 80's, sixteen from the 90's of the last century; and five from the first decade and three from the second decade of the present century. Note how recent they all are. They were organized as the American Bar Association was at first. They did not include all the lawyers in the jurisdiction nor representatives of the local associations.

For a long time, the purpose of these associations continued to be primarily social. The American Bar Association had a small and highly select membership and until after the first World War no state organization included the whole bar as is now the case in about half of the states. The meetings of the American Bar Association had good programs—excellent papers and addresses—and there were useful reports of committees. But the association had little influence and achieved little in the first two decades of its existence. Down to 1893, the average attendance at its meetings, held each year at Saratoga, was from seventy-five to one hundred and fifty. It began to grow slowly after 1893, and by 1903 had two thousand members. In this period it met alternately at Saratoga and at some one of the larger cities of the country. After 1904, it began to grow more rapidly and the meetings at Saratoga were given up. In 1914, it had eight thousand members, and in 1924 it had twenty thousand. In 1928, at the end of its first fifty years, it had a membership of twenty-eight thousand. The membership is now about thirty thousand. In 1936, it was reorganized so as to include representatives of state bar associations in its governing body.

Its useful activities have been: (1) Its promotion of the Conference of Commissioners on Uniform State Laws; (2) its work for reform of procedure; (3) its work for improvement of the conditions of admission to the bar; (4) its work for codification of legal ethics, i.e. the canons of professional conduct. In all of these very important movements it has taken a leading part. Great steps forward have resulted in the present century.

The conferences on uniform state laws had their inception in a special committee of the American Bar Association on uniform state laws, appointed in 1889. With the increasing
economic unification of the country, diversity of state legislation and adjudication on matters of commercial law became a serious hindrance to business. This subject was taken up by the committee and as a result of its work an annual Conference of Commissioners on Uniform State Laws was organized, composed of two Commissioners from each state, appointed by the Governor of the state, and meeting in connection with the meetings of the American Bar Association. The Commissioners serve gratuitously. Beginning in 1895, it has drafted and promoted enactment of many important statutes, especially on commercial subjects, such as the Negotiable Instruments Law, the Warehouse Receipts Act, the Sales Act, the Stock Transfer Act, the Bills of Lading Act, and the Partnership Act. In this bringing about of uniformity of commercial law the conferences have done a conspicuous service.

From the beginning, the American Bar Association had a committee on law reform. But little of consequence resulted till after 1907. In that year, a special committee of fifteen was set up to report on delay and expense in the administration of justice. In 1909, that committee made a full report recommending a series of propositions for reform of court organization and procedure. After twenty-five years, substantially all of those propositions had been accepted and largely enacted in different states. One of the chief recommendations was to commit procedure to rules of court. After a generation of endeavor, congress enacted a statute committing civil procedure in the federal courts to rules prescribed by the Supreme Court of the United States, and the Federal Rules of 1938 were the result. Another achievement has been promotion of the system of judicial councils, which has done much for improvement of the administration of justice in many jurisdictions.

From the beginning, also, the Association maintained a committee on legal education, which made useful reports year after year. The chief result was that like committees were set up in the state bar associations, as they were organized, and the state committees drew largely upon the reports of the American Bar Association committee and thus disseminated its ideas. In 1901, during a meeting of the American Bar Association, at the instance of a member who was professor in a law school, the Association of American Law Schools was formed. That association set high standards for membership
which have had a marked influence in elevating the standards of American law schools, and thus have helped in the steady advance in requirements for admission to the profession which has gone on, chiefly through the impetus of the American Bar Association in the present century. As far back as 1893, the American Bar Association formed a Section on Legal Education. For some fifteen years, that section and the Association of American Law Schools worked cooperatively, the executive committee of each holding a joint meeting and arranging their programs with reference to each other. This cooperation of practitioners and law teachers had far reaching effects. It is enough to say here that as a result of movements initiated by the American Bar Association there has come to be in almost all jurisdictions a centralized system of examination and admission, superseding the old system of admission to local bars, and state after state has moved, at first slowly and often against legislative opposition, but in recent years more rapidly toward more adequate requirements both as to general and as to professional education.

At the 1905 meeting of the American Bar Association, a resolution was adopted providing for a special committee to report upon the advisability and practicability of adopting a Code of Professional Ethics. This committee made a favorable report at the 1906 meeting and a committee was appointed to draft a series of canons. That committee made a full report at the 1907 meeting, containing (1) a compilation of the codes of professional ethics (more or less complete) which had already been adopted in some twenty-six states; (2) a reprint of Hoffman's fifty resolutions as to professional deportment, contained in his book, Course of Legal Study (1 ed. 1817); (3) a recommendation that the Association reprint the book "Legal Ethics" by George Sharswood, Chief Justice of Pennsylvania (1 ed. 1852); and (4) a request for suggestions and criticisms from all members. It should be noted how through Hoffman and Sharswood the code connects with the traditions of the bar on the eve of the Revolution and so with the Inns of Court. The suggestions received, together with articles on the subject in legal periodicals were compiled and printed for the assistance of the committee. The final draft was submitted at the 1908 meeting of the Association and was adopted. It should be added that the foundation of the draft was the code adopted
by the Alabama State Bar Association in 1887, which had been adopted with some modifications in eleven states. This code was drafted by Judge Thomas G. Jones, with whom the movement for a restatement of professional ethics had originated.

