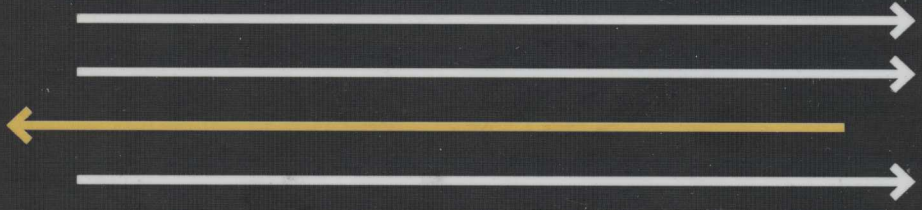
JAMES E. MOLITERNO

The American Legal Profession in Crisis



RESISTANCE AND RESPONSES TO CHANGE

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The American Legal Profession in Crisis

To my parents, Nick and Mary Moliterno, for their wisdom and their gentle ways.
To Dick Aynes, without whose professional influence and inspiration,
I would not have embarked on an academic career.
To Valerie Moliterno, for her unending love and patience.

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{ PREFACE }

The message of the book is that the legal profession tends to look inward and backward when faced with crisis and uncertainty. I will recommend that greater advances could be made by looking outward to find in society and culture the causes of and connections with the legal profession's crisis. Doing so would allow the profession to grow with the society; solve problems with, rather than against, the flow of society; and be more attuned to the society the profession claims to serve.

The book examines, for example, how the legal profession reacted to the Watergate events and the attendant public loss of confidence in authority, how it reacted to the rush of immigrants into the country and into the legal profession at the start of the 20th century, and how it reacted to perceived threats of communist infiltration in the 1920s and 1950s. The book will end with a treatment of how the profession is reacting to the current economic crisis and then finally a chapter to tie the threads together.

The book does not attempt to solve any particular crisis, including the current one. Rather, the book's aim is to focus attention on the legal profession's mode of crisis management. Understanding how the profession deals with crisis is a productive step toward effectively resolving any particular crisis.

In each of the book's chapters, I isolate a time and source of crisis in the profession. Often there is a parallel crisis or development in society generally. Always there are societal influences that are a generalized form of the crisis being felt by the legal profession. In each chapter, I attempt to answer a series of questions:

What is the nature of the crisis?
What was the surrounding legal history of the time?
What, if any, relationship existed between the crisis and the surrounding general history?
What did the profession do about the crisis?
What were the results of the profession's actions?
Were the profession's actions inward or outward focused?

Perhaps the 21st century's legal profession can learn from, and improve upon, the 20th-century American legal profession's approach to change and crisis.

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{ 1 }

What Crisis? Who Speaks for a Profession?

> I am by no means blind to the failings of the legal profession. . . . I know that we are often too conservative. We don't realize that the world is changing. We don't sufficiently look ahead. Instead of trying to help in so shaping changes that they accomplish benefits with a minimum of disturbance, we often stand stubbornly for the maintenance of methods that have been outworn.
>
> Henry P. Chandler, *What the Bar Does Today*, 7 Am. L. Sch. Rev. 1017, 1022 (1930–34)

In 1930 as in 1900 as in 2013, this is the mode of crisis management and regulation of the American legal profession. The legal profession tends to look inward and backward when faced with crisis and uncertainty. Greater advances could be made by looking outward and forward to find in society and culture the causes of and connections with the legal profession's crises. Doing so would allow the profession to grow with society, solve problems *with* rather than *against* the flow of society, and be more attuned to the society the profession claims to serve.

I. What Is Crisis?

The law is a crisis-prone profession. It seems that every decade or so, events take hold that cause the profession to self-identify a professional crisis: the immigrant wave of the first two decades of the 1900s, the communist scares of the 1920s and late 1940s and 1950s, the civil rights movement and associated social activist lawyering of the 1960s and 1970s, Watergate, the litigation explosion crisis of the 1980s, the civility (and associated professionalism) crisis of the late 1980s and 1990s, and technology and globalization threats of the first decade of the 21st century. In each, the profession looked predominantly to maintain its status quo against the odds posed by a changing world. Occasionally the threat subsided for reasons entirely unassociated with the profession's efforts (e.g., the communist infiltration crisis). More often, the world changed to the profession's dismay, and the walls of resistance built by the profession were overrun.

