# *ADVANCE SHEET- June 25, 2021*

## In this issue



### President's Letter

In this issue, we offer the usual two articles and a judicial opinion.

The first article is the chapter on recent developments (as of 1930) in the law and its administration prepared for President Hoover's unjustly forgotten two volume survey on Recent Social Trends. It is lent interest not only by its thoroughness but by its joint authorship by two leading legal 'realists' of the 1920s, Charles Clark, later a judge of the Second Circuit and a principal architect of the Federal Rules of Civil Procedure and William O. Douglas, then a law professor and later a more self-indulgent Justice of the Supreme Court. The article provides valuable historical perspective on the first 30 years of the 20th century; something of the same sort is much needed today.

The second article dates from the same year, 1930, and is a speech on *Sources of Tolerance* delivered by Judge Learned Hand at the University of Pennsylvania Law School, memorable for its admonition that "Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class."

The judicial opinion, in a somewhat lighter vein, is by Judge Edward Becker in *Plechner v. Widener University*, 418 F. Supp.1282 (E.D. Pa.1976), rejecting one of many lawsuits by a noted legal eccentric, the late Alfred Avins. I was slightly acquainted with Avins as an editor of the University of Chicago Law Review in 1962, when he laid siege to our offices in a vain effort to have us publish chapters from his book on The Law of AWOL. The Vietnam War at that point was not sufficiently under way for the subject to be interesting. Avins was most noted for his opposition to the school segregation decisions, which he regarded as illegitimate, and to claims that the 14th Amendment outlawed private racial discrimination. To that end, he published, under the auspices of the segregationist Virginia Commission on Constitutional Government, a full compilation of the debates on the 14th amendment and its associated civil rights acts. The anthology, notwithstanding its auspices, is still regarded as authoritative and valuable, though its limitation to floor debates omits the not unimportant Report of the Committee of Fifteen on Reconstruction. In a sense, he carried his point; the Brown opinion concedes that Congress was

silent on school segregation, and the 'state action' doctrine remains alive and well, the public accommodations law being sustained on the basis of the commerce clause, not the Fourteenth Amendment.

Avins' later career was as a founder or would-be founder of law schools. His efforts to establish weekend law schools in Northern Virginia and elsewhere foundered on opposition from the American Bar Association, but he was successful in establishing Delaware's first and only law school, though he lost control of it, a history related in Judge Becker's objective and kind opinion. It is pleasant to record that our current president was a member of its adjunct faculty from 1993 until his election as Vice President in 2008.

There also appears in this issue the most recent preface I have prepared for the annual edition of my *Maryland Procedure Practice Forms*, the 37th such preface issued since the original publication in 1984, first for pocket parts and now for more costly annually revised volumes. Since I do not derive per-copy royalties from these, I thought it not inappropriate to publish the preface here, since it affords a capsule summary of the last year's developments in Maryland law which may have been missed by many practitioners.

George W. Liebmann
June 20, 2021

**Hot And Humid With A Chance Of An Afternoon Storm**

When I was growing up there were four days each year that my father never failed to remind me about. A veteran of World War II, half of the yearly reminders pertained to the War. They were June 6 and December 7. The other two days were December 21, the first day of winter, which was always accompanied with "You'll notice the days getting longer soon", which I was always happy to hear, and June 21 which was accompanied by a corresponding "You'll notice the days getting shorter soon", which I was not quite so happy to hear. Although the folks who are in charge of letting us know when the summer solstice officially takes place say it was yesterday, for me the seasons start and end with a 21.

It is now summer, in Baltimore, where each and every day the television weather folks get to say "It will be hot and humid with a chance of an afternoon thunder storm." I remember last summer when we all hoped that just as warm weather sees the end of cold and flu season it would also mark the end of covid. Yep, we were wrong. Although it might still be with us, it looks like the end will come not with rising temperatures, but through the efforts of men and women in lab coats.

Traditionally, cognizant that a lot of you were not around, the Library would go into a bit of a "summer hibernation." Last summer, however, the Library began to move away from this model, in large measure in an effort to fill a void created by the slowing down or the complete cessation of the operations of many legal organizations. Whereas the Library's Lecture Series had gone on hiatus between Memorial and Labor Day, last year there were several presentations, with programs on "The Personal Divide Between Jefferson & Marshall" and "The Emancipation Proclamation." The "new tradition" will continue this year when Prof. Jose Anderson of the University of Baltimore School of Law will speak on his upcoming book on Justice Thurgood Marshall on July 21.

When it is time to roll up the sleeves again, however, as more court hearings and trials resume, remember the extensive collections and databases of the Library. We are here as we have been for the past 181 years.

Joe Bennett

## CHAPTER XXVIII

# LAW AND LEGAL INSTITUTIONS[1]

BY CHARLES E. CLARK AND WILLIAM O. DOUGLAS

A SURVEY of law and legal institutions must be selective. To count and classify, even if not to appraise, the edicts and rulings of governmental agencies would be an overwhelming task. As to rulings of courts, it is estimated that in America alone there are a million and a half reported decisions available as judicial precedents; and the increase each year represents 170,000 printed pages.[2] The proclivity of the American public for statute making is well known. According to a reported count the five years prior to 1914 show a total of over 62,000 statutes passed and included in the printed volumes of laws in the United States.[3]

passed and included in the printed volumes of laws in the United States.[3] It would not be proper to deduce from the bulk of this material that changes have been great. Many such statutes deal with private rights in individual cases. Even public statutes are ordinarily only amendments involving extension by modification of existing legislation. The mass appears as "sundry administrative regulations governing the manifold activities of government."[4] It comprises matters contained largely in administrative rules and regulations in other countries. In addition to decisions of courts and enactments of legislatures are the enormous and increasing quantity of rulings and decisions of various administrative tribunals and commissions. Recorded data respecting many of these agencies are unavailable without independent investigation. And if it were desired to include not only trends in what these agencies do but also changes in their organization and procedure resort would have to be made to original studies, an undertaking designed for several generations of scholars and many volumes of learning. Statistics are so meager as to defy comprehensive survey or description.

[1] In preparing this chapter extensive assistance in planning the work and in analyzing judicial statistics was given by Donald Slesinger. Among others who have assisted special acknowledgment should be made to Harry Shulman for his work on judicial statistics and his helpful comments generally.

[2] Root, Elihu, address to American Law Institute, American Law Institute, *Proceedings*, 1923, I, p. 49; Johns Hopkins University, *The Institute for the Study of Law*, Circular, 1929, no. 7, p. 10; Y. B. Smith, *Education and Research*, New York State Bar Association Bulletin, 1930, pp. 189, 190.

[3] Root, *op. cit.* For further statistics, see Chaps. XXII and XXIX.

[4] See "The Scope of Statute Law and the Extent of the Legislature's Participation in Its Making," *Harvard Law Review*, 1931, vol. XLIV, p. 976.



## LAW

A selection of topics for specific discussion has been made from among those seeming best to illustrate change or movement in law and legal institutions. Choice was also made of those having intimate connection with other chapters of this study.

From the topics selected we shall discover something of the nature of the judicial process and gain insight into the more significant attempts to improve the administration of the law and the development of new procedures for the consummation of programs of social change.

### I. SOCIAL LEGISLATION AND THE COURTS

A study of social legislation is in large measure an analysis of constitutional limitations. That in turn tends to emphasize the attitude of the

stitutional limitations. That in turn tends to emphasize the attitude of the Supreme Court of the United States which, actually or potentially, is the ultimate arbiter of most of it. Under the due process clauses of the Constitution it is called upon to determine the validity of acts of state legislatures and of Congress. Likewise it must pass upon contentions that state enactments violate the equal protection clause of the Constitution, impair the obligations of contract, or involve an interference with interstate commerce. By its interpretation of these constitutional provisions it determines the limitations on the exercise by the states of their police and taxing powers.

The validity of social legislation obviously cannot be determined within the four corners of the Constitution. "Due process," "equal protection," "interstate commerce" do not have precise content. They can be known only by particularized definitions from the congeries of cases. The cases deal with issues and situations so varied and different as to defy profitable expression in generalities. Due process of law as a test of the validity of state legislation under the police power may be said to require that the laws not be arbitrary or unreasonable. All such laws place some restriction on individual freedom or the use of property. The question, then, is whether in the light of the social and economic conditions involved the restriction is reasonable. The answer depends upon the opinions, beliefs and even the prejudices of judges, their knowledge of the basic conditions involved, their view of the proper scope of governmental activity, their willingness to let legislatures experiment with a social and economic theory with which they are not sympathetic. The personal elements involved destroy the clear force of precedents and render prediction impossible. Space prohibits a lengthy dissection of individual cases here to show concretely the nature of the judicial process involved and the influence and effect of the philosophies of particular judges. The literature of law abounds with adequate demonstrations.[5] It must suffice

[5] See *e.g.* T. R. Powell, *The Supreme Court and State Police Power, 1922–1930*, Harvard University, 1932; R. E. Cushman, "The Social and Economic Interpretation of the Four-





to sketch major trends in judge-made law and for the most part to leave hidden behind generalities the course of battles which have stirred men's souls and have resulted in striking alignments among the judges, revealing the various issues of governmental policy and social philosophy.

**Business and Financial Relations.**—The sphere of business has been invaded by a host of laws which seek to bring about more desirable rela-

invaded by a host of laws which seek to bring about more desirable relations between men in their social living. This legislation covers matters as diverse as trusts and small loans designed to finance consumers. Examples of the trend have been selected for presentation here on the basis of their interest and typicality.

*Price Fixing Legislation.*—In early Anglo-American law price fixing statutes and ordinances were not at all unusual. In line, however, with the laissez faire concepts of the early nineteenth century, the power was not resorted to again until the plight of the farmers after the Civil War led to a movement to restrict the rates of railroads and grain elevators. Legislation was passed in several states and in 1876 cases involving such statutes came before the Supreme Court of the United States which sustained their validity. The court held that businesses "affected with a public interest" might be so regulated.[6] Later cases held that *only* such businesses could be regulated. And by 1890 a further restriction was imposed: that such regulation was subject to court review so that rates would not constitute a taking of property without due process of law.

Common carriers and other public utilities were assumed from the first to be subject to such regulation without serious question. Regulation of rates on fire insurance policies was sustained in 1914 and regulation of prices of rooms and terms of leases (as an emergency measure due to the housing situation after the World War) in 1921. About that time four appointments were made to the Supreme Court, the new judges in nearly every instance becoming a part of the majority and writing the opinions. Subsequently, up to 1931, there was a tendency on the part of the Court to limit the number of public businesses. Thus in 1927 the New York statute limiting the resale price of theater tickets by brokers was nullified; in 1928 a New Jersey statute regulating fees of private employment agencies was annulled; and in 1929 a Tennessee statute regulating the price of gasoline met the same fate. By December, 1930, however, the previous majority had become a minority and by a five to four decision a New

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teenth Amendment," *Michigan Law Review*, 1922, vol. XX, p. 737; T. R. Powell, "Current Conflicts Between the Commerce Clause and State Police Power, 1922–1927," *Minnesota Law Review*, 1928, vol. XII, pp. 321, 470, 607; J. Frank, "Are Judges Human," *University of Pennsylvania Law Review*, 1931, vol. LXXX, p. 17; B. N. Cardozo, *The Nature of the Judicial Process*, Yale University, New Haven, 1925; O. W. Holmes, "Path of the Law," *Harvard Law Review*, 1897, vol. X, p. 457.

[6] *Munn v. Illinois*, 94 U. S. 113; see generally W. H. Hamilton, "Affectation with Public Interest," *Yale Law Journal*, 1930, vol. XXXIX, p. 1089.

Jersey statute regulating commissions of insurance agents was upheld. Other expressions of the Court, or at least its new majority, have indicated a possible expansion of the field of public interest and an insistence upon the presumption of constitutionality of legislative acts unless definite facts to the contrary are presented. Any prophecy of the beginning of a new trend either toward broadening or restricting the concept becomes futile without knowledge of the philosophies of those who will sit on the bench during the next decade and, in addition, the probable drift of controlling public opinion on specific issues.

**Regulation of Trade: Anti-trust Laws.**—The federal government has made two notable efforts to maintain competition and prohibit monopolies. The first of these was the Sherman Law (1890) and the second the Clayton Act (1914), both being exercises of power under the interstate commerce clause of the Constitution.

The Sherman Law declared illegal every contract, combination or conspiracy in restraint of interstate or foreign trade and made any monopoly of, or attempt to monopolize, such trade a misdemeanor. Since the law failed to define restraints or monopolies it was left to the courts to construe it. Though the Supreme Court at first gave a literal interpretation of the act, in 1911 it returned, in effect, to the rule of the common law, holding in the oil and tobacco cases that the "standard of reason" should serve as the measure of what restraints or monopolies were prohibited.

The Clayton Act was more particularized legislation. Other aspects of this law and the Federal Trade Commission Act, passed at the same time, are discussed in section III, the only pertinent provision here being that section which forbade intercorporate shareholding, the effect of which was "to substantially lessen competition" or "to tend to create a monopoly." The construction of this law by the Court cannot, however, be said to have compensated for the loose construction given the Sherman Law. The phrase "to substantially lessen competition" has been construed in terms closely akin to the "rule of reason" and the intercorporate purchase of assets even though brought about by stock unlawfully held has been sustained.

The judicial history of the Sherman Law subsequent to the Clayton Act shows a weakening rather than a strengthening of the literal language of the statute. It was held that mere size did not bring a case within the terms of the Act, and (by a lower court) that the low capital requirements for entering a business rebutted the claim of illegality of a combination which actually was in such dominant position in the trade as practically to destroy the chances for successful competition. Its latest pronouncement has evinced unwillingness to interfere without "definite factual showing of illegality."

Cooperative activities of trade associations composed of competing units in an industry have on the whole been more closely guarded. Early in the last decade it was held that trade associations having as their purpose the dissemination of information regarding production, prices, etc., were prohibited by the Sherman Law. But in 1925 such statistical reporting plans were held to be not per se evidence of illegal restraints on trade and associations organized for such purposes not illegal unless these plans served as a cloak for an agreement to regulate prices or limit production. Where there is evidence of a price fixing agreement, however, such trade association is held illegal whether or not the prices fixed are reasonable.[7]

A counterpart of this treatment of the federal anti-trust laws is found in the content and administration of state anti-trust laws, which have been on the statute books of most states for years.[8]

There is no indication that any shift or change in judicial policy is imminent. This trend in judicial attitude has been accompanied by an increasing tide of popular reaction against the statutes. It may be expected that the entire subject will soon be critically re-examined and many basic legislative changes made not necessarily in the direction of laissez faire but toward an adjustment of the law in light of the exigencies and requirements of particular industries.[9]

**Regulation of Farmers' Cooperatives.**—The use of the cooperative association dates well back into the nineteenth century. The bulk of legislation designed to apprise the farmers of the benefits of such organization and to encourage their use dates, however, from 1911 when both Nebraska and Wisconsin passed laws which served as the model for much of such legislation during the next decade. By 1921 most of the states had passed such laws. Since then a standard act has served as a model for legislative revision in some thirty-eight states. There is, however, but little uniformity of detail in the laws.

Both state and federal courts have adopted a liberal and generous attitude toward this type of legislation and have held constitutional the various features of the laws designed to make the cooperatives effective. But in 1929 the Supreme Court by a divided vote held unconstitutional an Oklahoma statute permitting cooperative cotton ginning associations of the stock type to secure operating licenses on terms more advantageous than those permitted commercial ginners. This decision may point to the

[7] See H. Oliphant, "Trade Associations and the Law," *Columbia Law Review*, 1926, vol. XXVI, p. 381.

[8] See *Columbia Law Review*, 1932, vol. XXXII, p. 347.

[9] See W. H. Hamilton, "The Problem of Trust Reform," *Columbia Law Review*, 1933, vol. XXXIII, p. 173; M. Handler, "Industrial Mergers and the Anti-trust Laws," *Columbia Law Review*, 1932, vol. XXXII, p. 179; M. W. Watkins, "An Appraisal of the Work of the Federal Trade Commission," *Columbia Law Review*, 1932, vol. XXXII, p. 272.





use of the non-stock form of organization in the future. This is difficult to evaluate as the court in 1930 returned to its earlier and more favorable attitude in upholding a statute authorizing the distribution of patronage dividends.

Congress, like the states, has shown a benevolent attitude toward these cooperatives. They have been exempted from federal anti-trust laws and the federal income tax. In 1926 and 1929 Congress set up machinery to aid in their development and expansion. And loans were made available to them through governmental agencies in 1921, 1924 and 1929.

These efforts of legislatures have been consistent in their endeavor to stabilize production and marketing, to eliminate waste, to increase credit resources and to promote educational programs. This benevolent attitude presages further legislative assistance in the advancement of the agricultural cooperative movement.[10]

**Chain Store Regulation.**—The last six years have seen the beginning of a decided movement toward imposing discriminatory taxation on chain stores, not only to protect local industry and the small independent owner but to obtain new sources of revenue for the state. Florida, Georgia, North Carolina, South Carolina and Indiana have passed license tax statutes; Mississippi, Kentucky, Georgia and North Carolina, gross sales tax statutes. The constitutionality of these statutes has been hotly contested. While a few statutes were held invalid a standard for such legislation was set when the Supreme Court in 1931 sustained, by a five to four decision, the constitutionality of the Indiana progressive license tax, sustaining it as a tax measure not in violation of the equal protection clause, but not passing on its validity under the police power. About the same time the Kentucky court sustained its gross sales act and subsequently the North Carolina license tax was held valid.[11]

Legislative activity has increased each year. In 1931 thirty-five legislatures introduced bills of an anti-chain store nature. So far the burdens of various taxes have been relatively light. What limits will be placed by the courts on the severity of the tax is yet to be decided.

**Blue Sky Laws.**—Since 1910 increasing attempts have been made to regulate the sale of security issues to the public. The name given to the laws indicates their purpose, viz., to prevent the promotion of "specula-

tive schemes which have no more basis than so many feet of 'blue sky.'" The movement began in the middle west but spread so rapidly that today all but two states have some regulation of security sales. Their constitu-

[10] See generally John Hanna, *The Law of Cooperative Marketing Associations*, New York, 1931; W. H. Hamilton, "Judicial Tolerance of Farmers Cooperatives," *Yale Law Journal*, 1929, vol. XXXVIII, p. 936. See also discussion of cooperatives in Chap. X.

[11] See *Yale Law Journal*, 1931, vol. XL, p. 131; the Supreme Court decision is *State Board of Tax Commissioners v. Jackson*, 1931, 283 U. S. 527. See also discussion of taxes on chain stores in Chap. XXVI.





tionality has been sustained by the Supreme Court as a proper exercise of the police power of the states. The acts are of two kinds—regulatory acts and fraud acts. The latter merely provide criminal penalties for marketing fraudulent issues. Most states, however, have regulatory acts. These vary both in substance and detail. Some merely license dealers. Most scrutinize the issues, requiring a showing of good faith, solvency of the company and reasonable chance of success.

The adoption of such preventive methods is a significant change in policy from the tenuous and expensive ex post facto protection awarded investors through the courts after fraudulent promotions have been made. Legislative and administrative trends at present are toward improvement of administration of the laws where qualification is merely a cumbersome ritual; further discrimination between types of promotions so as not to put too heavy a burden on legitimate enterprises; and fortification of state laws by federal legislation designed to prevent the use of the mails or other means of interstate commerce to market securities within a state forbidden by the laws of the state. To effect the last result a number of bills have been introduced into Congress in the last ten years.[12]

**Legislation Concerning Small Loans.**—Though late in the last century a few laws regulating small loans were passed there was no serious comprehensive planning in this field until about 1916. Today laws specially regulating small loans exist in thirty-six states. These laws represent a fundamental change in the policy of state regulation of usury. The increasing use of consumer credit resulted in demands which commercial banks were not equipped to handle. This demand gave rise to loan sharks who, operating outside the law, charged interest rates out of all proportion to the risks involved. The social problem was one of raising interest rates to such point as to attract decent capital and to regulate and supervise small lenders. After much study a uniform law was prepared by the

Russell Sage Foundation which has been adopted in twenty-six states. It licenses lenders to loan $300 or less at three and one-half percent a month, regulates wage assignments, etc., and provides for state control and supervision. The courts have quite uniformly sustained these laws as valid exercises of the police power. Two notable trends are discernable. The first is to provide closer and more vigorous supervision and selection of licensees. The second is to re-examine the risks of the business with a view towards downward revision of interest to a point that will still attract decent capital and make supervision practicable.[13]

[12] See generally J. E. Dalton, "The California Corporate Securities Act," *California Law Review*, 1929, vol. XVIII, pp. 115, 255, 373; J. E. Meeker, "Preventive v. Punitive Security Laws," *Columbia Law Review*, 1926, vol. XXVI, p. 318; F. E. Ashby, "Federal Regulation of Securities Sales," *Illinois Law Review*, 1928, vol. XXII, p. 635.

[13] See generally Evans Clark, *Financing the Consumer*, New York and London, 1930; Gallert, Hilborn, and May, *Small Loan Legislation*, Russell Sage Foundation, New York, 1932. See also discussion of consumer's credit in Chaps. V and XVII.





Closely paralleling this movement has been the trend towards legalizing loans by industrial banks at rates of interest higher than the normal.[14] Statutes regulating such loans have been passed in over twenty states. In some states these banks operate under the small loan acts. Likewise, in the last decade, there has been a decided trend toward statewide regulation and control of pawnbroking, this ancient business having been subject to but little state and municipal control.[15]

Supplementing the movements toward regulation of necessitous loans has been the growth of credit unions—cooperative societies with limited membership from homogeneous groups (such as local wage earners in a particular industry) operating under state supervision for the purpose of promoting thrift among the members and offering them short term credit facilities. Since 1910 statutes permitting their organization and regulating them have been passed in thirty-five states, twenty-four statutes having been passed in the last ten years. For the most part they have been formed among wage earners, the extension to farmers being infrequent. At present there is a trend toward limiting the groups which may be formed and providing stricter supervision.[16]

The interest in small loan legislation is evidenced by the fact that in 1931 forty state legislatures had 198 bills of that nature before them. It is predicted that the trend towards segregation of that type of loan for special regulation will be continued and that greater protection will be afforded to the necessitous borrower.

**Industrial Relations.**—In the twentieth century the laissez faire attitude toward labor underwent a complete change. Against liberty of contract and equality of bargaining power has been set off the police power of the states to care for the health, safety, morals and general welfare of the workers. Safety and health conditions in places of work early demanded attention and particularized laws were spread irregularly over the period since 1900. Special regulations for particular industries have likewise been passed. The growth of the movement has been rapid in recent years.[17] In general, judicial interference with these types of statutes has been negligible.

*Employer and Employee; Hours and Conditions of Labor; Workmen's Compensation Acts.*—A well defined trend toward shorter hours in all types of work dates from 1898, when the United States Supreme Court held a Utah eight hour day law for miners constitutional. A few years later, decisions rendered valid laws limiting hours of labor of employees on public works. By 1920 such laws had become general. The favorable decision by the United States Supreme Court in 1916 on the Oregon law requiring not more than a ten hour day for all factory employees paved the way for blanket regulation of hours of all labor. Today an eight hour day for employees on public works and the same for women in private employment is in force in a majority of states. The hours of child labor are in some cases even further limited and a trend is apparent toward limitation of hours for men in private employment. Likewise Congress in 1916 provided a basic eight hour day for railroad employees and later included certain post office employees within the scope of the Act.