The Movement for Better Standards of Admission and Control

At the Revolution, the prevailing system was for each court to admit to its own bar, and for two generations this system largely held its own. If there was an easy court somewhere, that court could not open the bars of all other courts of the jurisdiction to those whom it admitted. The applicant had to satisfy the requirements of the bar to which he came and where he sought to practise. This system held on in a number of states after the Revolution, but after 1828 began to give way to the other and looser system. The competing system, which came in involved admission by a local court but provided that, when admitted in one court, the attorney was then entitled without more ado to practise in all the courts of the jurisdiction. This system began in Delaware, and two New England colonies before the Revolution, but got its growth under the influence of democratic ideas under Jefferson, and even more under Andrew Jackson. The result was that except in the very smallest states, it was impossible to maintain any uniformity of standards. The court or judge which maintained the lowest standards was most frequently resorted to. Meanwhile, in the states in which a centralized system of admission had grown up before the Revolution, there was a gradual decadence until by the last decade of the nineteenth century there was substantially the same result as in those which had set up a decentralized system at the outset. In some the highest court delegated its control to local bar associations or local courts or local committees. In some the highest court adopted rules and left administration of them to local committees.

In general, when the movement for a better system of admission began after 1890, American jurisdictions were about equally divided between three systems: (1) A system under which admission to practise in all courts might be had through any of a number of local courts. This system sacrificed every other consideration to a desire to make the admitting machin-
very convenient of access to applicants. As a result, the lowest standard set the lead and the system became a vicious one under the conditions of the end of the nineteenth and beginning of the present century. (2) A system of local admission to all but the highest court and of admission by that court to its own bar. This aimed at a compromise between the convenience of applicants and the maintaining of standards. But in most of these states the centralized control was exercised only in form. (3) A system in which there was a centralized authority in charge of all admissions. But in eight of the sixteen states which had this system, the highest court was required to delegate or had delegated its control to local authorities. In only eight of the forty-nine jurisdictions which existed in 1890 was there centralized admission and in more than one of these a loose practice of relying on local committees had grown up.

Thus at the beginning of the last decade of the nineteenth century most of the good work of the last half of the eighteenth century as to admission to the profession had been undone.

Pennsylvania was, on the whole, more careful than any other state. The Supreme Court had retained the colonial rules and had done much to keep up a certain uniformity of local practices as to admission. What could happen even in that state at the end of the nineteenth century is illustrated by In re Splane, 123 Pa. St. 527 (1888). Splane had three times failed to pass the prescribed examination for admission to the bar of the Supreme Court, which would have, if passed, entitled him to practise in the lower courts. He lived in Allegheny County, where the facts were known. So he went to Cambria County and applied to be admitted to practise in the Courts of Common Pleas, and was admitted. He then took his certificate to Allegheny County and applied for admission there on the basis of his admission in Cambria County. The state statute provided that one who had been admitted in any Court of Common Pleas or in the Supreme Court, on producing a certificate of admission and a certificate as to character, should be admitted in any Court of Common Pleas in the Commonwealth. Being denied admission in Allegheny County, Splane brought a mandamus proceeding in the Supreme Court, on the theory that admission in Allegheny County had become a mere
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matter of form. The Supreme Court denied the writ, holding: (1) that it was not competent for legislation to compel the courts to admit any one as an attorney—legislation could only be in aid of the power of the courts to admit; (2) that the statute only declared the prior practice and so did not exclude an inquiry into the fitness of the person who presented the certificate from another court. Suppose Splane had not failed before, but was afraid of an examination in Allegheny County, and so went to Cambria County? I suspect he could have succeeded in evading the more difficult local examination. It was only in a very flagrant case in those days that the local bar acted.

In 1890, the decadence had reached its lowest point. After that date, a steady movement began toward centralized control of admission by the highest court of the state or under the control of an organized bar of the state.

Another feature of the improvement which had gone on since 1890 has been change from legislative control of admission to judicial control. The profession was by no means primarily responsible for the decadence in requirements for admission to the bar and in their administration. After 1800, the legislatures interfered more and more, and always in the direction of debasing the requirements. Even when a movement to improve requirements began under the auspices of bar associations in the last quarter of the nineteenth century and began to make headway after 1890, the legislatures responded slowly and reluctantly, and most of the significant progress began after the courts refused to admit the competency of legislatures to force unqualified practitioners upon them and took the matter over by rules of court.