In some ways, the American legal profession is always in crisis. By their very nature, American lawyers and courts find themselves at the center both of social movements and of more transient, private controversies alike. Being inside such events produces a feeling of crisis, an unsettled sense. That day-to-day placement of the legal profession in controversy's path creates a perpetual sense of crisis. But that perpetual sense of crisis is not the subject of this book. Instead, this book is about periods in the history of the American legal profession when it self-announced a state of professional crisis. In these special times, the crisis sense was different—more pronounced, to be sure, but even different in kind from the usual drama of courts and lawyers and deals. Outside these special times, the profession is confident in the midst of its daily regime of routine controversy, sees its place rightly there, and sees that the profession is a steadying influence amid crisis and controversy. Unlike the day-to-day sense of crisis, during these special crisis times that are the book's subject, the profession itself sees the crisis, feels and reacts to the crisis, and often even fears it. During these times, the profession is unsure of itself: less confident about its future and its place. This book is about some of those special times and about the profession's response. Does the profession see itself and its difficulties during such times as part of the larger society's problems and attributes? Does the profession respond to its crises by looking inward or outward?

II. Inward and Backward

My thesis is that the profession too often looks inward to diagnose and solve its crises. Doing so has caused the profession to be a late-arriving member of society during times of change. Doing so has caused the profession too often to fail in what could have been a leadership role in society. Rather, the profession has too often seen itself as a last bastion of a prior time, clinging too tightly to its past and failing to grow in step with world developments. This is not to say that the profession should dismiss its core attributes at the first signs of societal change; it is to say that a perceptive growing with change would be preferable to consistent, persistent resistance to change. We credit the greatest lawyers with being able to anticipate and predict the course of the law's change and the readiness of society for change. The legal profession has been a poor lawyer by this measure. The legal profession, as an institution, most often stays blind to change that is happening all around it.

One window on this long resistance to change can be seen in the apt remarks of Thomas Francis Howe, the 1922 chairman of the Professional Ethics and Grievances Committee:

> Ever increasing complexities of modern business, the rapid changes in its methods, and the relations of lawyers thereto, are constantly raising questions concerning proper professional conduct that were not contemplated—or even dreamed of—when the [1908] canons were prepared. As a consequence the

> committees of local bar associations find that the canons are not only silent on many of the questions they are now called upon to answer, but do not even furnish any general principle applicable thereto.[1]

Already badly out of date in 1922, the American Bar Association's (ABA) 1908 Canons, the first effort at an official, national statement of lawyer ethics, lasted with only modest amendment until 1969.

This resistance to change could be characterized as careful, deliberate growth, resistant only to precipitous, rash change. The ABA founders' motives were summarized in this more positive light by a confidant of ABA founder Simeon Baldwin:

> [W]hen innovation and change are demanded in every quarter, there ought to be found somewhere in our system a calm, conservative power which can expose fallacies, point out flaws, and suggest reforms without violence or shock to our government.[2]

Calm in the face of crisis is an attractive trait. But as will be seen in the coming chapters, the profession's reaction to crisis varied by the nature of the crisis but always served maintenance of the professional status quo. When outsiders threatened to invade the bar's homogeneity, the profession reacted rashly and often without much reflection (the influx of turn-of-the-20th-century immigrants or the communist infiltration threat, for example). By contrast, when social, economic, or technological change was occurring around the profession, the profession's calm became intractability and myopia (the civility crisis and the current technological, globalization, and economic developments, for example). In either event, the profession sought the status quo and resisted "innovation and change [that was being] demanded," even when change was inevitable or desirable.