Many states also limit hours of labor per week and night work, and require compulsory rest periods at night—movements under way since about 1912. All such legislation applies more commonly to women and children than to men. These types of legislation have generally been held valid by the courts.

[14] Robinson, L. N., "The Morris Plan," *American Economic Review*, 1931, vol. XXI, p. 222.

[15] Raby, R. C., *The Regulation of Pawnbroking*, Russell Sage Foundation, New York, 1924.

[16] Bergengren, R. F., *Credit Union*, Boston, 1931; Russell Sage Foundation, *A Credit Union Primer*, A. H. Nugent, ed., New York, 1930; *Harvard Law Review*, 1931, vol. XLIV, p. 1131.

[17] On industrial legislation, see Chap. XVI.

By 1911 a majority of the states had passed statutes establishing minimum wage laws for employees on public works, their validity having first been established in 1894. Efforts to extend control over private employment have not been successful, since the adverse decision of the United States Supreme Court in 1923 on the minimum wage law for women in the District of Columbia[18] blocked further progress toward minimum wages for all but public works employees and children. Regulations of the time and manner of payment of wages have been more successful. Many statutes on these matters have been passed subsequent to 1910 and by and large they have not been invalidated by the courts.

Special consideration has been given women and children. Protection for women, in addition to that already mentioned, includes a few statutes prohibiting work for certain periods before and after child birth, a few prohibiting work in dangerous occupations and a small number requiring equal pay for equal work—Michigan and Montana beginning the movement in 1919. The scope of control over child labor is by far the widest—the health of children having had strong appeal both to legislatures and courts. The period from 1910 to 1916 was most productive of legislation raising minimum ages for work, prohibiting their labor in dangerous occupations, prohibiting night labor and establishing child labor boards with supervisory powers. In 1919 twelve states—and since then others—included attendance at part time schools in restricted employment periods. All in all state control of child labor through the police power has flourished. But two federal efforts have been held to be unconstitutional—the first in 1918 under a statute applying to articles

[18] *Adkins v. Children's Hospital*, 261 U. S. 525, three justices dissenting. For further discussion, see Chap. XIV.





in interstate commerce; the second in 1922 under a taxing statute.[19] Likewise a constitutional amendment failed of ratification and a uniform law has been adopted only in four states.

Free public employment agencies have been established by a majority of the states, ten as early as 1910. Though, as noted above, laws regulating prices charged by private agencies were held unconstitutional in 1928, some degree of control has been achieved through the requirement that such agencies obtain operating licenses from the state. During the last decade and especially during the present depression there has been considerable agitation for unemployment insurance. Up to 1932 over

considerable agitation for unemployment insurance. Up to 1932 over twenty bills were introduced in legislatures and in Congress. In January, 1932 Wisconsin passed the first law of its kind in this country. The laws proposed generally provide for compulsory contributions by employers and employees subsidized by the state or for placing the cost on the employer. The Wisconsin law is limited in scope and allocates the cost between employee and employer.[20] The common type of relief afforded to date has been in the form of voluntary assistance by local agencies (it being estimated that 70 percent of the relief expenses on account of unemployment were made by local governments during 1931), by insurance plans voluntarily established by trade unions and employers, by state appropriation in some states, as New York in 1931, and in others by long term planning of public works.

The movement for insurance as a device for socializing the laborer's industrial risks has made its most notable progress in the field of industrial accident or injury. The beginning of the movement for workmen's compensation acts came in 1910 with the passage of the New York law. By the World War all but ten states had passed similar laws. Today all states except South Carolina, Arkansas, Mississippi and Florida have general compensation laws. The federal government enacted such legislation for harbor workers and longshoremen in 1927. When the New York statute was held unconstitutional, the constitution was amended and a new act passed and sustained. Such legislation has been accorded favorable reception by the courts.

Present trends are in the direction of making the scale of compensation more adequate; reducing delay; supervising more carefully private casualty companies doing compensation business; extension of compensation to include occupational diseases (some ten states and the federal government having such provision); making the state laws more uniform so as to render competitive conditions in an industry more equal; and providing programs for vocational rehabilitation of injured workers.

[19] *Hammer v. Dagenhart*, 1918, 247 U. S. 251, four justices dissenting; *Bailey v. Drexel Furniture Co.*, 1922, 259 U. S. 20.

[20] Jacobson, J. M., "The Wisconsin Unemployment Compensation Act," *Columbia Law Review*, 1932, vol. XXXII, p. 420.





In connection with the last most states have instituted some such plan and the movement gained great impetus by the federal appropriation in aid of state programs in 1920.[21]

**Social and Community Relations.**—In this field laws have frequently

been made in response to new conceptions of environmental control and to the invasion of society by devices for transportation and communication to which old laws have proved unadaptable.

*Zoning Laws.*—The zoning movement has been described elsewhere in this report.[22] It began over thirty years ago and today every state and the District of Columbia has adopted some form of zoning legislation or regulation. Since 1916, when New York City adopted a comprehensive zoning ordinance, the decided trend has been to integrate zoning with city planning. Today all but two states have comprehensive zoning legislation. Since the publication of a Standard Enabling Act by the Department of Commerce in 1923 approximately three-fourths of all the states have adopted it or modelled acts after it. Today more than three-fifths of the urban population live in zoned municipalities.

The trend in court decisions in the last decade respecting zoning has been as notable as the legislative trend. Comprehensive zoning is not only a matter of "safety, morality, health, and decency" (grounds on which regulation of billboards, and commonly recognized noxious enterprises was sustained)[23] but is also aesthetic in purpose (prohibition of billboards on such grounds having been held invalid) and designed to further the general comfort of living. Yet the vast majority of the courts sustained its constitutionality (including the United States Supreme Court in 1926)[24] holding it was a proper exercise of the police power and did not deprive property owners of property without due process of law. It is established, however, that the laws cannot render land practically unusable. Many legal questions remain unsolved, since the courts have reserved the question of further specific applications of a statute or ordinance even when approving some applications of it. But the preliminary, experimental stage seems to have been passed, though it may be too early to judge if the economic implications of the zoning movement have been fully recognized by the courts. Most of the present problems relate to administrative details and to the construction of individual

[21] See generally J. R. Commons, and J. B. Andrews, *Principles of Labor Legislation*, New York, rev. ed. 1927; Ezekiel H. Downey, *Workmen's Compensation*, New York, 1924; E. S. Furniss, *Labor Problems*, Boston and New York, 1925; T. R. Powell, "Judiciality of Minimum Wage Legislation," *Harvard Law Review*, 1923, vol. XXXVII, p. 545; Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," *Harvard Law Review*, 1915, vol. XXIX, p. 353.

[22] See discussion in Chap. IX.

[23] See *e.g.*, *Thomas Cusack Co. v. Chicago*, 1917, 242 U. S. 526; *Packer Corp. v. State*, 1932, 52 Supreme Court, 273; *Reinman v. Little Rock*, 1915, 237 U. S. 171.

[24] *Euclid v. Ambler Realty Co.*, 1926, 272 U. S. 365.

plans. In the latter connection they relate almost entirely to restrictions on use rather than to regulation of height and area. Since the general principle has been brought within constitutional limits the trend seems clearly to be in the direction of increasing administrative control in the attempt to bring order out of the complexities of modern urban life.[25]

*Statutes Concerning Automobile Accidents.*—During the last two decades the social aspects of automobile accidents have received increased attention on the part of legislatures. Of chief importance in this connection has been the protection afforded victims of accidents. The legislation can be divided into three types.

In the first group are those statutes making it a misdemeanor or even a felony for a motorist to leave the scene of an accident in which he is involved without stopping to render assistance and furnish his name and address. Most of the states have had such statutes for ten or a dozen years. They have been quite uniformly sustained by the courts as constituting a reasonable exercise of the police power. The recent preponderance of interstate road traffic and legal restrictions on jurisdiction over a resident of another state have given rise to other statutes making it easier for a non-resident motorist to be sued. In the last five years many states have followed the earlier example of New Jersey (1924–1927) and Massachusetts (1925) and have enacted that the non-resident motorist, driving on the local highways, thereby appoints a local official his agent for service of process. The response of the courts has been to hold such statutes constitutional provided they require that notice of service on the local agent be communicated to the non-resident.[26]

Second, the presence of the impecunious driver on the highways led to attempts to reach some responsible person who could be held liable for the negligence of the driver. The owner was not responsible where the driver was acting outside the scope of his employment or deviating substantially from his established route, nor in many states was the father responsible where his child or wife was driving the family car for his or her own pleasure. Hence a few states followed the initiative taken by Michigan in 1909 and made the owner accountable, in varying degrees, for the driver's negligence when the car was being used with his implied or express permission or consent. Likewise several states passed laws holding such owner for the negligence of a minor. Such statutes have generally been held constitutional[27] but a striking process of strict construction has set in, evidencing great reluctance on the part of courts to extend the principle of legal responsibility. The legislatures have not as

[25] See N. F. Baker, *The Legal Aspects of Zoning*, University of Chicago, 1927; James Metzenbaum, *The Law of Zoning*, New York, 1930. On retroactive ordinances see *Yale Law Journal*, 1930, vol. XXXIX, p. 735.

[26] See *Hess v. Pawloski*, 1927, 274 U. S. 352; *Wuchter v. Pizzutti*, 1928, 276 U. S. 13.

[27] See *e.g.*, *Bowerman v. Sheehan*, 1928, 242 Michigan 95.

yet responded to this limited construction of the statutes. Other statutes include those (passed in most instances since 1925) which make the state or smaller political units liable for the negligent driving of their employees and the earlier statutes denying an imputation to passengers of a bus driver's negligence at grade crossings. A counter trend is seen in a few very recent statutes which deny a right of recovery to non-paying automobile guests against the driver for mere negligent (as distinguished from grossly negligent, wilful or wanton) acts. Such legislation has been sustained by the courts.[28]

Third, even if legal liability is established, the problems of financial responsibility of the impecunious driver and collection of the claim are serious. In case of motor vehicles for hire statutes were passed throughout the last decade requiring them to carry liability bonds or insurance. Several states require similar proof of responsibility from persons using "drive-it-yourself" cars. These statutes or ordinances have been held constitutional.

Only Massachusetts with its well known compulsory insurance law (effective in 1927) demands that owners generally carry a liability policy or bond on deposit securities as a condition of registration. In the last seven or eight years thirteen states have enacted laws less inclusive in scope and more indirect in accomplishing the same result. In these states revocation of registration and license may be made if an automobile accident judgment is recovered and not paid and proof of financial responsibility is not furnished or if there is a conviction under the statute. Likewise a few require special proof of financial responsibility from minor owners and minor operators. These statutes with but few dissents have been upheld, the courts recognizing the need and justification for "rational means calculated to diminish" and provide compensation for such losses.[29]

There has been increasing agitation for more advanced types of relief in the nature of compulsory compensation to be administered somewhat in the manner of workmen's compensation acts.[30] This plan is postulated on a recognition of the accident victim as an inevitable result of the use of automobiles. It would distribute the cost of maintaining the burden on all car owners and attempt to avoid the technicalities and delays of court action. To date, even the most radical enactments fall short of such comprehensive program. In view of recent agitation culminating in an extensive study and analysis of the problem with definite recommenda-

[28] See *e.g.*, *Silver v. Silver*, 1929, 280 U. S. 117.

[29] See *e.g.*, *In re Opinion of the Justices*, 1925, 251 Massachusetts 569, sustaining the

Massachusetts statute.

[30] See generally R. Marx, "Compulsory Compensation Insurance," *Columbia Law Review*, 1925, vol. XXV, p. 164; E. L. Bowers (ed.), *Compulsory Automobile Insurance*, New York, 1929.





tions for the adoption of such a system it is felt that considerable legislative activity will follow.[31]

*Laws Regulating the Use of the Airplane and Radio.*—By 1931 the federal government and all states but one had passed some legislation regulating the licensing of pilots, registration and inspection of planes, and other details of aviation. The most comprehensive act is the Federal Air Commerce Act of 1926 which for the most part is administered by the Secretary of Commerce. Its constitutionality has not been passed upon by the courts. While Congress has power under the Constitution to regulate interstate commerce, the act purports to subject the whole field of aeronautics to federal control—intrastate as well as interstate. The question of division between federal and state control in this field promises to be a notable development in constitutional law. The state laws are not uniform either in substance or administration and, accordingly, the need for federal control has been great. There is considerable tendency toward adoption of uniform laws and toward closer coordination of state and federal control.[32]

Beginning in 1912 Congress has made various attempts to regulate radio broadcasting. These earlier acts did not supply effective regulation due to strict construction given them by courts. The resulting confusion led to the act of 1927 establishing the Federal Radio Commission with full authority to fix wave lengths, time of operation and other details. The act has not been passed upon by the Supreme Court but lower courts have on the whole interpreted it liberally with due regard to the necessity of radio regulation and the exigencies of broadcasting, the commission being sustained where its decisions were not manifestly against the evidence. The states and municipalities during the last nine years have been increasingly active in passing a large number of statutes and ordinances covering a variety of matters. The Supreme Court has not as yet determined how far states may go in such regulation. The clash of local and national problems of control over this new type of interstate communication presage a significant development in the field of constitutional law.[33]

[31] Committee to Study Compensation for Automobile Accidents, *Report*, Philadelphia, 1932. See discussion of the *Report* in *Columbia Law Review*, 1932, vol. XXXII, pp. 785, 803,

813.

[32] See A. L. Newman, "Aviation Law and The Constitution," *Yale Law Journal*, 1930, vol. XXXIX, p. 1113; C. W. Cuthell, "Development of Aviation Laws in the United States," *Air Law Review*, 1930, vol. I, p. 86; J. C. Cooper, Jr., "Aircraft Liability to Persons and Property on Ground," *American Bar Association Journal*, 1931, vol. XVII, p. 435; F. P. Lee, "State Adoption and Enforcement of Federal Air Navigation Law," *American Bar Association Journal*, 1930, vol. XVI, p. 715. See also discussion of air transportation problems in Chap. IV.

[33] See generally Irwin Stewart, "Recent Radio Legislation," *American Political Science Review*, 1929, vol. XXIII, p. 421; Blewett Lee, "Power of Congress over Radio Communication," *American Bar Association Journal*, 1925, vol. XI, p. 19; Warren J. Davis, *Radio Law*, Los Angeles, 1929.



## RECENT SOCIAL TRENDS

**Personal and Family Relations.**—There has been but little change in the laws respecting marriage and children (except in the matter of labor laws) during the last century. The bid for divorce business in a few states in recent years by lowering residence requirements is common knowledge. And the practice in some states of granting freely uncontested divorces is shown in a later section. On the whole, however, the statutory law of divorce stands where it did fifty years ago. Of course, there has been the recognition of women's property rights in the Married Women's Acts and considerable activity concerning protection of illegitimates. But the few changes in statutory law have come as corollaries of other types of legislation rather than from a recognition of a new appraisal of relationships.[34]

The movement for compulsory sterilization of defectives resulted in the enactment of the first statute in 1907. In the ten year period following sixteen states passed such laws. This number is now increased to twenty-four. The vast majority are strictly eugenical in purpose. Seven of the earlier laws were held unconstitutional. A majority of these were supplanted by new laws. In 1927 the United States Supreme Court gave sanction to such a statute (over only one dissent) and since then the judicial attitude has been one of tolerance in permitting this scientific attempt to improve the conditions of society. While judicial approval has been received only over some vigorous dissents, the standard of legislation has been set, the experimental stage passed, and the realm within which legislatures may operate fairly well defined.[35]

Since 1900 opinion has been growing that the state should make it possible for those reduced to poverty by age to spend their remaining years in self-respecting privacy, free from the anxiety of want and the stigma of pauperism, living independently in their own surroundings

instead of being massed in institutions.[36] By December 31, 1931, seventeen states had passed old age pension laws. The qualifications of recipients of aid vary, but not materially. The age requirement is 65 or 70; the maximum amount of relief is usually not over one dollar a day.[37] The present laws do not displace almshouses and poor farms. The constitutionality of the statutes has not been unduly contested. Three of the laws

[34] See generally D. M. Keezer, *Marriage and Divorce*, New York, 1923; Geoffry J. May, *Marriage Laws and Decisions in the United States, A Manual*, Russell Sage Foundation, New York, 1929; J. Lippman, "The Breakdown of Consortium," *Columbia Law Review*, 1930, vol. XXX, p. 651. Legislation giving women equal rights with men is, of course, excluded. See material on family status in Chap. XIII and data on women's rights in Chap. XIV.

[35] *Buck v. Bell*, 1927, 274 U. S. 200. See generally J. H. Landman, "The History of Human Sterilization in the United States," *Illinois Law Review*, 1929, vol. XXIII, p. 463; B. Shartel, "Sterilization of Mental Defectives," *Michigan Law Review*, 1925, vol. XXIV, p. 33.

[36] See A. Epstein, *The Challenge of the Aged*, New York, 1928.

[37] For table of laws see Chap. XVI.





were declared invalid but on rather narrow grounds. With the increasing number of bills being introduced it seems likely that the trend of the last eight years will continue and that the example of other civilized countries (the United States being in the decided minority) will be followed. Paralleling this movement have been the adoption by a few states and by the federal government of public service retirement systems, the inauguration in about half the states of plans for pensioning public school teachers and the adoption in most of the cities of retirement systems for some employees. In addition efforts have been made by private companies, trade unions, fraternal organizations, etc., to provide for their aged employees or members.

**Miscellaneous.**—What can be said of trends in other provinces of legislative and judicial activity not surveyed above?

The American Law Institute, organized in 1923 to prepare a scientific restatement of the whole field of the existing law, has chosen as its first topics for restatement those of Property, Torts, Contracts, Agency, Conflict of Laws, Trusts, and Business Associations. At the same time it has prepared a model Code of Criminal Procedure for improvement of the processes of the criminal law. These topics may be regarded as the Institute's selection of the more important of the law fields. What have been the changes here?

Many of the more important trends in these fields have just been outlined, for example, the development of aviation law which restricts

property rules, the growth of the workmen's compensation acts which change a large part of the law of torts, and so on. Beyond this, as is to be expected, there has been a considerable improvement of technical devices in these fields of the law, such as the business trust as one form of business organization, the trust receipt and trade acceptance in the law of sales and contracts, simple forms of deeds of conveyance, avoidance of double inheritance taxation and the like.

In total number in all fields these developments, of course, are considerable. In the main, however, they are modifications or adjustments of existing rules rather than major movements in themselves. To the outside observer they would show little in the way of change in the existing legal system. Many of them have been developed largely outside the law only to be accepted by it. And, finally, these developments have been slow. On the whole the slight change caused by the adjustment of law to them would tend to give the appearance of stability and changelessness to the law.

A few exceptions should perhaps be noted. Since about 1910 there has been a decided trend toward liberalizing corporation statutes resulting in greater ease of incorporation, greater freedom in manipulating financial structures and greater facility in financial management. With





the trend toward consolidation and concentration of industrial wealth and resources in relatively few companies, there has appeared a wide diffusion of stock ownership, naturally accompanied by a concentration of management.[38] Partly as the cause and partly as the result, there appeared extensive legislative sanction of non-voting shares or shares with qualified or contingent voting rights. Also significant is the increasing approval of voting trusts, designed to separate the vote from the other earmarks of ownership so as to provide concentration of control in the hands of a few. The number and variety of instruments of finance have likewise been multiplying under legislative sanction. Most significant perhaps has been the advent of no par shares designed to obviate many of the vices of par stock so frequently watered. At present they are legalized in practically every state.

Paralleling the extensive use of the corporate device and the increasing flexibility of corporate management has been the decided movement toward at least perfunctory regulation. Blue sky laws have been noted above. In addition is the greatly increased supervision over foreign as

well as domestic corporations, particularly as respects taxation and reports. Perhaps the major legal problem respecting these forms of organization is yet to be worked out. With the great number of absentee or non-voting stockholders, the concentration of control in the hands of a few, the flexibility of corporate structures and the presence on directorates of men of wide and varied interests and at times inconsistent loyalties, raise in many concrete forms the problem of legal control for the protection of minority interests. The problem will be increasingly acute as the trend toward concentration of industrial control continues. Its solution promises to be one of the most significant and bitterly fought problems of the near future.

**Summary.**—To predict trends in social legislation and judicial decisions is difficult, for prediction must take account of changes in the social and economic fabric, in the current of public opinion and in the philosophies of future judges. All that can be done is to take account of past developments and of significant accomplishments and directive influences in socio-legal philosophy. Such an analysis on the basis of the above sampling shows several distinct or fairly discernible trends.

First, and perhaps foremost, is the growing insistence on validity of legislation unless definite facts to the contrary are presented. Most influential in expounding this theory of constitutional interpretation has been Mr. Justice Holmes who in 1905 (in *Lochner v. New York*, 198 U. S. 45, holding unconstitutional a ten hour day for bakers) said in his dissent:

> Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

[38] On combinations in business and banking, see Chap. V.





And again dissenting in *Traux v. Corrigan*, 257 U. S. 312 (1921), he said:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforted by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgments I most respect.

This philosophy has had profound effect on judicial attitude. With that approach to specific problems by the judiciary, the individual notions of judges whose own social philosophy differs from that of legislatures have receded more and more into the background. Such development has not evolved into a complete acceptance of a new approach. Rather it has advanced and receded as the complexion of courts becomes more tolerant or more individualistic respectively.[39] But it persists as a militant challenge for judicial tolerance and comes prominently into play when a majority, individualistic in its philosophy, becomes a dissenting minority. It is well reflected in the case of *O'Gorman and Young, Inc. v. Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) upholding a New Jersey statute regulating the commissions of insurance agents, when Mr. Justice Brandeis, writing for the majority said, "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."[40] With the increasing acceptance of such an attitude by judges the opportunity for experimentation with social legislation increases. Without such tolerance the efforts to improve conditions have been (as noted above in the discussion of specific statutes) and may be measurably curbed by the substitution of notions of judges far removed from the facts and schooled in the philosophies and outlook of other traditions. In that connection it is interesting to speculate on the attitude of the judiciary toward the increasing advances of government into business during the present depression, issues that may not arise until long after the ventures have been launched.

[39] See Felix Frankfurter, "Mr. Justice Holmes and The Constitution," *Harvard Law Review*, 1927, vol. XLI, p. 121.

[40] See also the vigorous plea by the same Justice dissenting in *New State Ice Co. v. Liebmann*, 1932, 52 Supreme Court, 371, for freedom for novel social and economic experiments by the separate states. And see W. H. Hamilton, "The Jurist's Art," *Columbia Law Review*, 1931, vol. XXXI, p. 1073; and comment in *Yale Law Journal*, 1931, vol. XLI, p. 262.





Though in the absence of such tolerance constitutional limitations on legislative experiments have at times been rigidly imposed, there has evolved by degrees an increased recognition of the dependence of the individual on society, a whittling away of the notion of equality of bargaining power between labor and capital, a denial of the adequacy of self help under the complex conditions of present society and the desire

self-help under the complex conditions of present society and the desirability of dominant influence by the state in protecting those who are in no position to protect themselves.

As a part of the shift from an individualistic viewpoint there has been the increasing recognition of the need and desirability for the socialization of certain types of losses. Epitomized by workmen's compensation, these attempts have been gradually extending. Most recent focal points of attack are the treatment of the aged indigent, automobile accident victims and the unemployed.