Historically, at common law attorneys had always been admitted by the court and entered on the roll of attorneys of the court. Such was the practice in the colonies and when our original constitutions were adopted, and hence, when those constitutions set up courts, presumably they meant courts constituted as courts were at common law, that is, made up of judges and of practitioners licensed by the judges as officers of the court. But all through our earlier history the legislatures assumed to have a direct control over the courts; not merely a lawmaking power to enact statutes as rules of deci-
sion. For example, they sought to grant statutory new trials to defeated litigants, to probate wills rejected by the courts, to suspend the statute of limitations for a particular litigant in a particular case, to grant continuances, to require judges to do the work of reporting for incompetent politician reporters, and to dictate admission of particular persons to the bar by special statutes. The judges in the end successfully resisted these usurpations. But in the matter of admission to the bar they did not begin to do so till after they had made their stand good against the other encroachments. The sort of thing with which courts have had to contend is illustrated by In re Humphrey, 178 Minn. 331. There the statute provided that one who had served in military or naval forces of the United States in the first World War and been honorably discharged, and was disabled ten per cent, or more as defined by the World War Veterans Act of 1924, should be admitted to the bar without examination. The court refused to act on this statute since it contravened the constitutional separation of powers. Perhaps that statute and the one involved in In re Cannon, 206 Wis. 374 (1832), in which the legislature tried to reinstate a lawyer whom the Supreme Court had disbarred for flagrant misconduct, are the last of their kind.

I have spoken of the machinery of admission. Now as to the requirements for admission. In the depression after the Revolution, Massachusetts sought to allow any one to practise by procuring a power of attorney for the case in hand. Two other states had like legislation. More generally, however, legislation was directed to lowering the requirements of education and professional training. In 1800, there were nineteen states and organized territories. Of these, fourteen required a definite period of preparation. In 1880, there were thirty jurisdictions of which but eleven had such a requirement. On the eve of the Civil War, only one fourth of the jurisdictions even nominally required any set preparation. Moreover, the legislatures did away with all requirements of a real apprenticeship and often of any fixed period of study, and when the courts and the bar sought to insure an educated and competent profession by requiring examination of all applicants, legislation often granted special exemptions from the examinations. In New Hampshire in 1842, in Maine in 1843, in Wisconsin in 1849, in Indiana, in 1851, any citizen of good character was
entitled to be admitted to practise without more. The last vestige of this did not disappear till well along in the present century.

Today a system of central control and central examinations has become universal and has made admission some guarantee of learning and professional competence.

5

The Movement for Organization and Self Control

About twenty-five years ago a movement began in the bar associations throughout the country for organization of the whole profession in each state, with powers of self government and responsibility for discipline, analogous to the Law Society in England. As explained in another connection, bar associations are not inclusive. Their membership is select. Those who belong to the associations, as a general rule, do not need much supervision of their professional conduct, and those who do need it could not be elected to a bar association if they tried. The movement was furthered by the American Bar Association taking a step toward integration of the bar associations by setting up a conference of bar association delegates which now meets annually in connection with the annual meeting of the association. Thus the meetings have been acquiring a more representative character. Also, the visit of the American Bar Association to England in 1924, where some three thousand American lawyers saw the Law Society in action, contributed to give an impetus to the movement. As a result, one half of the states now have incorporated bars, including the whole profession and having powers of self government and discipline and corresponding responsibility, and in eight more an active campaign has been in progress which will no doubt bring at least six more into line in the near future. In most of these states the bar succeeded in obtaining incorporation by legislation. In a few, however, integration as it is called, has been brought about by rules of the highest court, and in six, legislation has been supplemented by rules of court.

Integration of the bar is the most hopeful feature of the movement to reprofessionalize the legal profession which has been going on in the past fifty years. Along with the progress of legal education since 1870, and the movement to improve
the administration of justice, now pushed actively by a special committee of the American Bar Association, it promises to do away with abuses which grew up in the era of legislative de-professionalization in the last century and by restoring an organized body of cultivated men, pursuing a learned art in the spirit of a public service, make it possible for the whole body of American lawyers to do for the oncoming era what a small body of outstanding judges and lawyers, liberally educated and adequately trained in their calling, were able to do for the era from the Revolution to the Civil War.

It has often been remarked that we seem to be turning back to some of the universal ideas of what we once mistakenly called the dark ages. In the great creative era of the later Middle Ages men had ideas of doing things for the glory of God and the advancement of justice, and not merely toward competitive individual acquisition, which we are learning to invoke once more. Not the least of these ideas is the idea of a profession.

—Roscoe Pound.