One early ABA leader, James M. Beck, articulated well just how deep and sweeping was their wish for the past to be maintained:

> In music, its fundamental canons have been thrown aside and discord has been established for harmony as its ideal. Its culmination—jazz—is a musical crime.
>
> In the plastic arts, all the laws of form and the criteria of beauty have been swept aside by the futurists, cubists, vorticists, tactilists and other aesthetic Bolsheviki.
>
> In poetry, where beauty of rhythm, melody of sound and nobility of thought were once regarded as the true tests, we now have the exaltation of the grotesque and brutal; and hundreds of poets are feebly echoing the barbaric yawp of Walt Whitman without the redeeming merit of his occasional sublimity of thought.

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[1] Thomas Francis Howe, *The Proposed Amendments to the Bylaws*, 8 A.B.A. J. 436 (1922).

[2] Letter from Senator Charles Jones to Simeon Baldwin (August 10, 1878) in SIMEON BALDWIN, THE FOUNDING OF THE AMERICAN BAR ASSOCIATION 682 (1917).

> In commerce, the revolt is one against the purity of standards and the integrity of business morals. Who can question that this is counterfeit? Science is prostituted to deceive the public by cloaking the increasing deterioration in quality. The blatant medium of advertising has become so mendacious as to defeat its own purpose.
>
> In the greater sphere of social life, we find the same revolt against institutions which have the sanction of the past. Laws which mark the decent restraints of print, speech and dress have in recent decades been increasingly disregarded. The very foundations of the great and primitive institutions of mankind—like the family, the church and the state—have been shaken. Nature itself is defied. Thus, the fundamental difference in sex is disregarded by social and political movements which ignore the permanent differentiation of the social function ordained by God himself.[3]

It is possible to characterize the discrete crises described and analyzed in this book as a single, continuous crisis of professionalism. In *Lawyers' Ideals/Lawyers' Practices,* Trubek and Nelson[4] saw it this way. It is plainly true that the several responses to the several discrete crises have common elements. But while they may all be a part of the legal profession's effort to hold tight to the professionalism ideal and its benefits, each of the crises chronicled in this book presented a unique challenge and warrants individual treatment. Each period presented a unique mixture of sometimes overlapping elements.

The profession's focus, inward or outward, drives its understanding and its response to a looming crisis. By inward and outward focused, I mean a couple of things. First, were the profession's actions considerate of the outside world developments, or were they primarily focused on attributes of the profession? Second, did the profession attempt to adjust to world developments, or did it attempt to maintain the profession's status quo in the face of change? Looking inward regarding a crisis means defining the crisis as belonging to the profession rather than the society generally. So, for example, the civility crisis was defined as a crisis of lawyer behavior without reference to the simple fact that lawyers were members of a broader society that was becoming far more competitive. Looking inward means searching for solutions to problems within the profession's ethos, largely assuming that any problem may be solved without professional change or adjustment. Looking outward means locating a professional woe within the broader societal context—relating lawyers' troubles to corresponding trends and phenomena in the culture generally. In some instances, the more apt descriptors will be "backward" and "forward." These terms give a more temporal than spatial sense. The comparative exists

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[3] James Beck, *The Spirit of Lawlessness*, 46 A.B.A. Rep. 167, 171 (1921); *See also* Morton Keller, In Defense of Yesterday: James M. Beck and the Politics of Conservatism 1861–1936 197 (Coward-McCann, Inc., New York, 1958).

[4] Robert L. Nelson & David M. Trubek, Arenas of Professional: The Professional Ideologies of Lawyers in Context 177–214 (1992).

on both spectra: from inward to outward and from backward to forward. Both sets help explain the profession's manner of seeing a crisis and framing a response. Whether characterized on one spectrum or the other, backward or inward vision produces the same result: service of the status quo.

The profession, it turns out, serves the status quo in multiple ways. At times, serving the status quo means making significant changes that will fend off outsiders or cultural change. At other times, serving the status quo means doing as little as possible in the vain hope that change will pass the profession by as if it were a bad dream rendered irrelevant by the morning light. In either event, the profession loses. Change comes and washes over the profession's walls.