Such recession from an individualistic philosophy has taken its toll. The commerce clause of the federal constitution, the police power of the states and the taxing power have been increasingly utilized by legislators, under the auspices of tolerant judiciaries, in attempts to bring about a more perfect adjustment of the individual to the society in which he lives. The concept "property" (along with its associate "liberty of contract") has accordingly become less absolute and increasingly flexible. Specific adjustments of industry and enterprise to the needs and requirements of the individuals and groups to which such enterprise has become indispensable or important are legion. The fluidity which the property concept has acquired during the last three decades as illustrated by the many species of legislative experimentation which have been sustained is in itself notable achievement. That fluidity having been established, the opportunities for further effective attempts at legal control over social problems have increased.[41]

### I. TRENDS IN LAW ADMINISTRATION

This section is concerned with trends in the methods of administering the law by the courts and in the procedural rules designed to secure the effective adjudication of litigated disputes. The first part deals with trends in the business of the courts as shown by judicial statistics, while a second part discusses various steps advocated and taken to improve legal procedure.

**Trends in the Business of the Courts.**—A most significant recent trend in the law is the growing interest in the continuous compilation of comprehensive, accurate information with respect to judicial administration —how our courts work, what they are called upon to do, what businesses they perform and how well they perform it.

[41] See discussion of liberty in Chap. XXIX.

*The Lack of Adequate Judicial Statistics.*—Despite the obvious indispensability of adequate statistical information for the intelligent handling of problems of judicial administration and reform and its utility for the study of social problems generally, the United States is, in that respect, still in the "prestatistical age." Thus, in recommending to Congress a restriction upon the diversity of citizenship jurisdiction of the federal district courts (allowing a citizen of one state to resort to the federal court if suing a citizen of another state), the President (in 1932) was unable, for lack of data, to advise Congress on the simple and primary questions of how much of a burden that basis of jurisdiction casts upon the federal courts and to what extent his proposal would relieve the congestion of their dockets. In continental Europe, judicial statistics are a well established institution. In England, official collection of civil judicial statistics began in 1857 and separate annual publications for England, Scotland and Wales have been issued since 1922. Similar statistics are published for the colonies and dominions—for Canada since 1876. But there is very little comparable to this in the United States. Various of the reform agencies referred to below, notably the crime commissions and the judicial councils, have directed their attention specifically to this lack.

With respect to crime, the National Commission on Law Observance and Enforcement found in 1931 that in only twenty-three states are there even court statistics about criminal cases published. But even there, the data are only infrequently adequate from the point of view of inclusion of desirable and available information. Moreover, the tabulations differ so from state to state, in content, method and classification, "that comparisons between states are extremely difficult and hazardous." In only three of the states do the statistics cover all cases tried in all the courts of the state.[42] Civil judicial statistics are much less complete than this. In no state are there continuous, comprehensive official statistics published about the civil work of all the courts. The Judicial Council movement has lent great impetus to the supplying of this want since the creation of the first active Council in 1923. The Judicial Councils of California, Connecticut, Kansas, Massachusetts, Rhode Island and Texas publish continuous annual statistics of varying degrees of comprehensiveness; the second report of the Michigan Council (1932) contains important statistical studies; and others have published data for specific years. The Indiana Legislative Bureau and the Secretary of State of Ohio have for many years published information as to case load and some other matters. There are annual reports from a few specific courts, such as of the Chicago Municipal Court, and preeminently the Supreme Court of the State of New York in

[42] U. S. National Commission on Law Observance and Enforcement, 1931, Report no. 3, p. 87. See also Chap. XXII.

the First Judicial Department (New York City) which publishes probably the most comprehensive civil judicial statistics in this country. The United States Attorney General's Reports contain data on some, but far too few, aspects of the federal judicial business. The most ambitious projects for the compilation of adequate judicial statistics have been launched by private enterprise; the Yale Law School began experimentation in 1927 with court records of Connecticut, Massachusetts, Ohio and West Virginia; the Johns Hopkins University Institute of Law taking up similar work in 1929 in New York and in Maryland and Ohio (in the two latter states with the cooperation of the state judicial councils); and the National Commission on Law Observance and Enforcement authorizing a study of the business of the federal courts in selected federal districts as a cooperative project in which representatives of twelve different law schools participated and which is now being completed at the Yale Law School under the auspices of the American Law Institute.[43]

*General Trends in Volume of Business.*—The criminal business of the courts is discussed elsewhere in this report.[44] Attention will be focused here on civil business. All available statistics show consistent and large growth in the amount of litigation. Thus the United States Attorney General's Reports disclose a constant gradual rise in the total case load (excluding Hawaii, Porto Rico and Alaska) from 47,553 cases in 1911 to 61,041 in 1917 and a quite precipitate rise thereafter to 196,953 cases at the close of the fiscal year in 1930, a rise at a rate nearly ten times greater than that of the population increase. The distribution of this load according to the classification used in the reports is as follows: (1) Civil suits to which the United States is a party fluctuated slightly from 3,773 in 1911 to 4,083 in 1914; then dropped to 3,509 in 1917 and 2,856 in 1918; whence they rose very precipitately in almost a straight line to 24,713 in 1930, exhibiting sharply the influence of income tax litigation and the business activities of the government resulting from the World War. (2) Criminal cases rose gradually from 14,788 in 1911 to 19,373 in 1917 and then rose sharply to 86,719 in 1930, with slight dips in 1921, 1926 and 1927, the largest cause of the rise being the prohibition legislation. (3) Admiralty cases constituted a small part of the business, beginning with 1,673 in 1911, rising gradually to 2,576 in 1919 and then sharply to 4,550 in 1921 with an irregular decline thereafter to 2,489 in 1930. (4) Bankruptcy cases rose gradually to 19,308 in 1911, to 27,519 in 1915, then dropped markedly to 13,515 in 1920, rose to 38,014 in 1922 and then increased in a straight line to 62, 643 in 1930, illustrating pretty accurately the trend of business conditions. (5) The remaining private civil suits increased irregularly

[43] See U. S. National Commission on Law Observance and Enforcement, 1931, Progress

[43] See U. S. National Commission on Law Observance and Enforcement, 1931, Progress Report no. 7; T. W. Arnold, *American Bar Association Journal*, 1931, vol. XVII, p. 799.

[44] See Chap. XXII.





from 8,011 in 1911 to 10,832 in 1919, to 17,430 in 1921, to 20,389 in 1930. Similar trends appear as to courts of general jurisdiction in Indiana (with an increase of case load of nearly 85 percent from 1918 to 1928), Rhode Island (increases from 1910 to 1927 of over 107 percent in the state and over 150 percent in the two principal urban counties as compared to a population increase of 25 percent), New Jersey (increase of 980 percent from 1900 to 1930), Oregon (three times the law actions, two times the equity and divorce suits in 1928 over 1917), Connecticut (increase of nearly one-fourth from 1927 to 1930), and Massachusetts (increase of 70 percent from 1924 to 1931 and an increase in the Boston Municipal Court by three times from 1920 to 1930).

These figures do not represent the number of cases actually tried. Thus in the federal courts well over half of the private, civil and admiralty suits commenced are settled, discontinued or dismissed without trial while in the Supreme Court of New York in the First Department in the period 1918–1930 from 56 to 78 percent of the cases were thus disposed of. In the Circuit Courts of Michigan, out of 48,541 cases commenced in 1931, only 9,686, or 19 percent of the total number disposed of, were actually tried, a little over a sixth of these being criminal cases. Moreover, a very substantial percentage of cases, though tabulated in some compilations as disposed of after consideration by the court, actually consume very little of court time, because they are not contested. To get a true picture of judicial business, much more must be known than the number of cases begun and the number disposed of—much which unfortunately does not appear in most of the official tabulations. Nor is the need for scientific information about judicial administration satisfied by the presentation of figures on the total number of cases commenced and tried. To make available the needed additional information is the aim of the recent private enterprises mentioned above.

*Some Specific Trends.*—The intensive study of the finished civil cases in the Superior Court for the County of New Haven in the ten year period, 1919–1928, conducted by the Yale Law School, shows a continually increasing case load, with only about a third of the total volume being carried to trial—a tendency similar to that indicated in other courts above. Divorce cases in this jurisdiction, not popularly regarded as a divorce mill, constitute almost 30 percent of the total number of cases

finished in any manner and are the largest single group. Negligence cases constitute the next largest group amounting to over 18 percent of the total, followed by real estate mortgage foreclosures and debt cases (including breach of contract), each group accounting for about 15 percent of the total.

Comparison with other states is difficult because of lack of data. In the Rhode Island Superior Courts the tort action predominates with divorce





cases in second place. In the Superior Courts of Massachusetts and in the Supreme Court in the First Department of New York tort actions also constitute the largest single class of cases, while in the Kansas District Courts for 1921–1930 divorce cases constituted from 39 to 45 percent of the total number of cases terminated in any manner. Preliminary figures from the Johns Hopkins Ohio studies for 1930 indicate that in the common pleas courts in Cuyahoga County the divorce cases provide about one-third the total business, followed by foreclosures. The increasing use of automobiles is reflected by a steadily increasing number of negligence cases. The adoption of the compulsory liability insurance plan in Massachusetts was followed at once by a large increase in the volume of negligence suits. While these actions in the New Haven Superior Court take only second place in respect of volume, their number for the period of the study increased steadily and the trend justifies a prediction that unless a new method is adopted for dealing with the traffic accident problem they will soon take first place.

Interesting variations in details of procedural practice occur. Thus, the use made of the jury varies greatly although on the whole indicating probably a slighter use than is popularly supposed. Of the tried cases in the New Haven study in which a jury could be claimed by the parties and had as of right under its state law, a jury was claimed and had in only about 40 percent. In the Massachusetts Superior Court for the period 1924 through 1931 four or five times as many actions at law were tried before juries as before the court without juries; and in Rhode Island only about 3 percent of the civil suits were tried without juries. But in Oregon in 1929 over one-half of the law actions were tried without juries; in Kansas from 1927 through 1930 only about one-tenth as many actions were tried before a jury as were tried without juries; and in the Texas District Courts an average over the state of about one-fourth were jury

cases. Variations also occur in the same state, apparently considerably influenced by the congested character of the calendars. Thus, in the largest metropolitan district in Michigan 29 percent of the law actions in the Circuit Court were tried before juries in the early part of 1931; while figures in other parts of the state at approximately the same period showed 65 percent, 70 percent and even 80 percent and 88 percent jury cases in rural counties.

An analysis of the New Haven figures discloses that the most extensive use of the jury is made in the negligence cases, these accounting for two-thi ds of the total. In Michigan, too, there were about double the number of tort jury cases to contract jury cases. Some figures from these jurisdictions cast doubt upon the popular belief that juries are disposed to be more favorable to plaintiffs than are judges; and the fewer appeals and the fewer reversals on appeal are striking.





These are but samples of types of data supplied by the special studies. Much further information will be available from them, such as the duration of trials, the nature of the parties litigant, the nature of the pleadings involved, the amounts of money involved in the cases, the use made of attachment process, information as to appeals, details as to the dispositions made with reference to alimony and children in divorce cases, details as to foreclosure and negligence cases and other matters of more local interest but which may be cited as examples of what may be ascertained from judicial statistics and of what should be known by any community which wishes to deal intelligently with problems of judicial administration. Thus there may be suggested the economic waste of a court which tries only about 150 cases a year (the Superior Court sitting at Waterbury, Connecticut). Again the facts that in 90 percent of the closed foreclosure cases in the New Haven figures no contest was made and that in only nine cases, less than 0.3 percent of the total, was the defendant victoriosu, leads to serious question as to whether a simpler procedure for these cases cannot be found, such as foreclosure by power of sale as in Massachusetts or under the proposed Uniform Mortgage Act. And that only 18 percent of the breach of contract and debt cases were carried to trial and in only 5 percent was judgment rendered for the defendant indicates a use of the courts as collecting agents for debts which are not in dispute and lends strong support to desires for more summary disposition of such cases, as by the summary judgment procedure discussed below. The information that about 80 percent of the divorce cases were uncontested and that in

only about 6 percent of the total cases terminated was a divorce denied to the plaintiff is certainly pertinent in considering the problem of divorce and our present methods of handling it.

Until judicial statistics are more developed, however, we must continue to be deprived of the wealth of information contained in court records, and criticism of law administration, not to speak of other social problems, will depend on conflicting, uncertain opinions and vague speculations.

**Trends of Procedural Law Reform.**—Criticism of the law has been as frequent in recent times as earlier but there has been more support of law reform movements from organized groups of the bar at least, if not from the rank and file of the professions. This has been due in large measure to the development of bar associations and more recently of judicial councils, crime commissions and other similar bodies officially engaged in law reform activities, and of law schools with full time faculties available for technical legal research. Movements for the improvement of law administration are better organized than ever before, even though the weight of inertia in both the public and the profession still peorates to delay change.



## RECENT SOCIAL TRENDS

Legal procedure should not be an end in itself, but only a means to an end—the enforcement of general rules of law. Nevertheless in actual operation it assumes as much importance as the end it serves. This is true because only the doubtful or disputed issue is likely to be bitterly litigated and in such case the rules controlling the presentation of the issue take on added significance. For example the literal application of the simple rule that the plaintiff must prove his case may operate to deny any recovery for the relatives of a victim of an automobile accident if the operator of the motor vehicle has killed his victim without the presence of eye witnesses, for then the plaintiff cannot prove freedom from contributory negligence.[45] Moreover, the rules of procedure determine in the main how quickly and efficiently the court may act. Often they result in long delay and thus act as a denial of justice.

The lay public therefore has quite properly stressed the importance of improved law administration. The trend away from strictly judicial procedure to some other method of settling disputes is, however, of unusual significance and will be discussed prior to consideration of reforms in the judicial establishment itself.

*Movement Away from Court Procedure.*—The usual lay suggestion for law reform is to abolish all the "red tape" of judicial procedure. An orderly way of bringing the issues in dispute before the tribunal is essential to its efficient operation and experience shows that attempts to avoid unnecessary rules are more successful than attempts to abolish all rules. Thus little success has attended movements to do away with the written pleadings before the courts except in highly specialized tribunals, such as those for the collection of small claims, where the point in dispute is obvious. On the other hand the development of new forms of tribunals such as bureas and commissions has gone very far. Many such tribunals (*e.g.*, public utility commissions) are expected to provide expert personnel for the solution of increasingly difficult problems of government but in most of them the adjudication of technical cases outside of the ordinary judicial system, save by way of appeal, is a feature. Thus, they are excepted from the operation of many customary legal rules such as those concerning the admission and exclusion of evidence. So outstanding and far reaching is this whole development that section III below is devoted to the subject.

Another similar movement is that for the arbitration of commercial disputes. At common law, agreements for the submission of disputed matters to unofficial arbitrators for settlement were not fostered since the courts were jealous of anything tending to oust them of their jurisdiction. This hostility prevented the specific enforcement of arbitration

[45] *Kotler v. Lalley*, 1930, 112 Connecticut 86; *Yale Law Journal*, 1930, XL, p. 484. The rule was changed by statute the following year, *Connecticut Public Acts*, 1931, c. 212.





agreements and made such agreements in effect revocable by permitting resort to the law courts by either party. Early statutes were only of a regulatory nature but by 1920 the movement toward arbitration had gained great impetus due largely to the activities of trade associations and chambers of commerce. These organizations then began to incorporate future disputes' clauses into their articles of membership and by-laws and standard contract forms, a practice which had been adopted by over 150 of them by 1931. Thus the parties avoided long delay due to the congestion of many court calendars and the technicalities and expense of legal proceedings, while securing more expert judgment than is normally available from the ordinary jury. Hence a new type of statute providing for specific enforcement of irrevocable contracts to arbitrate

future as well as present disputes was adopted, first by New York in 1920, and in 1932 by ten other states, the Territory of Hawaii and the federal government. The constitutionality of these statutes has been sustained as against claims that they were destroying the right of trial by jury and were diminishing the jurisdiction of the courts. The movement for arbitration in the field of business and commercial disputes where it has been most successful seems, therefore, to have a new strength and vitality as the result of support given it by legislatures and courts.[46]

*Improvement in Court Organization and Personnel.*—Effective court organization calls for a unified judicial system under one administrative head with power to assign his colleagues where their services are needed and to see that the entire machinery is operating smoothly and effectively. He should also have power to develop adequate devices in the office of the court clerk to determine the proper arrangement of cases on the court calendar and to assign cases to different judges for trial with reasonable dispatch and authority so as to avoid the long delays to which lawyers, parties and witnesses are subjected in most tribunals. Unfortunately the traditional plan still generally followed is for each judge to act in effect as a single independent unit. In a few cases, however, the more businesslike plan has been followed with great success, notably in the common pleas court in Cleveland pursuant to a law enacted in 1923 following a similar plan initiated earlier in the Cleveland Municipal Court and, in imitation of Cleveland, in other districts in 1931, as in the United States District Court for the Southern District of New York, the Supreme Court of New York and the Supreme Court of the District of Columbia.[47]

[46] See W. A. Sturges, *Commercial Arbitrations and Awards*, Kansas City, Missouri, 1930.

[47] *American Bar Association Journal*, 1930, vol. XVI, pp. 696, 805; Merchants Association of New York, Committee on Judicial Administration, *Report on Judicial Councils*, 1931, pp. 33–37; K. Dayton, "Trial Calendars in New York City," *American Bar Association Journal*, 1932, vol. XVIII, p. 245; H. Oliphant and T. Hope, *A Study of Day Calendars*, Institute of Law, Johns Hopkins University, 1932; R. Pound, "Organization of Courts," *Journal of the American Judicature Society*, 1927, vol. XI, pp. 69–83; also *ibid.* 1927, vol. XI, pp. 99–116, with model court act.



## RECENT SOCIAL TRENDS

Perhaps even more important than proper organization of the judicial establishment is the choice of adequate personnel. The question of the selection of proper judges is far reaching and fundamental. So highly regarded and so important is the prize of the judicial office that political considerations can hardly be prevented from affecting the appointment of many judges; but it seems possible to insure at least a minimum of capac-

ity for the office. In three-fourths of the states the judges of the higher courts are elected by the people. In a substantial proportion of the other states (especially in New England) and under the federal system the judges are named in the first instance by the governor or president, subject to confirmation by either one or both legislative houses. In a comparatively few states the higher court judges are named entirely by the legislature; in one court by its leading judicial officer—a practice following that of England and one much favored by students. Controversy between supporters of the various plans continues unabated though little immediate change seems probable. Recently, however, the bar associations and other interested groups in various places, such as New York City, Cleveland, Chicago, Detroit, Philadelphia, St. Louis, California and Connecticut have taken steps to recommend or to pass on the qualifications of candidates for judicial office. So far such scrutiny is entirely unofficial and its only effect is as it is persuasive to the appointing or electing power. It marks, however, a trend of an important nature if it may be extended and made official and continuous.[48] Recent municipal investigations indicate the necessity of careful scrutiny also of the subordinate court officials such as the court clerks.

On the other hand the movement for control of judges after appointment has definitely slowed up. Two decades ago there was agitation for the recall of judges and for the recall by popular vote of judicial decisions holding statutes unconstitutional. During the years 1912 and 1913 constitutional or statutory provisions for the recall of all public officers were enacted in nine or ten western states. Most of these were broad enough to include judicial officers, although in some (*e.g.*, in Idaho and Washington) the judiciary was expressly excluded.[49] In 1911 Congress made it a condition of the admission of the territory of Arizona to statehood that the recall provision of the state constitution exclude members of the judiciary, but after admission the state in 1912 restored the original article which included the judiciary. By amendment to the Colorado Constitution of 1912 provision was also made for the recall of judicial decisions. There are

[48] Willoughby, W. F., *Principles of Judicial Administration*, The Brookings Institution, Washington, D. C., 1929, pp. 361–389; *Journal of the American Judicature Society*, 1931, vol. XV, p. 5; and other current numbers of that journal. On federal judges see B. Shartel, *Michigan Law Review*, 1930, vol. XXVIII, p. 485; W. D. Mitchell, *American Bar Association Journal*, 1931, vol. XVII, p. 569.

[49] On general use of recall, see Chap. XXVII.





very few reported cases dealing with either of these provisions (none at

all in most states) and public agitation in support of the plans has disappeared so completely that the American Bar Association since 1919 has given up its special committee to oppose the judicial recall. Even the legal literature—almost entirely opposed to the plans—has ceased.[50] This movement also produced other plans for limiting the power of a court over legislative acts of which the more popular was that requiring more than a majority vote for a declaration of unconstitutionality. The constitutions of Ohio (1912), North Dakota (1913) and Nebraska (1920) contain such provisions though cases seem to have arisen only in Ohio where the Supreme Court chafes under the restriction.[51] The dubious nature of the results achieved, the lack of public interest and the strong conviction of the profession of the necessity of an independent judiciary points to the absence of any future trend in this direction.

Perhaps more interest may develop in the movement for the establishing of specialized courts for particular types of business. This movement is not inconsistent with the idea of a unified court organization, for the specialized court may be a division of a larger body with separation of function to secure special skills for a particular problem, as juvenile courts for juvenile offenders and small claims courts for the speedy and inexpensive adjudication of small claims.[52] Attempts have been made to secure efficiency in trial work by the development of commercial causes calendars. Though successful on the continent, they have not yet been so in this country, largely for lack of an effective means of sorting the cases as they come to court. More experimentation seems necessary to perfect some sorting system in the office of the court clerk. The growth of municipal courts (in some states, as Massachusetts, of district courts operating in wider areas) as trial courts of first instance in civil and criminal matters and in substitution of the unsatisfactory justice of the peace system is most important, though not a distinctly new trend.[53]

*Specific Reforms of Criminal and Civil Procedure.*—Agitation for procedural reform has tended to emphasize as desirable improvements the adoption of various procedural devices, many of them coming from the English system. Upon most of these features there is agreement among writers and reform groups as to the desirability and general trend of change. In spite of this, however, the total amount of change has not been

[50] The Index to Legal Periodicals lists no articles subsequent to 1922.

[51] On the Ohio provision see W. R. Maddox, *American Political Science Review*, 1930, vol. XXIV, p. 638; C. L. Meier, *Cincinnati Law Review*, 1931, vol. V, p. 293; *Ohio v. Akron Park District*, 1930, 281 U. S. 74.

[52] As to these courts, see U. S. National Commission on Law Observance and Enforcement, 1931, Report, no. 6, *The Child Offender in the Federal System of Justice*, pp. 158–172, giving the juvenile court statutes of the various states; R. H. Smith, *Justice and the Poor*, Carnegie Bulletin no. 13, New York, 3rd. ed. 1924. See also Chap. XXII.

[53] Willoughby, *op. cit.*, pp. 281–306.

large. Moreover, even formal adoption of a reform does not necessarily result in its extensive use by a bench and bar unfamiliar with it. Finally, too, procedural short cuts, effective though they may be with an efficient organization, must yield in their importance to the personnel which administers the system. These devices should be listed, however, as perhaps indicating the immediate direction of reform movements.

