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# The Contribution of Professional Organizations to Stability and Change Through Law

Glenn R. Winters\*

The term "stability" pertains more directly to the physical sciences than to law. Offhand, one associates stability with rest and instability with motion. Gibraltar is stable; a rowboat in rough water is not. There can be, however, stable motion and precarious rest. The earth moves at more than a thousand miles a minute in a stable orbit, and a railroad train thundering down a smooth and level track at ninety miles an hour may have a high degree of stability. On the other hand, the mass of rock and earth that recently plunged into the water behind an Italian dam killing three thousand people had obviously been resting all too precariously.

When Roscoe Pound gave to the law the seemingly paradoxical charge to be stable and yet to move, he was rejecting the idea of a Gibraltar-like law indifferent to changes going on about it and he was rejecting also a vacillating legal system which would yield like a rowboat to every wave of current events or public passion. He was asking instead for the kind of stability in motion which consists of moving steadily, predictably, and purposefully forward along the track of progress.

Natural factors which make for stability in the law outnumber and outweigh those productive of change. So far as rules of law themselves are concerned, there is an urgent need on the part of the people who live by them and on the part of the lawyers who work with them that they be definite, consistent, understandable, and predictable. It has been said with much validity that a definite, certain rule of law, although a bad one, is preferable to an uncertain one. It was this need that led to the development of the Justinian Code, and it is the principle underlying the common law principle of *stare decisis*. As for the machinery and institutions of justice, the greatest obstacle to change undoubtedly is simple inertia. To carry on with what we have is so much easier than to change it that only a strong countervailing pressure for change can overcome this inertia. In addition, the basic pattern for our judicial machinery has been laid out in the judicial articles of our constitutions, which have been protected against hasty change by intentional obstacles in the amending process. Throughout the legal

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world, as in some other areas of human life, there is a premium on age and experience which renders the older men relatively more influential than their youthful colleagues and so tends to put the reins in the hands of those who are most aware of what has gone before.

The great role and contribution of the organizations of the legal profession has been to provide the leadership, impetus, and motive power to overcome inertia and other forces favoring continuation of the status quo and to bring about the changes needed to keep pace with progress.

The first organizations of the legal profession in point of time and certainly the greatest in number are the bar associations, local, state, and national. The Philadelphia Bar Association traces its continuous existence back to 1802, but the modern era of bar associations began with the founding of the Association of the Bar of the City of New York in 1870, and the American Bar Association in 1878. Roscoe Pound has characterized the years preceding their founding as the "era of decadence," and the emergence of bar associations as the beginning of the end of that era.<sup>1</sup> John H. Wigmore described the lawyers of that day and of some years later in most unflattering terms: "At that period there was universal complacent torpidity in the profession; the thermometer of conscious progressive and collective effort was at the freezing point."<sup>2</sup>

It is not surprising, therefore, that such bar organizations as were established had little in the way of constructive programs and were largely social in character. The American Bar Association, significantly, met regularly for many years at Saratoga Springs, N.Y., a leading resort. When "conscious progressive and collective effort" came it was in what was undoubtedly the area of greatest need—professional standards. The professional status of the lawyer had sunk so low at the mid-century that a provision that "every person of good moral character who is a voter is entitled to practice law in any of the courts of this state" was incorporated into the Indiana Constitution of 1850.<sup>3</sup> A similar provision was nearly adopted in the Michigan convention of the same year.<sup>4</sup>

Here was a vicious circle—low standards resulting in incompetence, and incompetence perpetuating itself through continuation of low standards. The great and outstanding contribution of the bar associations in those early years was the breaking of this vicious circle by

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1. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 221-49 (1953).

2. Wigmore, *The Spark That Kindled the White Flame of Progress—Pound's St. Paul Address of 1906*, 46 J. AM. JUD. SOC'Y 50 (1962).

3. IND. CONST. art. 7, § 21 (1850). This provision is still in force in Indiana, but has been made tolerable by an Indiana Supreme Court decision holding it subject to reasonable rules and regulations. *In re McDonald*, 200 Ind. 424, 164 N.E. 261 (1928).