III. Who Speaks for the Legal Profession?

In describing how the legal profession reacts to crisis, the first step is to determine who speaks for the legal profession. The profession has spoken through different voices and entities at different times in its history. The question is not susceptible of an absolutely clear answer, but there is value in providing as much of an answer as can be given. A broad approach to answering the "who speaks" question seems advantageous. I mean to include the views of the usual three branches of the American legal profession: the practicing bar, the judiciary, and the legal academy. I include in the practicing bar lawyers in service of government, many of whom have at various times been important spokespersons for the profession.

The first two branches, the practicing bar and the judiciary, have been important speakers for the profession since it was fair to claim that there *was* an American legal profession.

A. JUDGES

Important public statements by judges have marked developments in the legal profession. A few prominent judges were among the leaders of the early bar associations, including the ABA. Warren Burger arguably announced the profession's response to the "civility crisis" in the 1980s. Others critiqued the profession's response to crisis, such as Justice Douglas's warnings about the persecution of lawyers who deigned to represent those accused of communist ties.[5] Current Justices continue to chime in on issues affecting the legal profession. Justice Roberts challenged the relevance of the scholarly contribution of the academic branch in 2012, echoing words written for the *Michigan Law Review* 20 years earlier by former professor and Judge Harry Edwards.

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[5] William O. Douglas, *The Black Silence of Fear*, N.Y. TIMES MAG., Jan. 13, 1952, at 7.

But more crucial than any statements by individual judges, or even the important organizational voice of the Conference of Chief Justices, the state judiciary has spoken for the legal profession as its chief regulator. The judiciary has long claimed the right to regulate the legal profession. In early times, when the practice of law was primarily court practice, the notion that lawyers are officers of the court strongly supported the claim. In the main, it is this court power to regulate that has been delegated to state bar associations. In a real way, when a state bar association speaks or acts, it does so on behalf of its state supreme court. (In a few states, the legislature has claimed this power and delegated it to bar associations.) Thus, for example, when state courts adopted the ABA's model ethics codes as their own, it was the power of courts to regulate and supervise lawyers that allowed them to speak for the legal profession. With few exceptions, mainly in low-status courts, American judges have all been lawyers. This American phenomenon contrasts with the norm in continental Europe, where most judges train to be judges and are never lawyers; and with regimes such as those in China, where judges need not be and usually are not law trained at all. Through this device, courts (and occasionally legislatures acting on the same power and often dominated by lawyer-members) speak for the American legal profession.

B. LAWYERS AND THEIR ORGANIZATIONS

Charles Warren has amply demonstrated the influence of the early cadres of lawyers, especially those in Virginia, New York, Massachusetts, and Pennsylvania.[6] Until the ABA began asserting itself as the proxy for the American legal profession around the turn of the 20th century, the profession was perhaps too loose to be called an organized profession. Bar admission rules were almost nonexistent during much of the 19th century, in part but not exclusively the result of generalized professional diminishment during Jacksonian times. Organizations of lawyers in the United States did not follow the pattern of the British Inns. Instead, the loose relationship among lawyers during the first three fourths of the 19th century encouraged the shrewd and clever.[7]

> For most of the 19th century, no organization even pretended to speak for the bar as a whole, or any substantial part, or to govern the conduct of lawyers. Lawyers formed associations, mainly social, from time to time; but there was no general bar group until the last third of the century.[8]

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[6] CHARLES WARREN, A HISTORY OF THE AMERICAN BAR; *see generally* (William S. Hein & Co. 1990) (1911).

[7] *See, e.g.*, JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES (1854), *reprinted in* NOLAN, at 113–115. ("The older lawyers kept their experience 'as a close monopoly,' forcing younger lawyers to 'run a gauntlet of technicalities' at a 'considerable tuition fee to be paid by [the young lawyers'] clients.")

[8] LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 648 (2d ed. 1985).