In criminal procedure the more important of such reforms are waiver of jury trial, institution of prosecution by information of the prosecutor rather than indictment by the grand jury, simpler forms of pleading in criminal cases, better control of expert witnesses through court appointment, routine psychiatric examination of accused and the indeterminate sentence with the suggestion as a final step of imposition of sentence by an expert board rather than by the judge alone.[54]

Among these, perhaps waiver of jury trial has been most popular, now being permitted even in felony cases in a dozen states, while in over thirty jurisdictions such waiver may be had in the case of misdemeanors and certain minor offenses. In Maryland, Connecticut, Indiana and parts of New Jersey, experience under the statutes seems to be most extensive, showing that trial by the court is claimed by the accused in the greater number of cases even up to 75 percent of the total so that jury trials are comparatively rare. It is urged that this plan saves delay and expense and goes far to avoid errors to be corrected upon appeal while still saving his jury trial right to an accused who fears the possible autocratic action of a single judge. Difficulties more or less technical in character have prevented or restricted its application in many jurisdictions.

Though little recent change has occurred, institution of prosecution by information or affidavit of the prosecutor instead of formal indictment by grand jury is optional for all cases or all except the most serious (and usually capital) offenses in the majority of states; twenty-two, however, require that felony prosecutions be begun by indictment and in one other state the court, where the action is brought is determinative of the course to be followed. Simpler forms of indictment and pleading in criminal causes were adopted in Connecticut, Iowa and New York in 1929. Court appointment of experts, especially medical experts on the issue of insanity, has made little progress, being upheld in two states and not sustained in two others. On the other hand, routine psychiatric examination under state authority of all accused within certain classifications is

[54] On reforms of criminal procedure generally, see among other sources, the various reports of the U. S. National Commission on Law Observance and Enforcement, 1931, the drafts of the Code of Criminal Procedure of the American Law Institute, 1928 and 1930, the Outline Code of the National Crime Commission, *American Bar Association Journal*, 1926, vol. XII, p. 690, and the reports of the various state and local crime commissions.

Only procedural changes are noted; for other improved methods of dealing with crime, see Chap. XXII.





already in effect in about forty cities following a statute of Massachusetts of 1921. It has recently been established in one of the courts of New York City.[55]

In civil procedure, the major reform of the nineteenth century, achieved in England in 1873 and in this country in thirty jurisdictions completely and in some others partially beginning with New York in 1848, consisted in uniting courts of law and equity in a single tribunal qualified to administer legal and equitable relief in a single form of action. The last such act was adopted in 1904 and even modifications in jurisdictions not achieving this result in full have not been recent. Thus the permission given under the federal court system of filing equitable defenses in law actions was by act of 1915. Recent developments have therefore been of less striking character.[56] The most popular have been the declaratory judgment and summary judgment procedure. The former, copied from the English practice, permits parties to obtain a binding adjudication of their legal rights before actual injury has occurred or threatened. The first American statute (in Michigan in 1919) was held unconstitutional as providing for merely an advisory opinion but later cases in that and other jurisdictions have recognized its nature as a final judgment and have sustained acts which by 1932 had been passed in twenty-five states, a majority following the terms of the Uniform Declaratory Judgment Act drafted by the Conference of Commissioners on Uniform State Laws. The summary judgment, in its more usual form at least, likewise comes from England and first became popular in this country following its adoption in New York in 1919. By the practice the plaintiff, in a case where the defendant cannot by affidavit show a real defense, may obtain judgment quickly and summarily on his affidavit of indebtedness. This simple, expeditious and inexpensive procedure was available in at least eighteen states by 1932. English rules providing for the adding of more parties to a single action were adopted in New Jersey (1912), New York (1920) and California (1929), while another English reform whereby parties can no longer force a preliminary hearing on questions of law only (hearing on "demurrer") has been had in New Jersey (1921), New York (1920) and under federal equity rules (1912). Jury trial must be had in most states following the original New York

Code of 1848, unless the parties expressly waive the right, though by the English practice and that of some states (*e.g.*, Massachusetts and

[55] On the extensive adoption of indeterminate sentence laws, see Chap. XXII. The proposal made by Governor Alfred E. Smith to the New York legislature in 1928 that sentence should be by an expert board has nowhere been inaugurated.

[56] In general see C. E. Clark, *Handbook of the Law of Code Pleading*, St. Paul, 1928; also current numbers of the *Journal of the American Judicature Society*. Special articles are available on many topics, such as the declaratory judgment, the summary judgment and the scope of appellate review.





Connecticut), such right is automatically waived unless within a certain time a party makes written request for it. This simple device coupled with a jury fee has been effective in reducing the number of jury trials, so much so that the New York legislature which in 1919 refused to make a change because the lawyers objected was finally compelled to take such action in 1927 and 1929 for New York City alone, in order to relieve the congestion of the jury docket. The reduction in jury trials, particularly in negligence cases, was marked. The experience is an interesting one, showing the reluctance with which lawyers yield to reforms even though in operation for many years in adjoining states. The reform was adopted in Rhode Island in 1923 and was recently recommended by the Pennsylvania Judicial Council.

A similar conservatism in the bar is shown toward changes in the law of evidence, in spite of criticism of many rules of exclusion.[57] Extensive rules of discovery before trial—an examination of the opposing party or of relevant documents—has been agitated and obtained to a limited extent, (*e.g.*, Connecticut) and acts were passed in Massachusetts and Connecticut in 1930 and 1931, in each case supported by the state judicial council, providing for admission of entries in books made in the regular course of business without the necessity of authentication by each person making them, as required at common law. Rhode Island has adopted the English practice of allowing an appellate court to receive evidence on review of a case on appeal and Ohio similarly allows amendment of the pleadings on review, thus often making new trials unnecessary.

As the amount of litigation increases (see above) the burden upon a single court of appellate review becomes heavy. More than one-third of the states have created intermediate appellate courts; while a considerable group provide that the highest court shall sit in divisions. There is some tendency to restrict the whole scope of judicial review, to reduce to a

tendency to restrict the whole scope of judicial review, to reduce to a minimum the compulsory jurisdiction of the court and to make most of its jurisdiction optional, exercised by it on the granting of a writ of certiorari (United States Supreme Court, 1910 and 1925, Illinois, 1909; California, 1928). Some courts limit review strictly to matters of law only. In New York the review is thus limited except in criminal cases where the judgment is of death and in a certain class of cases where the intermediate appellate court has made new findings of fact. Review of the facts in death cases was strongly advocated in Massachusetts after the appellate court of that state held in the Sacco-Vanzetti case that it lacked the power, but the bill to change the rule recommended by the Massachusetts Judicial Council in 1927 and 1928 failed of passage.

[57] See E. M. Morgan, and others, *Law of Evidence*, Yale University, New Haven, 1927; and the report of a Committee of the Commonwealth Foundation, finding that lawyers from three states having conflicting rules on a point of evidence very generally thought their local rule the only workable one.



## LAW

*Control of Law Administration by Legislature or Court.*—Fundamental to reform of procedure is the question whether the control should reside in the legislature to be exercised by statute or in the court to be exercised by court rule. Many writers now urge with some judicial support that the court alone has jurisdiction, but it is possible that the legislative power is too thoroughly established by tradition and past practice to be attacked with success. Advocacy of change now usually turns to the support of an act of a general nature conferring rule making power upon the highest court of the jurisdiction. While the legislatures at times may be more responsive to reform movements than any other bodies, yet reform of judicial procedure is a highly technical matter requiring specialized skill and knowledge. Furthermore the procedural rules should be flexible, adjusting themselves to cases and the attempt to couch them in arbitrary and abstract statutory terms not easily amended has resulted in an unfortunate vagueness which makes them difficult to understand and arbitrary in application. The success of the rules committee in England, which operates under the English Judicature Act of 1873, in suggesting and adopting practice changes, has led to support of this reform in this country. Many states have now more or less extensive rule making provisions. Recent statutes include Washington (1925), Rhode Island (1930), Florida (1929), Wisconsin (1929), Delaware (1925) and Virginia (1929).[58]

While rule making power in the courts thus seems important and

necessary to secure flexible rules of procedure, yet experience has shown that some group is necessary to stimulate reform. The lawyer's inertia and the court's absorption with its own business operate against change. It is a commonplace of history that the great procedural reforms in England during the last century were achieved against the determined opposition of the bench and bar, largely because lay interest was aroused. A great American jurist has suggested a "Ministry of Justice" to that end.[59] Perhaps the judicial council, described in the next section, may supply this need.

*Stimuli to Law Reform.*—We have just seen that many reforms strongly supported by reform groups have not yet achieved extensive official support. Probably a more actual trend may be found in the organization of many agencies, official and non-official, which are charged

[58] A bibliography is given in *American Bar Association Journal*, 1930, vol. XVI, pp. 199–202; see also S. Rosenbaum, *Rule-Making Authority in the English Supreme Court*, London, 1917; Merchants' Association of New York, *op. cit.*, pp. 95–123; Clark, *Code Pleading*, *op. cit.*, p. 32.

[59] Cardozo, B. N., "A Ministry of Justice," *Harvard Law Review*, 1921, vol. XXXV, p 113, reprinted in *Law and Literature*, New York, 1931; see also E. R. Sunderland, "The English Struggle for Procedural Reform," *Harvard Law Review*, 1926, vol. XXXIX, p. 725; also E. R. Sunderland, *Michigan Law Review*, 1924, vol. XXII, p. 293; and *Massachusetts Law Quarterly*, 1926, vol. XII, p. 3.





with or assume the obligation of stimulating reform. The last decade particularly has seen the growth of an extensive machinery suggesting and promoting improved law reform. It is a task of the immediate future to see how much use will be made of this machinery.

These agencies may be grouped as official, semi-official and non-official. The judicial council is the foremost example of the first group. It is an official body created by statute, usually appointed by the governor or chief justice or otherwise carefully selected, composed of lawyers and often judges, at times with lay and law school representation, and charged with the function of studying the judicial system of the state and of suggesting improvements in it. It first appeared in an undeveloped form in Wisconsin in 1913 with the establishment of a board of circuit judges. The first typical judicial council was not created, however, until 1923 in Ohio. Two states created such councils in 1924; two in 1925; one in 1926; four in 1927; three in 1928; five in 1929; one in 1930; and one in 1931. Two statutes have been repealed, although in one repealing state a substitute commission has been created. A National Conference of Judicial Councils was organized in 1930 for annual meetings in connection

Judicial Councils was organized in 1930 for annual meetings in connection with the meeting of the American Bar Association and for discussion of problems concerning the various councils. The greatest success of the councils to date has been achieved in Massachusetts, California and Connecticut where the numbers on the council have not been large, the state has supported the work with necessary finances and there seems to have been adequate directing force and technical knowledge in the council. The councils have concerned themselves with the general lack of statistical data as to courts (see above). They have advocated adequate judicial statistics, such as those to be obtained in Europe and they have supported specific reforms desirable in their particular states. Many of them have accomplished little, however, and there is danger that some of the more active councils may fall into inactivity as their directing members change or lose their initial interest. The problem is now one of making continuous the initial interest which the council movement aroused. Adequate financial support including stable and permanent organization seems vitally necessary.[60]

Other official agencies include the crime and other commissions appointed to study particular details of the judicial structure. The crime commissions have been important in giving detailed surveys of the operation of the criminal law in various places. More than fifty such commissions have been appointed in the last ten years. Outstanding among the crime surveys are those of the Cleveland Foundation, the Illinois Crime Survey, the Missouri Crime Survey and the publications of the New York State Crime Commission. Other surveys in particular

[60] See bibliography, *Law Library Journal*, 1931, vol. XXIV, pp. 25, 65.





states and cities have been published and are of importance for the information they contain. These bodies are, however, temporary and not continuing agencies.[61]

Of somewhat the same form was the National Commission on Law Observance and Enforcement appointed by the President in 1929 and which ceased its work in 1931. This Commission conducted studies on law enforcement and observance and prepared fourteen extensive reports on various subjects, including criminal statistics, prosecution, enforcement of the deportation laws of the United States, criminal procedure, penal institutions, probation and parole, crime and the foreign born, lawlessness in law enforcement, cost of crime and the causes of crime, and the police. It also directed the organization of the statistical study of the

business of the federal courts referred to above which is now being continued under the auspices of the American Law Institute in cooperation with Yale University.[62]

The National Conference of Commissioners on Uniform State Laws, a semi-official agency, was organized in 1890 as an adjunct of the American Bar Association. Its purpose is to prepare, consider and recommend for adoption by the various states drafts of acts upon subjects lending themselves to uniform legislation. A conference is held each year to pass upon acts which have been drafted by committees during the year. Each state is represented by three or more commissioners appointed by the governor usually under official statutory sanction. Many of the acts which have been recommended by the Conference, particularly those of a commercial nature, have been passed by large numbers of the legislatures and so the Conference has been successful as an agency for uniform legislation throughout the country. To date it has approved forty-six such acts and it has under consideration several more drafts at the present time. The acts which have been most generally accepted are the Uniform Negotiable Instruments Act, approved in 1896 and adopted in fifty-three jurisdictions; the Uniform Warehouse Receipts Act (1906, adopted in forty-eight jurisdictions); the Uniform Sales Act (1906, adopted in thirty-one jurisdictions); the Uniform Bills of Lading Act (1909, adopted in twenty-eight jurisdictions).[63]

Among non-official agencies, state and local bar associations are interested in many matters outside of law reform, but are potentially at least exceedingly useful forces in this respect. From time to time par-

[61] See bibliography, *Journal of Criminal Law and Criminology*, 1930, vol. XXI, p. 129; also the various published surveys; also Chap. XXII.

[62] See the fourteen official reports of the Commission; *Michigan Law Review*, 1931, vol. XXX, pp. 1–132; and numbers of the *American Bar Association Journal*, December, 1931 to 1932.

[63] See *Uniform Laws Annotated;* also annual *Handbook* of the Conference; also reports to the American Bar Association in annual American Bar Association *Reports*.





ticular associations support measures of reform with vigor and skill. On the whole, however, they have not been continuously effective in this field. Many of the members of such associations are practicing lawyers who look with disfavor upon change, and even when this is not the case they lack the political influence necessary to secure adoption of their measures by legislatures. These organizations have a loose affiliation,

which falls short of effective centralization and control, with the American Bar Association, founded in 1878 and having a present membership of 30,000 lawyers from all parts of the country. Through its affiliated organizations, of which the Conference of Commissioners on Uniform State Laws has been mentioned above and the Section on Legal Education and Admission to the Bar is discussed in the next section, through its other sections (on Criminal Law and Criminology, on Mineral Law, on Patent, Trade-Mark and Copyright Law, on Public Utility Law, the Judicial Section, the Comparative Law Bureau and the Conference of Bar Association Delegates), through its standing and special committees (there are now thirteen standing committees of which those on Jurisprudence and Law Reform and on Professional Ethics and Grievances are examples, and ten special committees), and through its annual meetings and reports and its bar journal, it possesses effective means for uniting the lawyers and for taking active steps in improving the law. In many ways its history is important and its record admirable, particularly in the field of legal education. On the other hand the unwieldy nature of its organization, coupled with inertia toward law reform, has often prevented it from mobilizing its potential strength most effectively. Possibly, as has been advocated by some of its members, a system involving representation by delegates from state and local associations would provide a more cohesive form of organization. In the states, too, a movement has recently been organized to secure legislative incorporation of bar associations with power to regulate, discipline and disbar their members. Beginning in Alabama and Idaho in 1923, there are in 1932 incorporated bars in nine states, while bills for such purpose were vetoed by the governors of two more states in 1931. The expected advantages of such bar integration are unification of the bar, permanency, broader powers and wider influence and establishment and enforcement of higher ethical standards.[64]

The important place in law reform of the full time member of law school faculties or institutes in furnishing the technical research for law reform is referred to in section IV below.

[64] See current numbers of the *American Bar Association Journal*, of various state bar association journals, and of the *Journal of the American Judicature Society;* also annual reports of the American Bar Association and state bar associations; J. G. Rogers, "Fifty Years of the American Bar Association," American Bar Association *Report*, 1928, vol. LIII, p. 518.

There also exist a number of different though important agencies interested in improvement of the law. The American Law Institute was formed in 1923 as a permanent organization with the general purpose of securing the better administration of justice, but with the particular purpose of providing restatement of the common law in various fields. Restatements prepared by specially appointed "reporters" with the assistance of a group of "advisers" are now approaching completion in the fields of Agency, Business Associations, Contracts, Conflict of Laws, Property, Torts and Trusts, and a model Code of Criminal Procedure has been completed. The Institute is composed of elected members from the legal profession and official delegates consisting of the chief justices of the highest court of each state and the deans of law schools. The organization is such as to bring the projects of the group before a highly representative body of the profession. The unique character of its plan, its unusual membership and its potentialities in the law are recognized. Moreover, its immediate objective is a truly gigantic one involving as it does the restatement of the entire common law in such a way as to obtain the agreement to it in detail of the vast Institute membership. Some difference of opinion has developed concerning the Institute. Many regard it as the outstanding development of recent years in the law. Others question the underlying conception of "restating the law," regret the Institute's preoccupation with existing law and fear that its restatements may have a deadening effect upon growth and reform. Perhaps its assumption of sponsorship for the study of the business of the federal courts when the National Commission on Law Observance and Enforcement ceased to exist, referred to in an earlier paragraph, indicates a widening of the scope of its activities.[65]

The American Judicature Society, organized in 1913 and supported by lawyers from the entire country, through its bi-monthly magazine, the *American Judicature Society Journal*, affords a means of disseminating current information as to the status of law reform and also for giving publicity to ideas fostered by the Society itself, including a model court act with unified control and a model code of procedure.[66]

The Carnegie Foundation for the Advancement of Teaching maintains a staff member on legal education and has published noteworthy surveys including, in 1914, *The Common Law and the Case Method in American University Law Schools;* in 1919, *Justice and the Poor*, an authoritative work on legal aid societies, small claims courts and other agencies of justice for the poor; in 1921, *Training for the Public Profession of the Law;*

[65] See the annual reports and other publications of the Institute; also the *Journal* and reports of the American Bar Association.

[66] See citations to this journal, above; also "The American Judicature Society Reorganizes," *American Bar Association Journal*, 1929, vol. XV, p. 59.

in 1928, *Present Day Law Schools in the United States and Canada;* and now each year its *Annual Review of Legal Education.*[67]

From time to time special groups are organized to stimulate legal research and reform. An example is the voluntary Committee to Study Accident Compensation which carried on an investigation of the possibility of employing the fundamental concept of the workmen's compensation acts as a solution of the problem of injuries from automobile accidents, with assistance from the Columbia and Yale Law Schools and other groups in various parts of the country. The report gives a full statement of the problem with unusual data developed from extensive case studies.[68]

Lay organizations, too, have contributed to the cause of law reform. Among such groups which have stimulated or fostered reports and studies are the National Economic League and the Merchants' Association of New York. The Commonwealth Club of California has a long history of general activity and research with special emphasis upon the selection of judges. Other city and civic clubs and organizations have been active. Some of the foundations have also been interested in legal research. Noteworthy among these is the Commonwealth Fund which has supported surveys of administrative law, of the Interstate Commerce Commission, of the Federal Trade Commission, of the operation of workmen's compensation acts and the like. And the American Legislators' Association, with a nucleus of 480 state legislators (five from each house of each state), 250 expert consultants, a central Interstate Legislative Bureau and a monthly magazine, *State Government*, seems destined to be an important influence on the better drafting of statutes.[69]

**Conclusion.**—The outstanding features of the picture given above of court business are first the inadequacy of the materials available in the way of statistical information, though such could be provided without great difficulty, and second, the clear trend toward a greater court load than mere increase of population would indicate. The need for improved court procedure becomes all the more apparent in the light of this trend.

The outstanding features of the picture of trends in procedural law reform are the trend toward administrative justice—adjudication by administrative tribunal rather than a court—and that toward the organization of various means of stimulating and supporting law reform. In the adoption of specific changes the trend is less striking since only a comparatively few specific reforms have had wide acceptance. Inertia or opposition of the rank and file of the profession, as against the activities of bar association leaders, has made for slow progress. Little legislative

[67] See references to these publications in section IV.
[68] See citations to the report and articles in section I.
[69] See also discussion in Chap. XXIX.





support has yet been secured for measures recommended by the judicial councils and crime commissions. In New York in 1919 a skilled official board (the Board of Statutory Consolidation) recommended an advanced procedural code, but the legislature listened to the opposition of lawyers and adopted a halfway reform in the new Civil Practice Act of 1920, unanimously regarded by students of practice as inferior to the recommended code. Experience both in England and in this country shows that the way of legal reform is long and difficult. The trend, however, in the development of an increasing number of agencies for the improvement of law administration is both new and important. If it can be properly capitalized it should produce results of some magnitude over a series of years. Perhaps the real problem of the immediate future is not to add to the number and kind of such agencies but to increase their power and resources and thus in turn make their responsibilities more real and more pressing.

### III. ADMINISTRATIVE TRIBUNALS

In the last thirty years administrative tribunals have been utilized with increasing frequency for the execution of governmental programs of regulation. Deriving their powers from broad legislative texts, they perform functions that are part legislative, part judicial and part executive. Their development is an outstanding governmental trend, perhaps nowhere more important than in that aspect which makes them a substitute for much of the judicial process.

**Judicial Review.**—Though administrative tribunals might thus seem to challenge the doctrine of the separation of powers, the limitation imposed upon them, that their rulings (generally though not always) be subject to judicial review, has secured for them constitutional sufferance as respects the prohibition against delegation of judicial powers and has permitted them to serve as a vital unit in the organization of the state and federal governments.[70] The complications of the problem of judicial review defy detailed discussion here. But, risking generalization, some noteworthy tendencies may be indicated. The power of judicial review has been saved, in most instances, to the courts as a method of control

over the assumption of unauthorized power or abuse of administrative discretion. The instances of judicial interference are innumerable and the exposition of rules established for such review a matter of many pages. We find courts stepping in when unfairness is patent, when prejudice is clear, when assertion of power is unwarranted. In theory at least, the administrative agent or commission is somewhat of an expert or techni-

[70] See generally E. Freund, *Administrative Powers over Persons and Property*, University of Chicago, 1928; J. Dickinson, *Administrative Justice and the Supremacy of the Law*, Harvard University, 1927.





cian, more familiar than others with the problem involved, and with the exigencies of particular situations at hand. Consequently, there has been a noticeable trend toward courts saving unto themselves more and more a mere residuum of control and leaving to these experts great latitude with regard to the findings of fact and the exercise of discretion. Likewise legislatures have more and more entrusted to such agencies final determination of facts and the establishing of the conclusiveness of such findings where there is evidence to support them. And in passing on such legislation courts have shown a decided tendency to hold it constitutional as constituting due process of law.