4. POUND, *op. cit. supra* note 1, at 225.

means of a three-fold attack led by the American Bar Association, with the support of state and local associations, in the first nationwide co-ordinated effort of the organized bar.<sup>5</sup> It manifested itself first in the establishment in 1900 of the Association of American Law Schools at the instance of the American Bar Association; second, in the early work of the American Bar Association's Section of Legal Education toward improvement of law schools and establishment of bar admission standards; and third, in American Bar Association leadership in the drafting of canons of professional ethics and their adoption in the states.<sup>6</sup>

Reform of the administration of justice and of the substantive law were recognized as suitable objectives of organized bar activity by the early bar associations, and a little was done in these fields in the early years,<sup>7</sup> but it remained for independent organizations to assume active leadership in each. At the 1906 convention of the American Bar Association in St. Paul, Minnesota, Roscoe Pound, then of the University of Nebraska Law School, issued a challenge to the bar in his historic address "Causes for Popular Dissatisfaction with the Administration of Justice." The American Bar Association did not accept the challenge. A motion that copies be printed and distributed to all members of the Association and to members of Congress was voted down, and the address was buried amidst protests that it contained dangerous doctrines.<sup>8</sup>

Wigmore and others met privately the next day and decided that if the ABA would not act something else would have to be done. It was into this atmosphere of official inaction and scattered, unorganized enthusiasm that Herbert Harley, a lawyer-newspaper editor of Manistee, Michigan, moved with a proposal for a new organization specifically devoted to judicial reform. He made a tour of the United States, visiting every state, and he found the men who felt as Pound and Wigmore did and brought them together to organize, on July 15, 1913, the American Judicature Society To Promote the Efficient Administration of Justice.<sup>9</sup>

This Society, fifty years old this year, has provided leadership throughout the past half-century for the judicial reform movement in this country. Supported today by more than twenty thousand lawyers,

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5. *Id.* at 271.

6. WINTERS, *BAR ASSOCIATION ORGANIZATION AND ACTIVITIES* 141-45 (1954).

7. Both the ABA and the Association of the Bar of the City of New York did early work for reform of procedure; the Association established a Judiciary Committee "charged with the duty of observing the working of our judicial system." POUND, *op. cit. supra* note 1, at 257.

8. Wigmore, *supra* note 2.

9. Winters, *The Founding of the Society*, 46 J. AM. JUD. Soc'y 45 (1962), and *Our Fortieth Anniversary*, 37 J. AM. JUD. Soc'y 5 (1953).

judges, and laymen, the Society promotes improvements in court and bar organization; selection, tenure, compensation, retirement, discipline, and removal of judges; court administration; judicial procedure; public relations of bench and bar; and legal service for all, including those who cannot pay a fee. It publishes a monthly *Journal*, conducts meetings, institutes, seminars, and programs, maintains an information and consultation service, and assists bar associations and others in the procuring of specific reforms in their localities. These activities are carried on by a staff of eleven from headquarters in the American Bar Center in Chicago.

It should not be overlooked that an early convert of the American Judicature Society's evangelism was the American Bar Association itself. Through its Conference of Bar Association Delegates, its Judicial Section, later renamed Section of Judicial Administration, and, in more recent years, through a score of sections and committees, the American Bar Association has devoted through the years an increasing proportion of its total energies to judicial reform projects until today they unquestionably together take up more of its program than any other activity or interest.

The American Bar Association never abdicated its responsibility for leadership in improvement of the substantive law as it did in 1906 with respect to the administration of justice. This developed slowly from small beginnings into the present complex structure of sections and committees devoted to specific areas of substantive law. ABA sections of Administrative Law, Antitrust Law, Corporation, Banking and Business Law, Insurance, Negligence and Compensation Law, Labor Relations Law, Mineral and Natural Resources Law, Patent, Trade Mark and Copyright Law, Public Utility Law, Real Property, Probate and Trust Law, and Taxation all maintain active programs for constant study and improvement of the substantive law in their respective fields. The Association also was instrumental in the founding of two independent organizations that have provided outstanding leadership in modernization of the substantive law—the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