The profession began to organize in earnest in the 1870s as state and local bar associations sprang up. The Bar of the City of New York, founded for the profession's "protect[ion], pur[ifaction] and preserv[ation],"[9] was easily the most prominent among a set of only marginally successful new enterprises. The ABA was founded at Sarasota Springs in 1878 by an exclusive group of mostly corporate lawyers. The earliest ABA leaders became lawyers at a time when university education for lawyers was unusual. Yet of the first 58 presidents of the ABA, 75 percent had some undergraduate education, and 59 percent had some university legal education.[10] The earliest among them had grown into prominence before the dawn of corporate power and their own places of influence were grown into rather than trained for. A second generation of ABA leadership, those who led it beginning in the early 20th century, formed their professional careers as corporate men.[11]

Early in its existence, the ABA's claims to represent the profession were hollow. By design, it represented a sliver of the profession, the so-called best men at the bar. Nonetheless, its assertions and actions did represent the actions of the most powerful segment of the profession, the segment that had the most influence. Its actions made things happen: higher educational standards, the spread of ethics codes, and changes in bar admission policies.[12] So although the early ABA had no formal power and in reality spoke for only a small segment of the bar, it effectively spoke for the profession.

1. Early Organizational Leaders and Speakers

Of those early speakers for the profession, a good bit is known. The earliest leaders of the ABA were learning how to be corporation lawyers because they had not trained to be so. Most of their professional lives had preceded the dawn of corporate power. But learn they did. A significant number of these early leaders represented railroad interests. Most had a core of their active practice representing corporations. Later in the ABA's still early years (the second 25 years of its existence), the leaders tended to have trained to be corporate lawyers.[13] While they were as much the gentlemen as the first leaders, they were far narrower in their interests. It has been said that while John W. Davis loved to read history, Simeon Baldwin loved to write it.[14] The second generation of early speakers for the profession were more narrowly focused on commerce than their predecessors had been.

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[9] *Professional Organizations*, 6 ALBANY L. J. 233 (1873); Walter B. Hill, *Bar Associations*, 5 GA. B. ASS'N. REP. at 75 (1888).

[10] JAMES GRAFTON ROGERS, AMERICAN BAR LEADERS, 1878–1928 (1932); EDSON R. SUNDERLAND & WILLIAM J. JAMESON, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK (1953).

[11] *Id.*

[12] *See* chapter 2.

[13] John Austin Matzko, The Early Years of the American Bar Association, 1878–1928 at 507 (1984) (dissertation, University of Virginia) (on file with author).

[14] WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 378 (1973).

The first generation of presidents were almost Lincolnesque in their fond recollections of circuit-riding representation in the frontier. The first ABA president, James Overton Broadhead, produced diaries recalling the "exhilaration and adventure of [his] circuit-riding youth."[15] The romantic image of the young lawyer is enhanced by mentions of saddle bags packed with lunches and code books and Blackstone, "trying an action for forcible entry and detainer" for a fee of "ten Mexican dollars," arguing points of law with fellow lawyer-travelers, and "resting on the green grass with a saddle for a pillow."[16]

Charles Freeman Libby was perhaps the first example of the *second* generation of presidents, those who were born to corporate practice.[17] His remarks as president to his organization in 1910 followed those of the then-almost unknown president of Princeton, and later president of the United States, Woodrow Wilson. Wilson's remarks were not well received by the ABA members, as he provided them with an "onslaught" on all things corporate, which is to say, all things regarding the audience members' clients.[18] But Libby's remarks "on the Constitution, in the good old way lawyers love" were seen as "an adequate antidote to the disturbing gentleman from Princeton."[19] From Broadhead to Libby and on to the end of the 1930s, the tale of the ABA presidents' careers told the story of the changing exemplar of the leading lawyer from a country lawyer traveling from courtroom to courtroom, to a corporate man of office-practice fame.