Striking exceptions should be noted. The United States Supreme Court held in 1920[71] that in rate cases from state public utility commissions, raising the issue of confiscation of property, the reviewing court must make an independent judgment on the weight of evidence upon which the commission entered the order. This was held to be necessary under the provision of the Fourteenth Amendment that no property may be taken without due process of law. Thus there is carved out the exception based on assertion of "constitutional" rights. The justification for the rule is frequently stated to be that on withdrawal of the facts—the value of the property and the rate of return—from the court the question of law disappears. The court did not go so far in that case as to hold that there was a right of trial de novo before the court with opportunity to introduce wholly new evidence and with the right to disregard completely the findings of the commission. But the recent case of *Crowell v. Benson*[72] is significant in that regard. There the issue was whether or not the relationship of employee and employer existed so as to bring the claimant within the Federal Longshoremen's and Harbor Workers' Compensation Act. It was held that the lower court was justified in disregarding completely the deputy commissioner's findings

of fact and holding a trial de novo, since the determination of that issue was a jurisdictional matter raising a question of constitutional rights. This was true, it was held, because by the constitution the power of the United States with reference to workmen's compensation and liability without fault extended only to the employment relation within the admiralty and maritime jurisdiction. The determination of that jurisdiction could not, consistently with the doctrine of separation of powers, be delegated by Congress to an administrative agency. The majority indicated that the number of such instances "appear to be few." The court stated that this requirement of a trial de novo is applicable to all cases of administrative review where a constitutional right is claimed to

[71] *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (three justices dissenting).
[72] 52 Supreme Court 285 (February 23, 1932), decided by a vote of five to three. See *Yale Law Journal*, 1932, vol. XLI, p. 1037.





be infringed. But, since this requirement was found in the separation of powers doctrine, the court stated that the rule was not applicable to review of state commission orders in state courts. And the court had so held under a state workmen's compensation statute.[73]

The great uncertainty which *Crowell v. Benson* throws on the scope of judicial review is apparent. If the class of cases in which there is a constitutional right, not only to re-examine the findings of fact of an administrative agency but also to disregard these findings completely and initiate a new trial is extended, the administrative tribunal, to the degree of that extension, ceases to be an expert body passing upon questions of social and economic importance and becomes a perfunctory agency performing ministerial acts. Thus the implications of the decision go to the heart of the problem of governmental control through these agencies. It seems safe to conclude that this case has a profound unsettling effect on the status of such agencies and that the fear of the minority of the court that it will provoke a "multitude of disputes" will be justified. Certain it is that a decade of litigation may be necessary to redefine the status of these administrative agencies.

Even though the exceptions of cases of "constitutional" rights are not extended, the day is probably far distant when the courts will cease to perform the function of review or will give mere formal sanction to such adjudications. But it is felt that the trend will continue—in spite of doubts raised by the Crowell case—toward increased independence

consistent with the performance of important governmental functions by experts and skilled technicians.

**Executive Departments.**—The expansion of the services of administrative tribunals has been effected in two ways: (1) by the enlargement of the powers of existing executive departments; and (2) by the creation of independent boards and commissions. The first method is older and has been employed, apparently, more extensively. The greater share of both types of legislation has been enacted since 1890.

An examination of the many powers exercised in this way would be too long for this place. Perhaps the Department of Agriculture of the federal government affords the best illustration of the variety and scope of control achieved in this way. By the Packers and Stockyards Act of 1921 the Secretary is empowered to prevent meat packers from using unfair trade practices and from restraining trade or creating a monopoly. To carry out the duties he may make charges, hold inquiries and issue orders, subject to an appeal to the courts. Likewise he may regulate the care of stock in stockyards and the services of commission men and traders, and to effect this regulation hold hearings and issue orders. Thus

[73] *Dahlstrom M. D. Co. v. Helfrick*, 1932, 284 U. S. 594, a case, however, which involved no question of jurisdiction but only an issue as to extent of injury.





the first power is similar to that exercised by the Federal Trade Commission over other industries; the second analogous to the control of the utility commissions.[74] Under this act the Supreme Court has sustained his orders and accepted as conclusive his findings, if the evidence was legally sufficient and there was no irregularity in the proceedings, and has refused to permit a trial de novo by the court.[75]

The Secretary's licensing powers are also numerous: over Boards of Trade reporting or selling grain futures; over cotton inspectors and graders; and over licensed and bonded warehouses; and his powers to gather information and set commodity standards have been granted under numerous statutes passed in the last decade.

Another striking instance of the grant of such broad powers to an executive branch of the federal government is the jurisdiction (dating for the most part from 1917) conferred on the Department of Labor over enforcement of the deportation laws. The process combines the role of detective, prosecutor and judge in this one body, with no recourse to the courts except through the writ of habeas corpus. This combination of powers was condemned by the National Commission on Law Observance

and Enforcement.[76] Such integration of functions without provision for judicial review is somewhat isolated and rendered more dramatic by the elements of personal liberties involved. Yet it may serve as an example of attempts to secure simple and expeditious procedure without greater guaranty of fair adjudications.

**Independent Boards and Commissions.**—Creation of independent administrative bodies by Congress began with the Act of 1887 establishing the Interstate Commerce Commission. Subsequently extensive administrative control over the economic and industrial system was established through many other commissions. Conspicuous are the Federal Reserve Board (1914), the Federal Trade Commission (1914), the Power Commission (1920), the Radio Commission (1920–1927) and the Farm Board (1929). But the administrative agencies and departments of the states are far more numerous and pervasive in their influence. The use of such boards by the states dates back well into the nineteenth century, though the period of expansion begins in the latter part of the century. Early limited to supervision of public works and of tax assessments and to management of state institutions, they now effect a regulation of a great portion of our social and economic life. A developing police power has resorted to this method of regulation—not only as a result of creation of new rights but also in consequence of the establish-

[74] See generally G. C. Thorpe, *Federal Departmental Organization and Practice*, Kansas City, Missouri, 1925, pp. 365–383; Freund, *op. cit.*, Chap. XX.

[75] *Tagg Brothers and Morehead v. the United States*, 1930, 280 U. S. 420.

[76] U. S. National Commission on Law Observance and Enforcement, Report no. 5, *The Enforcement of the Deportation Laws of the United States*, 1931.





ment of new methods and devices for protecting ancient rights. The list of these agencies is too large to tabulate; the range of their activities too wide to describe. Illustrative are public utility commissions; motor vehicle commissions; various boards supervising and enforcing labor laws; commissions controlling the marketing of securities; workmen's compensation boards; zoning boards; various commissions licensing professions and even trades, many with disciplinary powers; health boards with licensing and inspection powers; educational commissions maintaining standards of public education; banking commissions regulating banks and more recently credit unions and small loan companies; and innumerable commissions controlling sports, amusement, forests, water power, minerals, game, fish, and the like.

The development of this widespread system of administrative govern-

The development of this widespread system of administrative government in the states has been quite patternless and varied. So mushroom-like has been its growth in some jurisdictions that comprehensive plans for administrative reorganization have been undertaken, beginning in Illinois in 1917. With the experimental stage of administrative control well past, efforts to perfect it to its highest point of efficiency are now under way.[77] The functions of these commissions, the evolution of their procedures and the legal problems of their operation and control may perhaps be illustrated by a few short sketches.

The Interstate Commerce Commission[78] was long viewed as an administrative body for settling and maintaining reasonable and non-discriminatory rates. But with the enlargement of its powers in 1920 it became intrusted with the responsibility of fostering and maintaining an adequate transportation system. Thus it was given control over railroad financing and construction and over withdrawal of existing service facilities; the power to force consolidations, to require strong roads to surrender earnings above a certain "fair return" to strengthen weak roads through "recapture" of earnings from prosperous roads; and supplementary and broader powers over rate structures.

To perform its functions the Commission may initiate complaints, hold hearings, make investigations, act as a board to hear complaints brought by others and issue orders which will be enforced by courts. While most of its orders are subject to judicial review the attitude of the Supreme Court has been not to interfere in matters involving administrative discretion but to confine its review to matters of administrative power. This has resulted on the whole in great freedom from judicial interference, the court recognizing the importance of "expert decisions upon questions of great economic importance." The operation of the

[77] On administrative reorganization, see Chap. XXVII.

[78] See I. Sharfman, *The Interstate Commerce Commission*, The Commonwealth Fund, New York, 1931 (only two of the four volumes have been published to date).





recapture clause, however, has been found to be so unworkable, expensive and provocative of litigation that the Commission recommended its repeal in 1930.

The Commission's control of railroad financing, of construction, of abandonment of lines and withdrawal of services has accomplished much toward the maintenance of adequate service, elimination of wasteful

competition and the establishment of an integrated transportation system. Of late, however, demand has been made for a return to the states by the federal government of some of the control exercised by the Commission, not only because the Commission is overburdened with work but also because of the feeling that unified regulation of a distinctly national railroad system could be as well (if not better) realized by reallocation of control and the maintenance of cooperative regulation by local and national agencies.

The Federal Trade Commission[79] was established in 1914 to eradicate those trade practices declared unlawful by the Clayton Act (described in section I above). The Commission was given broad powers. It was intended to function in two capacities—as a fact finding and as a prosecuting-judicial body. In the former capacity the Commission has not been conspicuously successful. Though the Supreme Court has not passed on the question, past efforts to conduct purely informational investigations, without reference to particular violations, have not been successful. The review by the courts of its prosecuting-judicial activities frequently has placed extensive limitations on its powers. The disagreement of the courts with the Commission on what practices constitute illegal marketing contracts, resale price maintenance, price discrimination, false advertising and the like, has been quite conspicuous. The various fine distinctions drawn by the courts are too involved to develop here. But it may be safely asserted that the Commission has not been able by its prosecutions to make great progress in the elimination of what it considers to be unfair competitive practices. A recognition of that fact has in very recent years resulted in the rapid growth of a new administrative device, the trade practice conference, whereby the Commission seeks to eliminate undesirable practices by voluntary agreements between the members of a trade. Likewise it has held prelininary hearings without publicity and sought to settle minor cases by stipulation of the parties. These new procedures have not been fully tested. But they indicate a most significant trend in the public control of industry, as combining self-regulation with imposed regulation and as precedents for both administrative policy and procedures in this and other fields. In fact, the trade practice conference is

[79] See generally G. Henderson, *The Federal Trade Commission*, Yale University, New Haven, 1924; D. M. Keezer, and S. May, *The Public Control of Business*, New York and London, 1930.

not peculiar to this commission, but has been used by other governmental agencies in the ordinary routine of making rules and orders. Its continuance may dispel some of the prevailing notions of arbitrariness attributed to administrative action.

Workmen's compensation boards are representative of a most significant procedural development (evolving for the most part in the last decade) in attempting to substitute for private litigation a more informal but at the same time more exact procedure. In most of the states (38), boards or commissions administer these laws, as is the case in the administration of the federal compensation laws. Contested claims are heard by the commission or one of its members, the hearings being informally conducted and free from the restrictions of trial procedure and practice.[80] In only six of the states does the court hear contested cases in the manner of other trials. The commission form, however, has been subject to some criticism as being at times inclined to take on a litigous character and acquire many technical formalities. Studies of the operation of these laws are at present being made and it is probable that remedial legislation will soon be suggested. The procedure effected under those acts may well serve as a model or example for other similar attempts. It is frequently mentioned in connection with proposals for broadening the liability for automobile accidents.

The trend has been for legislatures to make findings of these commissions conclusive if there is any evidence to support them, about eighteen states making such provision. The Supreme Court has held that no further provision need be made for judicial review of the facts.[81] Discussion was had above of the recent case of *Crowell v. Benson* arising under the federal act, where the court held that in cases involving "constitutional" rights the findings of fact could be totally disregarded and a new trial had. No major class of exceptions of that kind has arisen under state compensation acts. The courts have quite uniformly held that the conclusive determination of facts by such commissions does no violence to due process of law.

**Cooperative and Coordinated Administration.**—There has been an increasing tendency in the last twenty years toward cooperative administration by federal and state governments and (to a lesser extent) by two or more states, which in its philosophical complications as well as its practical importance transcends the mere extension of administrative powers and procedures to new subject matter or the mere improvement of procedures. Belief that the solution of a particular problem was to be "conceived in terms of exclusive duality" of the state or federal govern-

[80] See discussion in Chap. XVI.

[81] See *Matter of Helfrick v. Dahlstrom M. D. Co.*, 1931, 256 N. Y. 199, aff'd, 1932, 594 U. S. 202.

ment led to the resort to one or the other when often neither had sufficient flexibility or power to give adequate relief by itself.[82] The frequent result was that a state, jurisdictionally limited to state lines, was faced with the problem of control over a business which knew no state boundaries, or the federal government was confronted with futile or impolitic attempts to regulate essentially local problems. The recent trend has been toward treating the problem as a unit where it called for such treatment and allowing the nature of the problem more and more to fashion the administrative procedure.

The examples cover a wide field. One of the oldest is the federal subsidy or grant in aid of state activity, described elsewhere in this report.[83] By this method the federal government appropriates funds to states and retains administrative supervision and control over the expenditure. In this way a centralized administrative unit is obtained, a more or less consistent policy maintained and a degree of state autonomy preserved. This rapid development of "government by special consent" is illustrated in many ways. In the field of aviation (see section I, above) the decided trend has been for the states to permit qualification under the regulations of the Secretary of Commerce. About two-thirds of the states now grant such permission. The demand for a more integrated and coordinated control over radio broadcasting presages a comparable development there. There has been a concerted movement toward securing supplementary federal control under the blue sky laws to regulate interstate marketing of speculative and fraudulent securities (see section I, above) more effectively. Extensive cooperative endeavor of federal and state governments respecting agricultural experiment stations and colleges has been accomplished. There has been an increasing tendency to commission state health, food and drug officials as officers of the Department of Agriculture for enforcement of the federal Food and Drug Act. Also there has developed during the last fifteen years extensive cooperation by state and federal officials in the exchange of information and in the enforcement of such acts.[84] The same tendency is evidenced in the appointment of state game wardens as federal wardens. Control of the marketing of produce has made increasing progress by adoption in many states of commodity standards set by the Department of Agriculture. There is an increasing tendency by private parties and local government agencies to invoke and accept the aid of the federal government. Thus intervention by the Department of Labor as mediator in local labor disputes has been constantly employed though not to the same

[82] See F. Frankfurter, and J. M. Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," *Yale Law Journal*, 1925, vol. XXXIV, p. 685.

[83] Chaps. XXV and XXVII.

[84] See *e.g.* M. Conover, "National, State, and Local Cooperation in Food and Drug Control," *American Political Science Review*, 1928, vol. XXII, p. 910.





extent as during the period of the World War. Private owners of flying schools solicit and permit federal inspection and rating with growing frequency. And the Department of Agriculture exerts continually greater efforts to aid the farming industry by sending experts and expert advice not only in ordinary course but also in emergencies. These are but few examples showing the variety and scope of the methods and instances of cooperative administration. Illustrating less formal devices are the decided movement towards adoption of uniform laws, the conferences of governors and the cooperative efforts of dozens of state administrative officials. Much of this coordinated or cooperative administration has resulted in a gravitation of power and control to Washington; and at times a recession to the states. The former, however, has been by far the more conspicuous.[85]

More detailed reference to a few instances of this related and interlocking control will be illuminating. The use by the states of the compact clause of the Constitution to effect coordinated control has been increasingly conspicuous.[86] One of the most ancient uses has been in the settlement of boundary disputes. More recent accomplishments are evidenced by the combined action of New York and New Jersey in establishing the Port of New York Authority as an interstate administrative agency; the arrangements between several states for protection of fish, for improvement of navigation and control of floods, for apportionment of water (as in the case of the Colorado river where the compact was sanctioned in 1931[87] though Arizona refused to ratify), for control of parks, for the development of waterworks and for the construction of tunnels. The use of this device has not been phenomenal or widespread. But its steady increase and adaptability to many problems of modern government indicate its great value. It seems destined, however, to perform important tasks by functioning interstitially between a limited federal power and a state power which is confined to state lines. In fact if its potentialities continue to be recognized it may result in a finer balance of power between state and nation. Through its use might well appear a genuine counter-trend of control from the federal government to the states as respects problems of administration which are regional rather than federal in character.[88]

The possibilities of cooperative administration are particularly

prominent in the field of public utilities. One of the major problems is the establishment of effective control over the holding companies by state

[85] On federal centralization, see Chap. XXVII.

[86] Frankfurter and Landis, *op. cit.*, p. 685; and notes in *Illinois Law Review*, 1925, vol. XIX, p. 479; *Columbia Law Review*, 1926, vol. XXVI, p. 216.

[87] *State of Arizona v. State of California*, 1931, 283 U. S. 423.

[88] "State Compacts as a Method of Settling Problems Common to Several States," *University of Pennsylvania Law Review*, 1931, vol. LXXX, p. 5.





and federal administrative agencies.[89] The holding company is frequently a foreign corporation. A reasonable return on the stock of a subsidiary may give to the holders of stock of the parent company many times a reasonable return. The relevancy of this factor in the determination of rates has not been decided by the Supreme Court. But its reality forces to the fore the problem of administrative power over the holding company. The holding company in the railroad field has recently been the subject of investigation by a Committee of Congress, and the Interstate Commerce Commission in 1930 ordered the divestment by an affiliate of the Pennsylvania Railroad Company of its stock in the Wabash and Lehigh. The jurisdiction of the Commission to act has not been tested and the power of Congress to regulate such companies is undecided. Again, the holding company or an affiliate in the public utility field often furnishes engineering and technical staffs to supervise the subsidiary, provides a financing service, and sells equipment and supplies to it. During recent years there has been growing demand to place the holding company under commission control largely to obtain accurate and reliable figures respecting these intercorporate contracts so as to regulate rates more effectively by eliminating as expenses excessive charges placed on the subsidiary through these contracts. In 1930 the Supreme Court indicated the relevancy of such charges to a rate determination,[90] thus implying that consumers as well as investors are entitled to the benefits resulting from the economies of an integrated utility system. How far state commissions may go in demanding full disclosure is still conjectural. The problem in part is posited in terms of coordinated control since the affiliated or holding company is frequently a foreign corporation. But assuming it is within the regulating state, the problem of subjecting it to regulation as a "public utility" is not without difficulties. Two trends are, however, noticeable. One is the practice of commissions in going beyond the strict limits set by the courts and assuming some

in going beyond the strict limits set by the courts and assuming some direct control over it. The other is the 1930 legislation in New York and Massachusetts giving commissions supervision over intercorporate contracts and access to records and data of affiliates.[91]

More exclusively problems for cooperative administration are the increasing number of activities of electric and gas utilities, interstate in character.[92] These are not within the power of a state to regulate where the regulation imposes a direct burden on interstate commerce in viola-

[89] Lilienthal, D., "The Regulation of Public Utility Holding Companies," *Columbia Law Review*, 1929, vol. XXIX, p. 404; Lilienthal, D., "Recent Developments in the Law of Public Utility Holding Companies," *Columbia Law Review*, 1931, vol. XXXI, p. 189.

[90] *Smith v. Illinois Bell Telephone Company*, 1930, 282 U. S. 133.

[91] New York, *Report of Commission on Revision of the Public Service Commission Law*, 1930. See in general J. C. Bonbright and G. C. Means, *The Holding Company, its Public Significance and its Regulation*, New York and London, 1932.

[92] Elsbree, H. L., *Interstate Transmission of Electric Power*, Harvard University, 1931.





tion of the federal constitution.[93] Such utilities are not within the jurisdiction of the Interstate Commerce Commission. That Congress has power to regulate where the company is engaged in interstate commerce is clear. It is undecided if Congress has power to regulate holding or affiliated companies not directly engaged in interstate commerce but which have subsidiary corporations that are. So far Congress has not acted except to create in 1920 a Federal Power Commission which in 1930 was reorganized as a more permanent body. The powers of this commission, however, are considerably restricted. Whether or not this commission will ultimately prove to be the nucleus of a federal regulatory body over electric and gas utilities remains to be seen. In recent years various attempts at joint control by neighboring states have been made but none has as yet been adopted. There is a growing feeling that the remedy lies in cooperative regulation by federal and state governments so as to leave to the states essentially local or regional problems, to reserve perhaps to the federal government a residuum of control and at the same time to avoid conflicts in administration which would make regulation by all agencies ineffective.

Likewise the great increase in interstate business in the transmission of electrical energy has given rise to a complicated interstate question of the regulation of security issues of these companies. There is no uniformity in the substance or administration of the state laws. In about half of the states there is no regulation of security issues. The demand is increasing not only for uniformity of legislation but also for cooperative

control so as to treat the problem of the capitalization of one company doing business in six states as a unit rather than as six separate problems. The number of investigations into various aspects of utility regulation and the growing agitation for stricter and more effective control all presage a definite trend in the next decade toward comprehensive and cooperative measures of regulation of industries whose peculiar problems of generation, transmission and distribution defy resort to the traditionally exclusive dualities of federal and state jurisdiction.

The increasing use of motor vehicles for passenger and freight transportation gave rise to the need for comprehensive regulation. Such regulation was necessary not only to insure the maintenance of efficient service at reasonable rates but also, in view of competition with the railroads, to preserve a balanced transportation system. By 1930 forty-seven states had passed statutes vesting extensive powers over motor carriers in state commissions. Yet effective control over motor carriers has not been achieved. Two chief reasons have been assigned. First, the more restrictive regulations of the state statutes have been held to apply only to common, and not to private, or contract, carriers—a distinction which

[93] *Public Utilities Commission v. Attleboro Steam and Electric Company*, 1927, 273 U. S. 83.





the Supreme Court has held may not be destroyed by legislative enactment.[94] Second and more importantly, many of the regulations have been held inapplicable to all interstate carriers as being burdens on interstate commerce.[95] Thus there is eliminated any possibility of securing effective regulation of motor carriers under the present system. Though the complete control of private carriers may apparently be achieved only through a change in the attitude of the courts, several methods of control may be employed by means of which interstate as well as intrastate carriers may be regulated. The formation of interstate compacts adopting uniform programs of regulation, the extension of the control of the Interstate Commerce Commission over motor carriers, the creation of a special federal board, the passage of federal legislation delegating to existing state agencies the enforcement of regulations established by the federal government (a plan presented to Congress in 1925) have all been suggested as methods for regulating these interstate carriers. Certain it is that the present regulation of motor carriers is one of the weakest points in the regulation of industry in the country and that there will be definite

attempts in the immediate future to develop effective means of control. Significant, both in its philosophical implications and in its practical aspects, is the fact that much of the discussion of the problem is being posited in terms of cooperative and coordinated administration.[96]

**Summary.**—From the above it is seen that the use of administrative agencies has been increasing in vast proportions during the last three decades and that these agencies are today performing a multitude of governmental functions varying from mere observation and inspection to adjudication of disputes, making of awards and control of gigantic enterprises.

There has been but little direct substitution of administrative commission for court procedure. Rather there has taken place a reappraisal of problems and a supplement or substitution of more extensive regulation for partial or piecemeal control by courts. Thus in the field of industrial accidents, workmen's compensation statutes have supplied greater protection than the common law right of an employee against his employer. Necessitous borrowers are given protection from loan sharks through licensing and supervision of lenders and not solely by defenses of usury in the courts. Doctors are examined and licensed, the sole protection of patients no longer being an action for malpractice. Health boards condemn food or unsanitary places in the market and the con-

[94] See *Frost and Frost Trucking Company v. Railroad Commission*, 1926, 271 U. S. 583; *Smith v. Cahoon*, 1931, 283 U. S. 553.

[95] *Buck v. Kuykendall*, 1925, 267 U. S. 307.

[96] See generally *Motor Bus and Motor Truck Operation*, 1928, 140 I.C.C. 685; Brown and Scott, "Regulation of the Contract Motor Carrier under the Constitution," *Harvard Law Review*, 1931, vol. XLIV, p. 530. On integration of transportation agencies, see Chap. IV.





sumer or neighbor is not relegated solely to courts for abatement of nuisances. Such illustrations might be multiplied almost indefinitely. They all bespeak the evolution of different techniques than courts possess; the advent of new procedures to effect nicer adjustments of social conditions.