The American Bar Association from the beginning included among its objectives the promotion of "uniformity of legislation throughout the nation," and in 1889 it appointed a special committee on uniform state laws. The National Conference of Commissioners on Uniform State Laws was founded in 1892 and is still in action. It consists of three or more commissioners from each state, appointed by the governor, and its expenses are paid by the states. Although its professed goal is only "uniformity," its draftsmen of necessity endeavor to offer

the best pattern for uniform adoption, so that in fact the National Conference's influence toward progressive change in the law is very great indeed. At the same time, the pressure toward uniformity restrains the states to some extent from tinkering with the model acts; this is a major influence toward stability.<sup>10</sup>

In the early 1920's a group of prominent American lawyers, judges, and law teachers decided that there was need for a more systematic and thorough movement for law improvement than then existed in either the committees and sections of the bar associations or in the National Conference of Commissioners on Uniform State Laws. They designated themselves as "The Committee on the Establishment of a Permanent Organization for the Improvement of the Law," and announced that the "two chief defects in American law are its uncertainty and its complexity." As a result of their efforts a great convocation was held in Washington, D.C., in 1923 and the American Law Institute was chartered "to promote the clarification and simplification of the law and its better adaption to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."<sup>11</sup>

The American Law Institute's greatest single accomplishment has been its various restatements of the law, codifications of American common law in various substantive law areas, based upon the decisions of the courts of last resort of the states. Here again, the Institute's influence has been strongly cast toward progressive change, in that the restatements endeavor to point out not only the weight of authority but also the best reasoned and most persuasive holdings. The thousands of citations that have been made to the various restatements witness the extent to which they are respected by the courts. At the same time, the crystallization of the amorphous spirit of the law into a blackletter paragraph followed by a page of commentary has been one of the greatest stabilizing forces in our legal history, serving the same end, although by no means as thoroughly, as Justinian's code did in his day.

The American Law Institute has gone beyond the mere restatement of existing common law to the drafting of important model acts and codes—the Model Code of Evidence, Code of Criminal Procedure, and Model Penal Code. The Uniform Commercial Code is the greatest model achievement of the American Law Institute, and also of the

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10. Armstrong, *Uniform State Laws and the National Conference*, 35 STATE GOV'T 185-90 (1962).

11. GOODRICH & WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE, 1923-1961* (1961), a pamphlet reprinting and updating an article first published in 1951 WASH. U.L.Q. 283; Wickersham, *The American Law Institute*, 72 U. PA. L. REV. 1 (1923).

Commissioners on Uniform State Laws, both of whom rightfully claim it.

Although the foregoing organizations have been outstanding, there are others which should be mentioned as space permits. For the past ten years the Institute of Judicial Administration, Inc., housed in Arthur T. Vanderbilt Hall at New York University, has carried on a splendid program of research, drafting, and publications on behalf of better courts and judges. The Institute has focused attention on delay in the courts through its annual "Calendar Status Study" of trial courts of major metropolitan centers. It has conducted major surveys of the courts of Maricopa County, Arizona, Allegheny County, Pennsylvania, and other localities. It furnished consulting service in the drafting of the judicial article of the Alaska constitution, and in the recent reorganization of the minor courts of Maine.<sup>12</sup>

The National Legal Aid and Defender Association observed its semi-centennial in 1961<sup>13</sup> as an organization specifically devoted to extending and improving the legal service available to persons who cannot afford a fee. During most of its history its emphasis was on legal aid in civil cases; the addition of "and Defender" to its formal title in 1958 signified enlarged emphasis on the problem of the criminal defendant. The Conference of Chief Justices,<sup>14</sup> the Inter-American and International Bar Associations,<sup>15</sup> and others that might be named have each assumed a special responsibility for a particular area of legal interest and provided leadership for changes needed to improve it.

Progress in improvement of the law, the legal profession, and the administration of justice during the past half century has proceeded at a constantly accelerating pace. There are those who argue today with sincerity and conviction that the law reform movement would benefit from a reduction in the number of organizations at work in the field and who urge that an organization having a counterpart among the sections or committees of the American Bar Association should be merged into that section or committee in the interest of a "unified effort." With all deference to the distinguished leaders of the bar who hold this view, there appears to be little in logic or human experience to support it.