Although all early ABA presidents represented railroads, utility companies, and other corporate interests, it would be an overstatement to say they *only* represented corporate interests. Occasionally they even represented unpopular clients. Stephen Strong Gregory, president in 1911–1912, for example, represented the highly unpopular assassin of the mayor of Chicago. He also represented Eugene Debs much before the celebrated espionage charges a few years later. In the Debs representation regarding labor union disruption of railroad terminals, Gregory's cocounsel were none other than Clarence Darrow and Senator Lyman Trumbull.[20]

The first 50 years of speakers for the profession were homogeneous. All the 50 presidents and 200-plus committee members were men. All were white (the ABA did not admit blacks in its early days, and great controversy ensued when it "accidentally" admitted two blacks to membership in 1912.)[21] Nearly all were born well

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[15] Rogers, *supra* note 10 at 6.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] A carefully orchestrated resolution-without-public-debate allowed the two mistakenly admitted to remain while demanding that applicants thereafter make their race known to the Executive Committee that considered membership. *See* 35 ANN. REP. A.B.A. 12 (1912); SPECIAL REPORT OF THE EXECUTIVE COMMITTEE CONCERNING THE VOTE BY THE COMMITTEE TO ELECT MESSRS. WILLIAM H. LEWIS, BUTLER R. WILSON, AND WILLIAM R. MORRIS TO MEMBERSHIP IN THE ASSOCIATION, AND THE RESCISSION THEREOF, 35 ANN. REP. A.B.A. 93 (1912). "[T]he curtained solution to of the unhappy colored problem passed largely through [Francis Rawle's] sanctuary." Rogers, *supra* note 10 at 124.

and of means. Nearly all were Protestant.[22] Of the first 50 presidents, almost 25 percent were from New York; no more than 4 were from any other state.

Thomas Cooley and Frederick Lehmann are often cited as those who did not fit the mold of the hundreds of other ABA leaders during its first 50 years. Cooley was the son of a farmer and attended undistinguished country schools for a mere three years. He apprenticed into the profession and headed west to Michigan for a small-town practice. His great opportunity came when he was asked to codify the Michigan statutes. He achieved that task in brilliant fashion and was next asked to create reports for state supreme court decisions, a task at which he also excelled. When the University of Michigan launched a law faculty, he was one of its founding three members. Eventually he published a highly distinguished American edition of Blackstone's *Commentaries*. Cooley had indeed made his own way to leadership in the early American legal profession.[23] Lehmann was among the few leaders not born in the United States. He was born in Prussia and brought to Cincinnati by his father at age 3. Unhappy with life in his father's home, Lehmann ran away at age 11 and found his own way by doing a variety of farm work, sometimes in exchange for schooling. He continued to drift until he was hired by a doctor in Iowa. The doctor sponsored him to a seat at a local college, where Lehmann excelled. Eventually, after studying Blackstone, Kent, and Story, he was informally examined and admitted to practice. His practice had mixed success early on, but he made acquaintance with a fellow lawyer in Des Moines, whom he persuaded to run for governor. After some years of practice, he ventured to St. Louis where he won the business of the Wabash Railroad. He became president of the ABA when the Saratoga meetings began to exchange every other year with some prominent western cities. As part of the ABA effort to expand into the West, presidents were sometimes chosen from the places of a recent annual meeting.[24] He remained active in politics and eventually became solicitor general under President Taft, also a former ABA president.[25]

Both Lehmann and Cooley made their own careers and fortunes, unlike the rest of their fellow ABA presidents of the first 50 years. Lehmann, despite his foreign heritage, was early in life an American. The disadvantages of later foreign-born lawyers were not his. He and Cooley were both Horatio Alger stories, using their instincts and thirst for knowledge to drive their own success. Both stand in stark contrast to the standard-issue early ABA leader.

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[22] Of the first 233 committee men, 227 were Protestant. Three of the 4 Catholics were "Baltimore-Catholics," descended from the Maryland founders. The fourth was from Louisiana, where Catholics were in great numbers among the elite. Of the two Jews, both were of early immigrant stock and had long roots in the United States. Neither was a recent immigrant.

[23] Rogers, *supra* note 10 at 77–79.

[24] Rogers, *supra* note 10, Forward at x. ("[The Association] tried to enlarge itself in the horizon of Western and Southern lawyers, and there are... selections for the presidency that are explainable chiefly on this ground.")

[25] Rogers, *supra* note 10 at 151–155.