This adaptation of procedure to the nature of problems of government has followed not only the increase of ministerial acts of executive departments but the expanding use of the police power by the states and the control of interstate commerce by the federal government. We have seen in the discussion of social legislation and the courts (section I, above) and in other sections of this study, the vast extension of governmental

regulation to a great variety of social and economic problems touching all phases of life. In all such instances there has been devised an administrative control. At times it has been only inspection and licensing (as in case of small remedial loans); in others it has taken the form of elaborate machinery for adjudication of disputes and rendition of awards or granting of orders (as in case of workmen's compensation and in public utilities). Yet in all there have been attempts to avoid the rigidity of court or judicial procedure, and an endeavor to adopt more flexible devices. This movement has necessitated and resulted in an increasing number of experts skilled in the handling of special and technical problems. Their discretionary powers make possible more intimate adjustments, more use of preventive methods and more individualization of treatment than is possible in courts with their more formal ex post facto adjudications and less specialized techniques. The advent and evolution of this form of law, then, is significant for in it is found not only a vehicle for extending social control over complex problems but a device for making that control more effective than the inherited judicial machinery. The continuance and increase of these agencies is predestined, not only because of their extensive establishment but also because of their great utility in consummating programs of social change.

Popular attitude towards commissions, however, should be noted. They have not yet acquired such high sanction and dignity as courts. Their actions are apt to be called bureaucratic; the wisdom of their rulings doubted; their fairness challenged. It may be that their phenomenal rise to places of importance in modern life in a relatively short period of time, the informality of their proceedings, the speed of much of their activity, the absence of elaborate procedures, the direct and intimate contact with parties affected, the absence of aloofness and independence associated with courts, and their occasional political complexion all militate against a ready acceptance of them as vital and important governmental agencies. It is interesting matter for speculation if definite acceptance of them as governmental institutions and further perfection





of their procedures, techniques and personnel will establish them as institutions of the same high sanction and prestige as courts.

These tribunals have not, of course, been created or permitted to function as independent bodies. Rather they have operated interstitially

between courts on the one hand and legislatures or executives on the other. As indicated above, the power of judicial review has been saved, in most instances, to the courts as a control over assumption of unauthorized power or abuse of administrative discretion. Though prominent exceptions have been noted, the trend in judicial review has been toward carving out a larger realm of activity for commissions on which the less expert and further removed judicial body will not impinge. Likewise, legislatures are entrusting more and more to such agencies final determination of facts and the establishment of the conclusiveness of such findings if there is any evidence to support them.

In conclusion, two major trends in administrative procedure should be noted. Prominent is the shift of control to the federal government and a complete or partial abdication or renunciation by the states. Further, more and more do problems of administrative control call for cooperative regulation. And the trend, during the last decade especially, has been and, it is thought, will continue to be toward shaping the administrative procedure to fit the problem rather than to force the problem to fit rigid administrative procedures. This strong call for cooperative administration promises to militate against a definite recession to individual states of power exercised by the federal government. On the other hand it prophesies a closer and more intimate fusion of administrative resources by two or more states or by the states and the federal government in an attack on problems that override state lines or that are dependent for effective regulation on mobilization of independent resources. The result may well be a finer balance of power between state and nation and a counter-trend from centralization of power in Washington as respects problems regional or local rather than national in character.

### IV. TRENDS IN LEGAL EDUCATION AND BAR ADMISSION REQUIREMENTS

One of the most determined efforts aimed at improving law and its administration is that for stricter education and character requirements for admission to the bar. Though legally the lawyer is an officer of the court subject to its control and discipline, in practice it has been easy to secure admission to the bar, and expulsion has been only for proved misdeeds. Bar admission standards have not compared in severity with medical admission standards. During the last decade, however, a complete and far reaching program under the general leadership of the American Bar Association has been followed with increasing success. Meanwhile many of the national law schools of the country have had a definite

share in law administration reform, either by providing the technical research for other groups or by themselves assuming the initiative. These connected movements suggest, perhaps more than any other, long range possibilities for molding and changing the law. They are the subject matter of this section.

**Number of Lawyers and Law Students.**—The United States census figures on lawyers indicate a very rapid increase in the proportionate number of lawyers to the total population from 1870 to 1900, so that by the latter date there were 151 lawyers to each 100,000 of the population or one lawyer for each 664 persons. After 1900 the increase was less than the increase in population, so that by 1920 there was one lawyer (excluding notaries, abstractors and justices of the peace) for each 862 of population or 116 lawyers for each 100,000 of population and a total of 122,519 lawyers in the country. During the ten years from 1920 to 1930, while the population increased 16 percent, the number of lawyers increased 31 percent to reach the total of 160,605 lawyers in the country, or 131 for each 100,000 of population and one lawyer for each 764 persons. This rate of increase was much greater than that of doctors (6 percent) or clergymen (17 percent), and the number of lawyers now exceeds that of doctors (153,803) or clergymen (148,848).[97]

The ratio of lawyers to population varies from state to state, there now being one lawyer to each 140 persons in the District of Columbia, one to 394 in Nevada, as compared to one to 1,656 persons in Alabama and one to 1,609 persons in Mississippi. The general average in this country is much greater than the average in other countries. "The United States with three times the population of England and Wales has seven times as many lawyers."[98] On the continent of Europe the proportion is even greater, though differences in legal procedure tending to increase the importance of the judge and decrease that of the lawyer should be noted.

After the World War the number of law students increased from around 25,000 in 1919–1920 to almost 50,000 in 1928–1929. The number has now decreased somewhat to about 40,000 in 1931. About 50 percent of the applicants for admission to the bar pass the state examinations and are admitted to practice (53.6 percent in 1928, 51.2 percent in 1929, and 47.6 in 1930).[99] Permission given to applicants to repeat the examinations on failure, in most states unlimited in any way, makes the examinations less effective in protecting the public against improperly prepared attorneys.

[97] Compare with Chap. VI.

[98] Andrews, A. B., "Legal Education and Admission to the Bar," North Carolina Bar Association *Report*, 1929, vol. XXXI, p. 13; see also A. Z. Reed, "Lawyers," *Encyclopaedia Brittanica*, vol. XIII (14th ed.).

[99] Figures supplied by Will Shafroth, Adviser to the American Bar Association's Council on Legal Education and Admission to the Bar.

Estimates by several members of the profession recently are to the effect that the present rate of admission is about double that needed to keep the relative number of lawyers at its present position, which number is thought to be much more than sufficient for the country's needs.[100]

Important changes are occurring in professional practice. The centralization of control of business and industry in the large cities has carried with it a concentration of legal business in places such as New York and Chicago. There has also been a distinct trend toward specialization in practice such as in the fields of corporations, estates, bankruptcy, and divorce and negligence cases. The general practitioner and the country lawyer have tended to disappear. But this process has been checked temporarily at least by the financial depression since 1929. Finally, many lay agencies are encroaching upon professional practice. Trust companies with estate work, title insurance companies, insurance adjusters, collection agencies and even the legal staffs of large industrial corporations are diverting much law work from the general practitioners. The lawyers have been aroused, and through bar committees and by persuasion, agreement and legislation have attempted to combat this movement.[101] The bar has become more cosmopolitan in character and is less of a cohesive unit. A feeling has been general that it is not meeting as it should the needs of a complex civilization and that the primary problem in the law today is the acquisition of a personnel of higher grade both from the standpoint of character and of ability and training.[102] This has given added emphasis to the movement for advancing standards of bar admission now to be described.

**Movement for Restriction.**[103]—Severe and lengthy preparation for admission to the bar was required in the early history of the country, but beginning about 1830 a period of laissez faire ensued. The movement for stricter standards is almost coincident with the growth of the American Bar Association. Founded in 1878 the Association did not even recommend official examination of candidates until 1892 and it was not until 1897 that it recommended the requirement of a high school education. In 1893 it organized a Section on Legal Education and Admission to the

[100] Kinnane, C. H., "The Threatened Inundation of the Bar," *American Bar Association Journal*, 1931, vol. XVII, p. 475; Will Shafroth, "Bar Examiners and Examinees," *American Bar Association Journal*, 1931, vol. XVII, p. 374, quoting also other estimates.

[101] Hicks, F. C., and Katz, E. R., "The Practice of Law by Laymen and Lay Agencies," *Yale Law Journal*, 1931, vol. XLI, p. 69, with citations there given.

[102] Compare A. J. Harno, "Building a Better Bar," *The Bar Examiner*, 1932, vol. I, p. 179.

[103] In this and the following paragraphs reliance for statistical information is in the main upon the invaluable Annual Reviews of Legal Education of the Carnegie Foundation. See

upon the invaluable Annual Reviews of Legal Education of the Carnegie Foundation. See also the annual *Reports* of the American Bar Association, the publications of its Section on Legal Education and Admission to the Bar, information supplied by its Adviser, Will Shafroth, and the two monographs by Alfred Z. Reed of the Carnegie Foundation, *Training for the Public Profession of the Law*, 1921, and *Present Day Law Schools in the United States and Canada*, 1928.





Bar. With the organization of this Section and of the Association of American Law Schools, founded in 1900 and admitting to membership only non-commercial schools maintaining certain standards of requirement and physical condition, the movement gained strength and leadership. It was not, however, until 1921 that the American Bar Association took the definite stand of actively supporting certain requirements. At its annual meeting that year it adopted resolutions stating its opinion that every candidate for admission to the bar should be subjected to an examination by public authorities and should give evidence of graduation from a law school complying with standards which included at least two years of college study for admission of students, three years of full time law study or a longer part time course and an adequate library and staff of full time teachers.[104]

The Council on Legal Education and Admission to the Bar was directed to publish from time to time lists of law schools complying and those not complying with these standards. It was also charged with the duty of urging the requirements upon the duly constituted authorities of the several states. At a meeting the following February of the Conference of Bar Association Delegates composed of delegates from state and local associations strong support was given to the movement[105] and the Council began actively to advance the standards. In 1927 the American Bar Association appropriated funds to the Council for the support of a salaried official or adviser who acts as inspector of law schools as well as general field agent. This provides an effective organization to advance the Association standards.

At the time of the adoption of the resolutions in 1921 no state (except Kansas as to general education) even approximated the requirements stated, particularly as to college and law school training. A decade later, while no state had adopted all the requirements in full, about a third had standards of a reasonably advanced type, a like number had primitive admission systems, while the remainder were in an intermediate class.

Two arguments have been most utilized in pressing for the raising of standards by states. The first is that the law is a profession requiring

a high degree of skill and competence, and that the presence of ill trained and ill equipped members is a menace to society. The loss is immediate to the litigants whom they assume to serve, but is likewise great for the community as a whole because of the added frictions of group life caused by their incompetence. Here is an item of social waste which can at the very least be greatly reduced. The other argument is that in the law, with

[104] See *Standards of the American Bar Association*, 1931, published by the Council on Legal Education and Admission to the Bar. See also American Bar Association *Report*, 1921, vol. XLVII, p. 37. In 1929 it added a requirement that the school should not be operated as a commercial enterprise.

[105] American Bar Association *Report*, 1922, vol. XLVII, pp. 482–599.





the extremely personal relation subsisting between attorney and client, a high standard of moral character is necessary in order that advantage not be taken of the weak and defenceless. The supporters of the higher standards urge, on the basis of experience, that there is a direct connection between lack of equipment for the profession and lack of ability to succeed in it without departing from professional standards. The revelations made recently by the investigations in several cities of the "ambulance chasing" lawyers and the "bankruptcy rings," showing many lawyers openly seeking accident injury litigation and practice in the bankruptcy courts, have given impetus to the movement. Argument has been made, particularly on behalf of some of the commercial law schools, that these standards may exclude a prospective Abraham Lincoln, but to this it is answered that a man of the Lincoln type is preeminently the one who will surmount all difficulties in the way of acquiring an education. Moreover, admission to the bar is to be considered a privilege, not a right, and should be granted only where it will benefit the community as a whole, not merely the individual applicant. This point of view has now been so accepted by members of the Association that at the last attack on the standards—before the Section on Legal Education at Memphis in 1929—the opponents of the resolutions were in a hopeless minority, so much so that a vote was not called for.

**Bar Admission Requirements of Various States.**—The general method of control over admission to the bar of a state is through a bar examining committee usually appointed under the direction of the highest court of the state. In this connection a question has arisen whether control of the requirements lies with the legislature or with the court. The tradition has been in favor of court control and exclusive power has been asserted by some courts in actual decisions.[106] In many other cases, either by tacit

consent or express holding, statutes concerning admission to the bar have been upheld. These acts were initially favored as means of securing advanced requirements of a uniform kind for an entire state with quickness and finality. Statutes are now general, prescribing who shall have the power to admit and to a certain extent what the requirements shall be, although in perhaps an increasing number of states the legislature commits the determination of detailed requirements to the courts. The latter course is preferred, since it avoids the cumbersome and dilatory nature of all legislative processes and commits the enforcement of the standards to that official body probably most interested in seeing that they are observed.

The two requirements of most far reaching importance are those concerned with preliminary general education and those concerned with law study. As late as 1890 only five states had any requirements of pre-

[106] Compare *Opinion of the Justices*, 1932, (Massachusetts) 180 N. E. 725.





liminary general education and in 1921 when the American Bar Association's resolutions were adopted the number was only fourteen, of which only ten required the equivalent of a high school education. By the end of 1931 there were a total of nineteen states in which substantially all candidates for admission either presently or prospectively are required to have two years of college education or its equivalent as shown by the passing of an examination (in seven this need not be fulfilled before commencing law study); while fifteen require the equivalent of graduation from a high school, two more either two or three years of high school study and three others more indefinite regulations. The remaining states have no requirement on the subject.

The American Bar Association's recommendation that three years of study in an approved law school be required has been adopted by only one state, one other requires two years of law school study and two others require one and two years out of the three year total of such study. In all the other jurisdictions either there is no stated requirement or law study wholly outside of a school is expressly permitted. The recommendation seems, however, to have induced strengthening of the requirements of both office study and law study in matters of detail. By the autumn of 1931 forty jurisdictions specified a certain definite period of law study, varying in length in the different states. In some thirteen states registration before commencing law study was required of students of law offices only, while in eight others requirements for registration varied, applying

in certain cases to all applicants and in other cases only to residents or non-residents. The registration requirement is at times utilized to enforce definite standards of time and amount of study, particularly in law offices. Five states have a requirement of some period spent in office apprenticeship. The plan of a graded bar with different functions determined by difference in preparation has received support but has been opposed by bar associations and legal educators because of fear that it may lead to permanent lower standards of practice before the minor courts so-called, where perhaps the higher standards are most needed. Perhaps some plan of a probationary period possibly even of a "junior" or "interlocutory" bar may avoid this danger.[107]

Twelve states now have the so-called diploma privilege admitting graduates of one or more local institutions to practice without further examination. This has been disapproved by the American Bar Association since 1892 and the number has been reduced from sixteen, the number in 1890. Most states have some requirements for admission of attorneys of other jurisdictions on motion without examination. It is

[107] See *e. g.* "The Missing Element in Legal Education," *Annual Review of Legal Education*, 1929, pp. 3, 28 f.; also other bulletins referred to in footnote 103, *supra*. See also the plan for a temporary license to practice adopted by the U. S. District Court for the District of New Jersey; I. K. Clark, *American Bar Association Journal*, 1932, vol. XVIII, p. 531.





usual to require some proof of good character by affidavit or otherwise and in many states varying periods of practice from one to five years are a necessary preliminary. In order to prevent "bootleg" admissions some states are requiring a showing that the bar requirements of the other jurisdiction are substantially equivalent to those of the admitting state.

Much emphasis is placed upon moral character requirements, although it has been difficult to develop definite provisions of an effective kind to test character. Twenty-eight jurisdictions rely only upon references and certificates of character furnished by the applicant, while in twenty-one provision is made for the appointment of committees on moral character of the applicants and (or) examinations of varying types and forms. An example of an extensive system exists in Connecticut where by rule of long standing every applicant must be approved by vote of the county bar association.[108] One such association had developed a committee on moral character, making recommendations for approval only after extensive personal and other examination of the applicant's

qualifications. By rule of court in 1931 this practice was extended to each county in the state.

**Trends in Law Schools.**—The great growth in law schools has been indicated above. Nearly all the bar applicants in many states now have at least some law school training. No figures are available for the number of wholly office trained applicants, but the relative figures of law school students and applicants for admission to the bar indicate that this number can hardly reach 5 percent.

The establishment of the Association of American Law Schools in 1900, with its rigorous test for membership, followed by the adoption of the American Bar Association recommendations of 1921, given above, as a result of which its list of approved law schools is now nearly identical with the membership roll of the Law School Association, have effected a material raising of standards in the law schools. There were in the autumn of 1931, 182 degree conferring law schools. Of these 84 were full time schools, of which all but two required residence for at least three academic years or their equivalent for their first degree in law, and all but three at least two years of college work for admission. Seventy-three or 87 percent were on the approved list of the Council of Legal Education and Admission to the Bar and 68 or 81 percent were also members of the Association of American Law Schools. The remaining 98 schools included 6 having law courses of less than three academic years and 23 maintaining separate divisions for full time students. Of these only 8, all of the mixed full time and part time type, had been approved

[108] Such vote, properly registered, is final. *O'Brien's Petition*, 1906, 79 Connecticut, 46; *Higgins* v. *Hartford County Bar Association*, 1930, 111 Connecticut, 47.





by the Council and six of these were members of the Law School Association by January 1, 1932.

The percentage of law school students attending full time schools requiring five or more academic years of college and law study has increased from 6.1 in 1900, when the Law School Association was formed, and 23.3 in 1920 to 33.3 in the fall of 1929. In the autumn of 1930 the attendance at the 81 schools approved by the Council up to 1932 was 17,948 or 44 percent of the total as against 22,899 or 56 percent in unapproved schools. This ratio indicates how important the problem of the night and part time schools still is. No general figures are available but the records kept by the California and New York examiners indicate

a much higher ratio of success in the examinations for those attending the schools with the higher requirements than for others.[109]

The requirement for preliminary education for admission to a law school has only slowly developed. Until 1915 only one school demanded a college degree for admission, but in 1930 seven schools had the requirement, four more required the degree from all except seniors in the college of the same university who then began the study of law, eight more required three years of college, and all other full time schools, except three which required no college study, were content with the rule that applicants must have completed two years of college study. Within the past five years a few schools have limited their enrollment, admitting only those among their applicants whom they decide to be most fitted for law study. The part time schools vary, but none requires more than two years of college education and many do not require any pre-legal training. The practice of admitting special or conditional students is condemned by the American Bar Association and the Association of American Law Schools.

In 1890 seven schools had a three year course; in 1900 the number was forty-seven. A course of this length was made one of the membership requirements of the Association of American Law Schools, effective in 1905. In 1931 only eight schools, situated in the south, of which only two were full time, offered a course of less than three years. A four year course has been offered on an optional basis at five or six schools, but is now retained at two schools only, in one of which it is part of a six year course designed to make use of the junior college movement. Summer law sessions, usually the equivalent of one-third of an academic year, have been conducted at fifty-two schools, though the number seems now to be falling off.

[109] Wickser, P. J., "Bar Examinations," *American Bar Association Journal*, 1930, vol. XVI, p. 733; American Bar Association *Report*, 1930, vol. LV, p. 639; J. E. Biby, "Bar Examination Statistics and the Standards," American Bar Association *Report*, 1930, vol. LV, p. 658.



## RECENT SOCIAL TRENDS

The casebook method, using reported cases as the basis of instruction, predominates in the schools which are members of the Association of American Law Schools, while the other schools vary greatly as to use of casebook, text book, or lecture method. Objections that even the casebook does not bring out individual discussion in the large class have been met in some schools by small seminar courses and honors or individual studies

on the part of advanced students. The first year work is usually required and consists in the main of standard professional courses.

In the second and third years the elective system is popular. Though professional courses still predominate, a changing attitude towards law is reflected by a different approach in several schools to a broader training, at least in the social sciences, for the lawyer. Economics has been perhaps most stressed, though psychiatry and psychology are being looked to as important adjuncts to the law curriculum.

A similar trend is indicated by an increased interest in legal research, and by the establishment of endowments for that purpose at Harvard and Michigan and of a special research Institute of Law at Johns Hopkins and of the Institute of Human Relations at Yale. Some schools have undertaken extensive projects for the collection of social data, as for example case studies of bankruptcies, to throw light on their causes, of law administration as shown by judicial statistics, and of automobile accidents in connection with proposals for applying the principle of compensation without reference to fault to the victims of such accidents. Law schools with adequate faculties and not overcrowded with students are able to conduct such studies with a considerable competence. The law reviews published in many law schools are important channels for bringing the work of the schools to the attention of teachers, students, lawyers and judges.

Law schools and law professors are assisting in many of the movements for legal reform discussed in section III, above, as by serving upon or acting as experts for judicial councils and crime commissions, serving as draftsmen for uniform acts or reporters or annotators for law restatements or themselves initiating and pressing reform proposals. Both by training and by interest law professors are fitted and have the time and opportunity which the practitioner lacks to prepare adequate restatements of existing law or detailed and documented proposals for improvement. The influence of teachers in training future members of the bar is great, but this is not likely to be exceeded in the future by their influence in improving the law.

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## SOURCES OF TOLERANCE*


HON. LEARNED HAND


I am going to ask you to go with me, not into questions which have direct relation to the law or to government, but to those which concern the mental habits of our people, since these, indirectly at any rate, in the end determine its institutions. This is not an easy, maybe it is an impossible undertaking, but at any rate, nobody can very effectually challenge what you say about such vague things, and you are exempt from the need of citation—blessed exoneration to a judge. It may be worth discussion, if only for discussion's sake. At least it can serve to bring out differences of opinion.

By way of prelude may I then ask you for a moment to go back in our country for nearly a century and a half? We were substantially a nation of farmers; towns were few; cities, as we should now rate them, did not exist. Life was, as we like to believe, simple. Maybe it was not so in fact, for simplicity depends rather on one's inner state of mind; but at any rate it was less pressed and hurried; people did not think so much about how complicated they were, and less dissipated their attention.

The political notions of the time were divided into two contrasting groups which it has been the custom to associate with the

*An address delivered in Philadelphia, June, 1930, before the Juristic Society, a group of younger members of the bar whose aim is to stimulate interest in the academic aspects of the law.

great names of Jefferson and Hamilton. It is easy to associate Jefferson's ideas with those of Rousseau, from whom on the outside they seem to have been drawn. This, as I understand it, is wrong, but he had drunk deeply at the springs of Physiocracy, and in any event he believed in the basic virtue of mankind, once set free from artificial restraints. He found his ideal in a community of independent families, each intrenched in its farm, self-subsistent, independent, needing no regulation, and tolerant of little interference, especially by government. Those who invoke his name today must be shocked at his scorn of the mob of mechanics and artisans, whose turbulence and separation from some particular plot of earth, unfitted them in his eyes for sharing in the Good Life. A nation in which information, or what passes as such, can be instantaneously sent from one end to the other, in which the craving for conformity demands uniformity in belief, which for that reason wears the same clothes, reads the same print and follows the same fashions, amusements and conventions, would have seemed to him scurvy and sordid. He would have found little in the America of today to justify that Utopia of which he had dreamed.