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12. For a fuller description of its activities, see Elliott, *Arthur T. Vanderbilt: Administration of Justice*, 31 STATE GOV'T 224, 227 (1958), reprinted in ELLIOTT, IMPROVING OUR COURTS 5, 10 (1959); Elliott, *Judicial Administration's New Institute*, 37 J. AM. JUD. Soc'y 38 (1953).

13. See Avery, *Fifty Years of Progress—Challenge of the Future*, 19 LEGAL AID BRIEF CASE 124 (1961); Smith, *The First Twelve Critical Years—History of the National Legal Aid and Defender Association*, 19 LEGAL AID BRIEF CASE 128 (1961).

14. See Hyde, *The Conference of Chief Justices*, 9 F.R.D. 629 (1950); Hyde, *The Conference of Chief Justices*, 22 STATE GOV'T 276 (1949).

15. Herrera, *The Inter-American Bar Association*, Lawyers Guild Rev., Oct. 1941, p. 13.

It is no secret that, with exceptions, lawyers who are active in bar associations tend to come from the ranks of the more successful members of the profession, or of those who can afford to spare the time for it. This often results in what is thought to be a bent toward conservatism. Those who have risen to success under the existing system may indeed not be blind to its faults, but they will not as a rule be its most outspoken critics. Every specialized organization in the profession has its members who believe in it and support it but who at the same time do not consider themselves "organization" men. This is particularly true of a crusading organization, which can and does attract idealists who are willing to sacrifice to support the causes for which it fights. Although some of these members would follow along if their organization were merged, many of them would not, and it would be more difficult to maintain the same crusading spirit.

A further loss would be the stimulation that comes from witnessing each other's achievements. When there is no basis for comparison the best of us fail to keep on our toes. Long after all taxicabs in the city of Chicago had gone over to the use of automobiles, the transfer company that hauled passengers on an exclusive contract between Chicago railroad stations continued to use horse-drawn vehicles. Its work was comfortable, secure, and certain, and there was no pressure on it to modernize until the exclusive contract came to an end and competition entered the scene.

This is not to say, of course, that legal or judicial reform organizations should compete for the privilege of doing specific projects, or that they should duplicate their efforts. The competitive pressure, however, of knowing that another is engaged in similar work and that the respective products and achievements are being compared and evaluated cannot fail to simulate each to do a better job; it would be regrettable if this stimulation were lost simply for the sake of consolidation and unification.

We should not be doing justice to the professional organizations if we said or implied that their contribution is entirely toward change and not at all toward stability. Outstanding in the latter respect are the restatements of the American Law Institute. While the scholars who draft and debate their provisions are always alert to what the law should be as well as what it is, the putting into organized written form of what had previously existed only as an amorphous consensus of opinions and comments has been a tremendously powerful force toward crystallizing—stabilizing—it in that form. The same is true of the American Bar Association's *Model State Judicial Article* and of the uniform and model codes of the National Conference of Commissioners on Uniform State Laws.



In connection with the dedication of a new law school building it is appropriate to observe that one of the organizations that has had an increasingly influential part in determining the shape of the law, the practice of law, and the administration of justice is the Association of American Law Schools. Changes in curriculum, in aptitude testing, in teaching methods, and in other respects have been pioneered, to be sure, by individual schools, but some of them have resulted from studies stimulated by AALS, and all of them have been brought to the attention of others through the meetings and publications of the Association.

In these fast moving times, preservation of a proper balance between the old and the new, between stability and change, most often requires intentional effort toward preserving what is good from the past. Change has become a way of life. The oft-quoted remark from the introduction to Holmes' *The Common Law*, "The life of the law has not been logic, it has been experience," should be a reminder to us that it is perhaps a unique responsibility of law and of legal institutions to be a link between the new problems of a new day and the answers that were found to the problems that were new to past generations in their day. To fulfill that responsibility we cannot devote ourselves exclusively to either one, but, like Janus, god of the Romans, we must look both forward and backward all the time.