The extraordinary richness of his own nature, his omnivorant interest in all the activities of man, no doubt colored his picture of a life on the land; yet it also enabled him to transmute into a rosy ideal the dumb aspirations of his people, and so they looked to him for their leadership for a quarter of a century after his accession to power, and if we count Jackson as his dubious disciple, for that much longer. Clearly there was something in his outlook which responded to the needs of those among whom he lived.

Hamilton was a horse of another color, always an exotic, succeeding in his statecraft only because of the disorders which immediately followed the Revolution; whose genius needed the cloak of Washington beneath which his real work was hid for near a century. He was no Utopian; he did not believe in the perfectability of human nature. Government was a combination of those interests in the community which collectively would be irresistible; a combination resting upon self-interest. When he secured the passage of the Constitution, it was by means of such

a combination; the landed class, the manufacturers and the public creditors. In the doubtful contest for ratification, as Beard has shown, it was these votes which eventually won, and it was under the aegis of Washington that he managed to carry on for those critical eight years. With the constant movement of the frontier westward, the underlying, but less articulate, aspirations of a rural people finally asserted themselves, after Adams had run off Hamilton's momentum.

The animosity between the two men was well founded and inevitable. They represented, and we are right still to take them as our most shining examples of, two theories of human society: that which demands external control, that which insists upon the opportunity for personal expression. Jefferson's victory seemed to him to be the sanction of all that the Revolution had implied; the liberation of a free people from the domination of greed and corruption, opening vistas of human felicity not theretofore known on earth. For its fuller expression he was willing, forced by a sad necessity, to sacrifice his constitutional scruples and forever compromise his party by the acquisition of Louisiana. To Hamilton, Jefferson's accession was the beginning of the end, the last step in a plunge towards anarchy. The squalid political quarrel for the domination of the rump of Federalism which ended in his death, had for him a deeper significance than the leadership in a party then apparently writhing to dissolution. The Eighteenth Brumaire was five years past, and though the Coronation at Notre Dame was still some months away, recent events already foreshadowed it. In the final breakdown of that Jacobinism which he and his associates thought certain and early, the need would arise for some transatlantic Bonaparte to gather the shreds of society, and build a state upon surer foundations than that weak instrument in which at heart he had never really believed. To prevent Federalism, the sacred chalice, from passing into the obscene hands of a turncoat and a traitor was worth the chance that cost him his life.

Each man would have said that he was the champion of lib-

erty, and each would have been right. To one the essential condition of any tolerable life was the free expression of the individ-



ual, the power to lead his life on his own terms, to enjoy the fruits of his industry, to garner the harvest of his hands and brain, without subtraction by a horde of office-holders, locusts who laid waste the land and spread the venal doctrine of their right to eat what others had sown, the blight, the virus, of a society of honest men, enjoying the earth which God, at least in this blessed country, had patently spread out for their satisfaction. The other saw in all this no more than the maunderings of a toxic dream. What was the assurance of man's capacity to deal with his own fate? Was it not clear that virtue and intelligence among the sons of Adam was as rare as physical prowess, indeed much rarer? Liberty could not rest upon anarchy; it was conditioned upon an ordered society, in which power should rest where power should be, with the wise and the good, who could be at least presumptively ascertained as those who in the battle of life had already given some signs of capacity. It was an empty phantom to assume some automatic regulation by which without plan and direction public affairs manage themselves. The concerns of a great people are not all individual; they have collective interests without which their life can scarcely rise above that of savages, each shifting for himself, without comfort, security or the leisure which alone makes existence endurable. Jacobins might bawl of liberty, but really they meant no more than the tyranny of their own domination over the mob.

Placed as we now are, with an experience of over a century behind us, we can say that the future was apparently to justify Hamilton as against his great rival. Our knowledge of the ways of Nature, our command of her energies and the materials which she has set so freely at our hands, has made it no longer possible to think of a society of families, isolated and non-communicating, each weaving its own fate independently of the rest. We have fabricated a nexus of relations which makes even rural life impossible as Jefferson understood it. The motor, the airplane, the tele-

phone and telegraph, the radio, the railroad, the linotype, the modern newspaper, the "movie"—and thrice horrible, the "talkie"—have finally destroyed it. Liberty is irretrievably gone in any sense that it was worth having to him. A farmer must have



complicated machinery; he depends upon markets thousands of miles away; he will win by a crop shortage in India, and lose by a fall in industrial shares. He must "listen in" on Amos an' Andy, have camping places in the National Parks and tour in the Ford in winter. So be it; I welcome his larger life, but it has its price; he is tied to all men, as all men are tied to him, in a web whose threads no eye can follow and no fingers unravel.

Nor would there still be many, though doubtless some there are, who would deny that government must be the compromise of conflicting interests, as Hamilton supposed. While there lingers in political platforms and other declamatory compositions the notion that each man, if only he could be disabused of false doctrine, would act and vote with an enlightened eye to the public weal, few really believe it. We know well that an objective calculus of human values is impossible, and if it were available, would be so thin and speculative that men would not accept it. For any times that can count in human endeavor, we must be content with compromises in which the more powerful combination will prevail. The most we can hope is that if the maladjustment becomes too obvious, or the means too offensive to our conventions, the balance can be re-established without dissolution, a cost greater than almost any interests can justify. The method of Hamilton has had its way; so far as we can see must always have its way; in government, as in marriage, in the end the more insistent will prevails.

Liberty is so much latitude as the powerful choose to accord to the weak. So much perhaps must be admitted for abstract statement; anything short of it appears to lead to inconsistencies. At least no other formula has been devised which will answer. If a community decides that some conduct is prejudicial to itself, and so decides by numbers sufficient to impose its will upon dissenters,

I know of no principle which can stay its hand. Perhaps indeed it is no more than a truism to say so; for, when we set ourselves this or that limitation, religion for example, we find that we wince in application. Who can say that the polygamy of the Mormons was not a genuine article of that faith? When we forbade it in the name of our morals, was it not an obvious subterfuge still to



insist that we recognized religious freedom? Should we tolerate suttee? If we forbid birth-control in the interest of morals, is it inconceivable that we should tax celibacy? We call that conduct moral about whose effect upon our common interest we have unusually strong convictions. We do not hesitate to impose this upon those who do not share our views; and tolerance ends where faith begins. Plato may have been right about the proper relations of the sexes; we should not allow his experiment to be tried. I do not see how we can set any limits to legitimate coercion beyond those which our forbearance concedes.

And yet, so phrased, we should all agree, I think, that the whole substance of liberty has disappeared. It is intolerable to feel that we are each in the power of the conglomerate conscience of a mass of Babbitts, whose intelligence we do not respect, and whose standards we may detest. Life on their terms would be impossible to endure; of their compunctions we have no guarantee. Who shall deliver us from the body of this death? Certainly there was a meaning in Jefferson's hatred of the interposition of collective pressure, though he extended it to so much of what we now accept as government. We may believe that his emphasis was wrong; that it required a great war eventually to clear away the centrifugal tendencies that underlay it; but shall we not feel with him that it is monstrous to lay open the lives of each to whatever current notions of propriety may ordain? That feeling was the energy that lay back of the first ten amendments to the Constitution which were really a part of the document itself. Impossible though they be of literal interpretation, like a statute, as counsels of moderation, rather than as parts of our constituent law, they

represent a mood, an attitude towards life, deep rooted in any enduring society.

Jefferson thought that they could be made to prevail by weakening the central power, but he was too astute an observer to rely upon political device alone. It was in the social, not in the political, constitution of his society that real security lay. For it was impossible to sweep a community of small eighteenth century farmers with mob hysteria. His dislike of cities was in part at any rate because they were subject to just such accesses. He did



not, and he could not, see that time was to make rural life as susceptible to moral epidemics as the city mobs which he feared and mistrusted. He set his faith upon isolation and isolation in the end has failed him. The shores are no longer studded with rows of solid columns to break the waves of propaganda; they are not studded with anything whatever, and the waves sweep over them without obstacle and run far up into the land. The question I wish to put before you, which all this introduction is to prepare, is this—which I trust you will forgive me for putting in colloquial form—how far is liberty consistent with the methods of the modern "high-power" salesman? If it is not, what is to be done about it? Being Americans, we are not likely to agree that nothing can.

It has always interested me to read of the observations of those patient anthropologists who associate intimately with our cousin, the chimpanzee. I know a woman who endured the embrace of her son's pet for two hours, lest if disturbed in its caresses it might furiously strangle her. Devotion could scarcely ask more. We may learn much of ourselves from what are now, I believe, called the "conduct patterns" of the anthropoids, but it will not interest me so much as if the study could be of the herds. What I want to know is, why we have become so incurably imitative. I can improvise reasons, but you know how worthless that kind of anthropology is, so I shall spare you. But you will agree about the fact I fancy; you will agree that ideas are as infectious as bacteria and appear to run their course like epidemics. First, there is little immunity, nearly all individuals are susceptible,

so that the disease spreads like a prairie fire. Next, a period where the curve of infection, as the pathologists say, remains level; this may last a long time. Last a decline of the curve which, so far as is known, nothing can check. The virus has lost its potency, or some immunity has established itself in a wholly mysterious way.

Ideas, fashions, dogmas, literary, political, scientific, and religious, have a very similar course; they get a currency, spread like wildfire, have their day and thereafter nothing can revive them. Were the old questions ever answered? Has anyone ever proved or disproved the right of secession? Most issues are not decided; their importance passes and they follow after. But in their day



they rack the world they infest; men mill about them like a frantic herd: not understanding what their doctrines imply, or whither they lead. To them attach the noblest, and the meanest, motives, indifferent to all but that there is a cause to die for, or to profit by. Such habits are not conducive to the life of reason; that kind of devotion is not the method by which man has raised himself from a savage. Rather by quite another way, by doubt, by trial, by tentative conclusion.

In recent times we have deliberately systematized the production of epidemics in ideas, much as a pathologist experiments with a colony of white mice, who are scarcely less protected. The science of propaganda by no means had its origin in the Great War, but that gave it a greater impetus than ever before. To the advertiser we should look for our best technique. I am told that if I see McCracken's tooth-paste often enough in street cars, on billboards and in shop windows, it makes no difference how determined I may be not to become one of McCracken's customers, I shall buy McCracken's tooth-paste sooner or later, whether I will or no; it is as inevitable as that I shut my eyes when you strike at my face. In much the same way political ideas are spread, and moral too, or for that matter, religious. You know the established way of raising money for the School of Applied and Theoretical Taxidermy. One employs a master mind in group suggestion,

with lieutenants and field workers. The possible "prospects" are bombarded with a carefully planned series of what for some unknown reason is called "literature," leaflets, pictures, pathetic appeals, masterful appeals, appeals to patriotism. Shall American animals suffer the indignity of inadequate stuffing, having themselves given their lives to the cause? Will not you as a loyal American do your bit too; they having made the last supreme sacrifice? Taxidermy is a patriotic duty; are you for taxidermy? If not, you are against it, a taxidermical outlaw at best, at worst a taxidermical Laodicean. Brother, show your colors, join some group, at all costs join, be not a non-joiner, a detestable, lily-livered, half-hearted, supercilious, un-American, whom we would exile if we could and would not pass if he sought entrance.



I submit that a community used to be played on in this way, especially one so large and so homogeneous as we have become, is not a favorable soil for liberty. That plant cannot thrive in such a forcing bed; it is slow growing and needs a more equitable climate. It is the product, not of institutions, but of a temper, of an attitude towards life; of that mood that looks before and after and pines for what is not. It is idle to look to laws, or courts, or principalities, or powers, to secure it. You may write into your constitutions not ten, but fifty, amendments, and it shall not help a farthing, for casuistry will undermine it as casuistry should, if it have no stay but law. It is secure only in that *constans et perpetua voluntas suum cuique tribuendi;* in that sense of fair play, of give and take, of the uncertainty of human hypothesis, of how changeable and passing are our surest convictions, which has so hard a chance to survive in any times, perhaps especially in our own.

There are some who, looking on the American scene, see remedy in trying to introduce and maintain local differences. Especially in matters of government, let us be astute to preserve local autonomy, not to concentrate all power in our capital. There are reasons enough for this in any case, but as a relief from the prevalent mood it seems to me a delusion. That served very well

prevalent mood it seems to me a delusion. That served very well in Jefferson's time; it will not do today. We cannot set our faces against a world enraptured with the affluence which comes from mass production; and what has served so magically in material things, is it not proved to be good for our ideas, our amusements, our morals, our religion? The heretic is odious in proportion as large industry is successful. Rapidity of communication alone makes segregation a broken reed; for men will talk with one another, visit one another, join with one another, listen collectively, look collectively, play collectively, and in the end, for aught I know, eat and sleep collectively, though they have nothing to say, nothing to do, no eyes or ears with which to enjoy or to value what they see and hear. You cannot set up again a Jeffersonian world in separate monads, each looking up to heaven. For good or evil, man, who must have lived for long in groups, likes too much the warm feeling of his mental and moral elbows in touch with his neighbors'.



Well, then, shall we surrender; shall we agree to submit to the dictation of the prevalent fashion in morals and ideas, as we do in dress? Must we capture surreptitiously such independence as we can, "bootleg" it, as it were, and let the heathen rage, the cattle mill, the air resound with imperious nostrums which will brook no dissidence? Maybe it will come to that; sometimes I wonder whether to be a foe of war, for example—which might be thought a blameless disposition—is not a stigma of degeneracy. Again I have pondered on what it is to be a Bolshevik, and once I learned. There was a time when Congress thought it could reach the salaries of my brothers and myself by an income tax, until the Supreme Court manfully came to our rescue. A judge of much experience was talking with me one day about it; I was wrong enough in my law, as it afterwards turned out, and disloyal enough in temper to my class, to say that I thought the tax valid. "Do you know anything about it?" he asked with some asperity. "No," said I, "not a thing." "Have you ever read Taney's letter?"

No," said I again, for I was innocent of any learning. "Why, they can't do that," said he; "they can't do that, that's Bolshevism." And so it turned out, to my personal gratification, since when, freed from that Red Peril, I have enjoyed an immunity which the rest of you, alas, cannot share. Far be it from me to suggest that there are graver thrusts at the structure of society than to tax a Federal judge. Properly instructed, I have recanted my heresy, and yet there hangs about "Bolshevism" a residual vagueness, a lack of clear outline, as of a mountain against the setting sun; which only goes to show, I suppose, that a fundamentally corrupt nature can never be wholly reformed.

As I say, we may have to lie low like Bre'r Rabbit, and get our freedom as best we can, but that is the last resort. Perhaps if we cannot build breakwaters, we may be able to deepen the bottom. The Republic of Switzerland is cut into deep valleys; it has been a traditional home of freedom. Greece is made in the same way; to Greece we owe it that our civilization is not Asian. Our own country has not that protection; and in any event, of what value would it be in these later days, when Fords climb Pike's Peak and Babe Ruth is the local divinity at once in San Diego and



Bangor? But what nature has not done for us, perhaps time can. I conceive that there is nothing which gives a man more pause before taking as absolute what his feelings welcome, and his mind deems plausible, than even the flicker of a recollection that something of the sort has been tried before, felt before, disputed before, and for some reason or other has now quite gone into Limbo. Historians may be dogmatists, I know, though not so often now as when history was dogma. At least you will perhaps agree that even a smattering of history and especially of letters will go far to dull the edges of uncompromising conviction. No doubt one may quote history to support any cause, as the devil quotes scripture; but modern history is not a very satisfactory side-arm in political polemics; it grows less and less so. Besides, it is not so much the history one learns as the fact that one is aware that man has had a history at all. The liberation is not in the

information but in the background acquired, the sense of mutability, and of the transience of what seems so poignant and so pressing today. One may take sides violently over the execution of Charles the First, but he has been dead a long while; the issue is not bitter unless we connect it with what is going on today. Many can of course do this, but that in itself requires considerable knowledge of intervening events, and those who can achieve a sustained theory are almost entitled to their partisanship, in reward of their ingenuity. After all, we can hope only for palliatives.

With history I class what in general we call the Liberal Arts, Fiction, Drama, Poetry, Biography, especially those of other countries; as far as that be possible, in other tongues. In short, I argue that the political life of a country like ours would get depth and steadiness, would tend to escape its greatest danger, which is the disposition to take the immediate for the eternal, to press the advantage of present numbers to the full, to ignore dissenters and regard them as heretics, by some adumbration of what men have thought and felt in other times and at other places. This seems to me a surer resort than liberal weeklies, societies for the promotion of cultural relations, sermons upon tolerance, American Civil Liberty Unions. I know very well how remote from the possibilities of most men anything of the kind must be, but good tem-



per, as well as bad, is contagious. And today in America vast concourses of youth are flocking to our colleges, eager for something, just what they do not know. It makes much difference what they get. They will be prone to demand something they can immediately use; the tendency is strong to give it them; science, economics, business administration, law in its narrower sense. I submit that the shepherds should not first feed the flocks with these. I argue for the outlines of what used to go as a liberal education—not necessarily in the sense that young folks should waste precious years in efforts, unsuccessful for some reason I cannot understand, to master ancient tongues; but I speak for an

introduction into the thoughts and deeds of men who have lived before them, in other countries than their own, with other strifes and other needs. This I maintain, not in the interest of that general cultural background, which is so often a cloak for the superior person, the prig, the snob and the pedant. But I submit to you that in some such way alone can we meet and master the high-power salesman of political patent medicines. I come to you, not as an advocate of education for education's sake, but as one, who like you, I suppose, is troubled by the spirit of faction, by the catch-words with the explosive energy of faith behind them, by the unwillingness to live and let live with which we are plagued. It is well enough to put one's faith in education, but the kind makes a vast difference. The principles of a common pump are in my opinion not so important politically as Keat's Ode on a Grecian Urn, to crib a phrase from Augustine Birrell.

May I take an illustration nearer to the field with which you are especially concerned? I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not



gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

This is only an illustration of the much wider question of

our political life at large. I submit that the aim is not so fanciful as it may seem; though at the moment I agree the outlook is not promising. Young people are not much disposed to give their time to what seems like loose browsing in the past. Though there are signs of a turn, of the significance of the insignificant, I shall try no forecast. All I want to emphasize is the political aspect of the matter, of the opportunity to preserve that spirit of liberty without which life is insupportable, and nations have never in the past been able to endure.

Jefferson is dead; time has disproved his forecasts; the society which he strove to preserve is gone to chaos and black night, as much as the empire of Ghengis Khan; what has succeeded he would disown as any get of his. Yet back of the form there is still the substance, the possibility of the individual expression of life on the terms of him who has to live it. The victory is not all Hamilton's, nor can it be unless we are all to be checked as anonymous members regulated by some bureaucratic machine, impersonal, inflexible, a Chronos to devour us, its children. We shall not succeed by any attempt to put the old wine in new bottles; liberty is an essence so volatile that it will escape any vial however corked. It rests in the hearts of men, in the belief that knowledge is hard to get, that man must break through again and again the thin crust on which he walks, that the certainties of today may become the superstitions of tomorrow, that we have no warrant of assurance save by everlasting readiness to test and test again. William James was its great American apostle in modern times; we shall do well to remember him.

Surely we, the children of a time when the assumptions of even the science of our fathers have been outworn; surely we

ought not to speak in apocalyptic verities, nor scourge from the temple those who do not see with our eyes. All the devices of our ingenuity, all our command over the materials of this earth, all the organization and differentiation of our industry and our social life, all our moral fetiches and exaltations, all our societies to ameliorate mankind, our hospitals, our colleges, our institutes,—all these shall not save us. We shall still need some knowledge of ourselves, and where shall we better look than to the fate of those who went before? Would we hold liberty, we must have charity—charity to others, charity to ourselves, crawling up from the moist ovens of a steaming world, still carrying the passional equipment of our ferocious ancestors, emerging from black superstition amid carnage and atrocity to our perilous present. What shall it profit us, who come so by our possessions, if we have not charity?

## Plechner v. Widener College, Inc., 418 F. Supp. 1282 (E.D. Pa. 1976)

**U.S. District Court for the Eastern District of Pennsylvania - 418 F. Supp. 1282 (E.D. Pa. 1976)**

**July 29, 1976**

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**418 F. Supp. 1282 (1976)**

**Richard F. PLECHNER, Plaintiff,**
**and**
**Alfred Avins, Intervenor-Plaintiff,**
**v.**
**WIDENER COLLEGE, INC., a Pennsylvania corporation, et al., Defendants.**

Civ. A. No. 75-2862.

**United States District Court, E. D. Pennsylvania.**

July 29, 1976.

***1283*1284*1285** Alan S. Fellheimer, Philadelphia, Pa., for plaintiff.

Alfred Avins, intervenor-plaintiff, pro se.

Franklin Poul, Judith Cohn, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for defendants.

**OPINION AND ORDER**

EDWARD R. BECKER, District Judge.

**I. *Preliminary Statement***

At stake in this unusual lawsuit is the control of the Delaware Law School (DLS), which was founded in 1971 by Dean Emeritus Alfred Avins (Avins), one of the plaintiffs. DLS is located in Wilmington, Delaware. The other plaintiff, Richard F. Plechner, is a DLS trustee. The legal issues before us concern the validity of the transactions in July, 1975, which resulted in the affiliation of DLS with defendant Widener College, Inc. (Widener) and in the transfer of governance of the law school from a Board of Trustees dominated by Avins to a Board, the majority of whose members were named by Widener.[1] However, the central and controlling issues are not legal but factual. Those factual issues emerge mainly from the tense and critical period in the life of DLS when accreditation of DLS by the American Bar Association (ABA) was in doubt. Unless DLS was accredited prior to the graduation of DLS' first class, the graduating students in that class would not be qualified to take bar examinations in most states. Moreover, later accreditation would not have the effect of qualifying these students. The doubt over accreditation thus presented to hundreds of students, who had committed years of study to the ambition of a career at the bar, the spectre that a significant portion of their lives might be wasted.

This thorny period was climaxed by the DLS-Widener affiliation and subsequent ABA provisional accreditation of DLS. Defendants, Widener and DLS, contend, *inter alia,* that DLS had been run by Avins as a "one-man law school," and that without the DLS-Widener affiliation there would have been no accreditation. The premise of plaintiffs' case is that the accreditation crisis was significantly fomented or fueled by actions of representatives of the defendants, with the connivance or succor of representatives of the Accreditation Committee (Committee) of the Council of the Section of Legal Education and Admissions to the Bar of the ABA (Council), and that accreditation would have followed without affiliation. The principal gravamen of plaintiffs' case is that the DLS-Widener affiliation was a product of coercion and undue influence upon the DLS trustees who voted for affiliation with Widener, or that their vote for affiliation was a product of duress. Plaintiffs also contend that the mechanism by which the affiliation was accomplished, *i. e.* the issuance by DLS, previously a non-stock corporation, of one share of stock with a par value of $1, and its ***1286** transfer to Widener for the sum of $1,[2] violates the corporation law of Delaware in that: (1) there was inadequate

consideration paid for the stock since DLS had assets valued well in excess of $1; and (2) as a Delaware nonprofit corporation, DLS could not issue stock hence the issuance of the stock was *ultra vires.* The relief sought by plaintiffs is the setting aside of the DLS-Widener affiliation and the removal of the present law school trustees so that the pro-Avins trustees could resume control of the law school.

After disposing of a significant number of pre-trial matters,[3] we proceeded to a bench trial[4] at which we heard some five days of testimony. It soon appeared that the plaintiffs could not establish that the defendants or their representatives engaged in acts of coercion against or exerted undue influence over the DLS trustees who ***1287** voted for merger or that they placed them under duress. What plaintiffs were advancing, it seemed to us, was what we dubbed the doctrine of "ambient coercion," *i. e.* that the atmosphere was so highly charged, that pressure from DLS students and their parents (many of whom were lawyers and judges who had intervened and taken active roles in what had become an accreditation campaign) was so great, that the DLS trustees felt compelled to vote for Widener affiliation. Of course, there is no such doctrine of "ambient coercion," but in any event, the evidence, both in its discrete portions, and in its totality, demonstrated to us beyond peradventure that the trustees were not subject to compulsion, duress, coercion or undue influence, but rather acted responsibly and voluntarily in voting for affiliation with Widener in the manner and by the means noted above.

The critical time in the quest for accreditation was the summer of 1975, when the first DLS class was about to graduate, for, as we have noted, under most state bar admission standards subsequent accreditation does not resurrect a wasted law school career. As will appear from our findings of fact, there is no doubt that but for affiliation with Widener, DLS would not have been accredited at that critical time, nor is there doubt that the trustees reasonably believed this to be so and acted accordingly. Neither, as will appear in our discussion of the applicable law, is there merit in plaintiffs' contentions as to the validity of the affiliation mechanism under Delaware corporation law. Accordingly, we will enter judgment for the defendants.

What now follows is our more detailed findings of fact as well as our conclusions of law, as required by Fed.R.Civ.P. 52(a). Because of the unique nature of the case and the importance of the matter to the parties and the DLS students, we have chronicled the relevant facts in considerable detail.

## II. *Findings of Fact*

Delaware Law School was incorporated in Delaware as a non-profit corporation on June 1, 1971. Avins, who was its incorporator and first dean, started the school to create a "haven" for conservative members of the teaching profession.[5]

By the terms of the original certificate of incorporation, the purposes of the corporation were "to establish and operate a law school in the State of Delaware" and engage in the various activities normally related to such an enterprise. The trustees or "members" had no right to any financial benefit arising out of their interest in the corporation. Upon the filing of the certificate of incorporation, the powers of the incorporator Avins terminated

and were transferred to a Board of Trustees composed of Avins, Delaware State Senator Dean C. Steele, and Cornelius Milione, a Wilmington banker. The trustees had the power to dissolve the corporation and donate the assets to "another school." The corporation also reserved the right to restate or amend, alter, change or repeal any provision contained in the certificate. Finally, in contemplation of a future affiliation with a university, the certificate provided that the corporation could "merge, affiliate or contract with another non-profit educational institution under terms and conditions to be set by the Board of Trustees." Such an intention was indicated in the first catalogue of DLS.

The first students at DLS enrolled in a four-year evening program in September, 1971, with graduation set for spring of 1975.[6] Avins taught the first classes, which were held in space rented by him at the Wilmington YMCA. The only other employee of DLS at the time was a part-time librarian. During the first year Avins handled all the administrative details as well, with the assistance of only a few part-time personnel. At this time DLS had neither ***1288** degree-granting power nor accreditation from the ABA which was necessary to enable its graduates to take bar examinations in most states. Avins, however, apparently anticipated no problems in getting the necessary approvals.

By the fall of the next academic year, DLS moved to its present quarters in a former church in Wilmington which Avins had arranged for DLS to purchase by use of a purchase money mortgage. The building was in dilapidated condition, and Avins personally supervised its clean-up. At the same time, he was teaching classes and acquiring books for a library. The story of how Avins, using the help of students, revamped the physical facilities, furnished the building, and built an adequate law school library is truly astounding. We will not recount here how he (to use his own term) "scrounged;" *e. g.* searched out the estates of deceased lawyers and purchased books from them, obtained (at distress prices or gratis) shelving and furniture from structures about to be razed, acted as watchman for the premises, and supervised a clean up, paint up and fix up campaign, etc., but will comment only that we marvel at his resourcefulness and energy.

In the fall of 1972, DLS admitted its first full-time day students. These students also anticipated graduation in the spring of 1975. During the 1972-73 academic year, DLS hired four faculty members. Apparently as a "gimmick" to render DLS distinctive and aid its quest for accreditation, Avins imposed the requirement that a faculty member could not obtain tenure unless he had a J.S.D. or Ph.D. (law) degree. No faculty member except Avins had such a degree.[7]

During 1972 DLS attempted to obtain degree granting power. Avins initially applied to the Delaware Department of Public Instruction for such approval, but when he was unsuccessful, he sought legislation as an alternate route. Legislation was then passed which would have given DLS degree granting power if an application were made and there were no objection made by the Chief Justice of the Delaware Supreme Court, the Chancellor of Delaware, the Presiding Judge of the Superior Court, the Attorney General, the State Superintendent of Public Instruction, the President of the Delaware State Bar Association or the Chairman of the Delaware Board of Bar Examiners. However, when DLS filed its application under the statute, all but one of these persons objected.

During 1973, Avins, as the moving force behind DLS, continued to improve the physical facilities, acquire a library, and staff and obtain a faculty. The Board of Trustees was enlarged to include several of Avins' acquaintances Dr. William Roberts, a retired Catholic University law professor; Sam Crutchfield,[8] a Washington lawyer; co-plaintiff Richard Plechner, a New Jersey lawyer; and Edward P. Scharfenberger, a New York lawyer. At the time there was no interest in the DLS from the Delaware bar. In fact, the Delaware bar was hostile to Avins.

The normal procedure for a law school to obtain provisional ABA accreditation is as follows:

The school is inspected by an ABA team which makes a report and recommendation to the Committee. The Committee in turn makes a recommendation to the Council which then makes its own recommendation. If the Council makes an affirmative recommendation of accreditation, it is reported for further action to the ABA House of Delegates. The House of Delegates then makes a final determination on whether the school will be granted provisional accreditation. In order to obtain provisional accreditation, the ABA must be satisfied that the law school will fulfill the requirements for final approval in three years. All of these procedures and the standards for accreditation are set forth in APPROVAL OF LAW SCHOOLS, *American Bar Association Standards and Rules of Procedure* (1973).

***1289** The first catalogue of DLS stated that the school would be ready for an ABA inspection by the end of the second year of operation. The second DLS catalogue represented that the school would be ready for its initial inspection in the spring of 1973. By the fall of 1973 the Board of Trustees anticipated attempting to obtain ABA approval (although DLS still did not have degree granting power). Thus, on September 15, 1973, the Board of Trustees passed a resolution calling for an inspection as soon as possible. This was consistent with the representation in the first DLS catalogue that the school would be ready for ABA inspection by the end of the second year of operation.

On January 14, 15, and 16, 1974, DLS was inspected by Dean James P. White of Indianapolis Law School (the ABA consultant on legal education) and Millard Ruud (the former ABA consultant on legal education). This inspection was the first step in the procedure for obtaining ABA accreditation. However, the report prepared and submitted by the ABA inspectors was devastating. The inspectors found fault with the physical plant, the library, the faculty, faculty salaries, the Board of Trustees, the lack of degree-granting power, the general lack of a "pursuit of excellence," and referred to DLS as a "one man law school."[9] One of the inspectors also raised the question of whether Avins' membership on the Board was consistent with the ABA standards. Accordingly, a negative recommendation on accreditation was given by the inspectors, the Committee and the Council. This "turndown" was communicated to the students.

On May 28-30, 1974, an inspection team made up of Dean Paul W. Wildman (Southwestern Law School), Dean Jerome Prince (Brooklyn Law School), and Professor Peyton Neal (Washington & Lee Law School) conducted a second ABA inspection of DLS. Although the results of the second inspection were somewhat better than the first, the report was still highly unfavorable and was accompanied by a negative recommendation. In July, 1974, DLS was again turned down by the ABA.[10] At this time

DLS still did not have degree-granting power.[11] Although a second statute was passed in Delaware in June, 1974, which would give DLS degree-granting power if there were a satisfactory report by an inspector chosen by the State Attorney General, this inspection had not taken place.[12]

As a result of the failure of DLS to obtain accreditation after two inspections and with graduation less than one year away, the students and their parents (led by those parents who were judges and lawyers) became gravely concerned and began to articulate that concern. The Student Bar Association (SBA) held various meetings to determine what to do. At one meeting in August, 1974, the students considered a resolution demanding that Avins and members of the Board of Trustees resign. Philadelphia Common Pleas Court Judge G. Fred DiBona (parent of a DLS student) prevailed on the students not to ***1290** take any action until after he attended the ABA meeting in Honolulu that month. He promised that he would try to ascertain the facts and circumstances with respect to the failure of DLS to obtain accreditation. Prior to this time Avins had told Judge DiBona that he (Avins) "was the stumbling block in the accreditation process."

At the ABA meeting, Judge DiBona spoke to members of the Committee and Council and ascertained that DLS would not receive accreditation with Avins in control. He was told *inter alia* that the faculty was below the required level, Avins could not attract faculty, the tenure requirement was unacceptable, Avins' personal conduct was under attack, and that the law school was a "one man operation."

After returning, Judge DiBona met with Avins and asked him to resign as dean to help achieve accreditation. The SBA also passed a resolution calling for the resignation of Avins as dean. Thereafter, on September 8, 1974, Avins tendered his resignation to the Board of Trustees and became dean emeritus.

Prior to his resignation Avins contacted Dean Arthur A. Weeks at the Cumberland Law School of Samford University in Birmingham, Alabama, to ask whether he would be interested in the deanship of DLS. Dean Weeks visited DLS on September 8, 1974. At the time Avins said that Weeks was "the best person to handle [the] situation," and "the best possible person in the United States to handle the Delaware Law School." Dean Weeks accepted the position and became Dean shortly thereafter.[13]

When Dean Weeks assumed his position, he began to make as many improvements as he could, including the setting up of a record keeping and administrative system, the updating of the library and improvement of the physical facilities, to ready the school for another inspection in January, 1975. As early as October 1974, he suggested affiliation with a college or university as a means of obtaining accreditation.[14] We do not find, as Avins suggests we should, that Weeks concealed his pro-affiliation views. In November 1974, a favorable inspection by Dean Pasco Bowman of Wake Forest Law School resulted in DLS obtaining degree-granting power from Delaware.[14a]

On January 9-11, 1975, an ABA team consisting of Dean White, Dean Willard D. Lorenson (University of West Virginia Law School) and Professor Donald A. Garbrecht (University of Maine Law School) inspected DLS. Their report stated that, although there were "drastic physical changes" and "substantial improvements" since the last inspection, DLS was still not ready for accreditation.[15]

After an inspection report, a law school has the opportunity to do an update on the school and make a personal presentation to the Committee and Council. Dean Weeks, three of the trustees (Thomas S. Lodge, Charles Maddock,[16] and Richard Plechner) and various students went to Chicago in ***1291** February, 1975, to appear before the Committee and Council. Despite their presentation, DLS was again denied accreditation.[17] In connection with the official notification of the ABA action, White wrote DLS a letter outlining the various deficiencies which concerned the Council and Committee.

On the basis of information he obtained in Chicago, Dean Weeks submitted a status report to the trustees. This report recommended affiliation with a college or university (several, including Widener and the University of Delaware, were suggested) or a drastic change in the Board of Trustees as means to achieve accreditation. Shortly thereafter, discussions about affiliation were held with Widener College and the University of Delaware. Some time prior to the spring of 1975, Widener had been looking into the possibility of starting a law school. When exploring this possibility, Widener discussed DLS as a possible competitor. At the time, however, Widener knew little about DLS, except that its reputation was not good.

Widener first learned that DLS might be interested in an affiliation in late February, 1975. On March 3, 1975, Dr. Clarence Moll, Widener's president, and other representatives of Widener met with Dean Weeks and Senator Steele to discuss affiliation. Subsequent to that meeting, the Widener board voted to pursue the possibility of affiliation with DLS.[18] In March, 1975, Dr. Moll, who was not interested in affiliation with an unaccredited law school, contacted Dean White to determine the chances of accreditation of DLS if it affiliated with Widener. White said that if DLS were to merge with an established institution, accreditation would be "almost assured."

On March 23, 1975, the Board of Trustees of DLS appointed an Accreditation Committee consisting of Maddock, Lodge, Plechner and Roberts to look into affiliation, determine whether it was necessary for accreditation, and if so, to undertake discussions with a college or university approved by the Board of Trustees.

On April 11, 1975, Widener made a formal offer to merge with DLS. Widener's original deadline for acceptance of this offer was May 1, 1975. Prior to that date, Widener representatives met with DLS representatives, and Dr. Moll told the DLS representatives that, according to White, affiliation would materially enhance the possibility of ABA approval.

At the April 12, 1975, DLS Board of Trustees meeting, affiliation with Widener or the University of Delaware was discussed. Dr. Moll presented the position of Widener. The board voted to pursue affiliation with the University of Delaware, but if that were not successful, to accept the Widener offer.[19] Affiliation with the University of Delaware was the more logical alternative in view of its location within Delaware, whereas Widener, though geographically equidistant, was located in Pennsylvania. Mr. Maddock had pursued the University of Delaware alternative (which he strongly favored) vigorously, but in due course conceded that, given the urgency of DLS accreditation needs, the alternative was not viable in view of the cautious attitude of the University of Delaware authorities and the measured pace at which they approached the matter.

In order to reach an understanding between DLS and the ABA about the ABA's position on affiliation and accreditation, a meeting was held in the office of John Bracken, Chairman of the ABA's House of Delegates, on April 17, 1975. Dean James P. White, the ABA consultant, and various representatives of DLS, students, and parents were present. A memorandum of the meeting stated that "the future best interests ***1292** of the Delaware Law School lie in its affiliation with a college or university. We all agree that such affiliation would enhance accreditation." On May 2, 1975, as a result of this meeting, Widener extended the deadline for acceptance of its offer until the completion of the next ABA inspection. It was later extended until after the May 24, 1975, Board of Trustees meeting. We find that neither the deadlines imposed on its offer nor any other conduct of Widener represented an attempt to exploit the difficulties of DLS, and that Widener acted in good faith, on the basis of its own legitimate concerns with respect to the timing of affiliation, the need for accreditation and its desire for orderly planning of its programs for the fall semester.

On May 8-10, 1975, a fourth inspection of DLS was made by Professor William P. Cunningham (University of Maryland Law School), Professor Roger Jacobs (University of Southern Illinois Law School) and Professor Ralph Norvell (University of South Carolina Law School). This inspection team recommended accreditation if DLS affiliated with either Widener or the University of Delaware.[20] The inspectors also said that although affiliation was not required, "there is little probability that an independent Delaware Law School could attract the broad support which is required to afford a reasonable expectation of its future stability and development without a dramatic and drastic restructuring of membership of its governing body." The results of this inspection were conveyed to Dean Weeks and some of the trustees, including Avins, at a debriefing session on the last day of the inspection. The final report was not sent until June 20, 1975.[21]

The DLS Board of Trustees met on May 24, 1975. The DLS Accreditation Committee reported its unanimous belief that affiliation with a college or university was for all practical purposes necessary for accreditation of DLS by the fall. The Committee also reported that the University of Delaware had advised the Committee that they were not interested in affiliation with DLS. In view of the University of Delaware's position, the DLS Accreditation Committee reluctantly but unanimously recommended that DLS accept the Widener College affiliation offer. The trustees present at the meeting were Steele, Avins, Maddock, Scharfenberger, Milione and Lodge. The trustees unanimously accepted and approved the Widener offer, with Avins abstaining because he felt he had a conflict of interest because of his position as a tenured faculty member.

On June 1, 1975, a memorandum of agreement was signed by DLS and Widener. On July 8, the DLS Board of Trustees adopted and approved that agreement. Present at this meeting were Steele, Milione, Avins, Maddock, and Lodge. The vote was unanimous, with Avins abstaining and stating that he did not interpose an objection only because of the urgency of the matter.

Throughout the spring of 1975, after the DLS presentation to the ABA at its Chicago meeting, there had been tremendous agitation and concern among the students and parents at DLS. The refusal of the ABA to accredit DLS at that meeting meant that there was a serious risk that attendance at DLS for three or four years would represent an

irretrievable and irreparable loss for the graduating students, an eluded career opportunity, and the veritable waste of some of the best years of their lives. Accordingly, the students and parents, through their respective organizations, the SBA and the Parents Association formed earlier, expressed great concern about the situation. They held numerous meetings among themselves and with all others who might have any input on accreditation possibilities, including Dean Weeks, and Dr. Moll of Widener College. The students and parents felt that there was little chance of ***1293** affiliation with the University of Delaware. They therefore lobbied strongly for affiliation with Widener. Once the Widener offer was received and they learned that the chances for accreditation after affiliation with Widener were much improved, they urged the Board of Trustees to vote for affiliation with Widener.

Although most of the expression of anxiety took the conventional forms of consultations, meetings, petitions and normal means of advocacy of their position, including the use of an attorney, a small number of students engaged in less admirable types of lobbying, including the making of nuisance phone calls to plaintiff Plechner and nonspecific threats or warnings to Avins. There was apparently also one disruption of a class when students wanted to discuss accreditation. Aside from Avins and Plechner, the only trustee bothered by any nuisance behavior was Maddock who was warned of a possible disruption at his house, which never materialized.[22]

None of the improper incidents was instituted or acquiesced in by Widener or Dean Weeks.[23] There is no evidence that any representative of Widener knew about these incidents or that Widener exerted any pressure on students, parents, faculty or trustees. Although plaintiffs claim that Dean Weeks instituted "pressure," the evidence demonstrates that from the time he first came to DLS, Weeks tried to calm and cool the students. We find that the only "pressure" towards affiliation Dean Weeks created was through his advocacy of his own opinion that the best way to obtain accreditation was through affiliation. We find that this opinion was not based on anything other than the best interests of the students and DLS. In so finding, we reject Avins' contention that Weeks acted improperly and that he attempted to inflame the students and parents or at least to increase tension by misrepresenting the chances of accreditation with (and without) affiliation, and that Weeks (in conspiracy with Dean White) undermined the DLS Board of Trustees. We also reject Avins' contention that Dean Weeks concealed from his own board the existence of a viable "independent alternative" for DLS. There was in fact no viable independent alternative.[24]

There was no evidence before us that any trustee was "coerced" into voting for affiliation by any activities of students, parents, Dean Weeks, Widener or the ABA. Trustees Williams, Maddock, and Judge Stefan, who voted for affiliation with Widener specifically denied any coercion when called to testify by plaintiffs.[25] They testified that (and we find that) they voted for affiliation with Widener because they felt a responsibility to the students and thought that affiliation would bring about accreditation in time for the first graduation. Mr. Lodge gave the same testimony at his deposition, which was received in evidence. Mr. Plechner, who testified that he was "influenced" by student activity, did not attend any of the meetings where affiliation was voted. We find that the trustees who voted for affiliation were experienced in life and in making difficult decisions, and they were not timid or susceptible to being overwhelmed by pressure. The only real "pressure" which was imposed upon the trustees was the pressure to

obtain accreditation in time to benefit the first graduating class. ***1294** We find that the trustees' decision to affiliate with Widener was a function of their intelligence, judgment and free will, and not of coercion, compulsion or duress.

After the memorandum of agreement between Widener and DLS was signed, accreditation was not immediate. When DLS appeared before the Accreditation Committee of the ABA in July 1975, the Committee would not recommend approval. The Council, however, did not follow the recommendation of the Committee and voted to approve DLS if the Widener affiliation was consummated before the ABA House of Delegates met in Montreal on August 7, 1975. On July 22, 1975, the DLS Board of Trustees met and voted to amend the charter and to issue one share of stock to Widener for $1.[26] The authorization of the one share of stock and its issuance to Widener, which was the principal affiliation mechanism, became effective at the Board meeting held on August 6, 1975, at which time the Board also voted to amend the bylaws to enlarge the Board to 20 members to afford Widener sufficient appointees to obtain control. Dean Weeks carried the final affiliation papers to Montreal on August 7, 1975. On August 12, 1975, the House of Delegates voted provisional approval for DLS. On August 23, 1975, the first class was graduated. DLS graduates have since taken and passed the bar examinations in various states, and some have already appeared in this court.

We note in conclusion that plaintiffs have demonstrated no wrong or injury to the corporation (DLS) as a result of affiliation. On the contrary, we find that in the absence of affiliation with Widener, DLS would have remained unaccredited. We also find that neither Plechner nor Avins has suffered any financial injury.

## III. *Discussion*

### A. *Duress, Compulsion, and "Ambient Coercion"*

Plaintiffs' claims of duress are founded upon Restatement of Contracts §§ 492 and 493 and some inapposite case law. Duress is defined in § 492 as:

> (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
>
> (b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

This definition (which is in essence followed in most jurisdictions)[27] requires that the party claiming duress establish[28] two essential elements: (1) a wrongful act or threat by the opposite party to the transaction or by a third party of which the opposite party is aware and takes advantage,[29] and (2) a state of mind in which the complaining party was overwhelmed by fear and precluded from using free will or judgment.

***1295** The methods of exerting duress are set forth in the Restatement of Contracts, § 493 as follows:

(a) personal violence or a threat thereof or

(b) imprisonment, or threat of imprisonment, except where the imprisonment brought about or threatened is for the enforcement of a civil claim, and is made in good faith in accordance with law, or

(c) threats of physical injury, or of wrongful imprisonment or prosecution of a husband, wife, child or other near relative, or

(d) threats of wrongfully destroying, injuring, seizing or withholding land or other things, or

(e) any other wrongful acts that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction.

Each of plaintiffs' trustee-witnesses Mr. Maddock, Mr. Williams, and Judge Stefan specifically denied that he was coerced or had his "arm twisted" into voting for affiliation with Widener. Each made a reasoned determination that affiliation was the only way to enable DLS to obtain accreditation in time to benefit the first graduating class. Mr. Williams testified that "good faith" with students required affiliation with Widener. Mr. Maddock testified that he favored affiliation with the University of Delaware and actively pursued it, but that when the University of Delaware rejected the overture, he felt the Board had made a commitment to Widener which should be honored. As Chairman of the DLS Accreditation Committee, Mr. Maddock reported that the Committee unanimously decided that the solution for accreditation was affiliation with Widener. Judge Stefan testified that if pressure from any students or parents had any effect on him, it was negative on the affiliation question. Mr. Lodge, who testified by deposition, likewise voted for affiliation because the school had been turned down three times as an independent and affiliation would go toward satisfying ABA objections to DLS' lack of long-range planning and financial responsibility.[30]

It is plain to us that the trustees who voted for affiliation acted not as the result of duress or coercion or improper conduct by the defendants or anyone with them but on the basis of their best (and reasoned) judgment that affiliation was necessary to achieve accreditation for the graduating class and was in the best interest of DLSa judgment which was eminently reasonable.[31] We reject plaintiffs' argument that any agreement entered into in the stressful summer of 1975 is voidable.

We have also found that without affiliation DLS could not have been accredited. Under these circumstances a vote for affiliation actually fulfilled an obligation of the trustees to the DLS students. Furthermore, even if affiliation were not a guarantee to accreditation, the ABA standards treat affiliation with a university as desirable. After much debate and many conversations as to the significance of this factor, a carefully drawn memorandum

of agreement expressed the position of Dean White, the ABA consultant, that "the best interests of the Delaware Law School lie in its affiliation with a college or university," and "that such affiliation would enhance accreditation." The trustees who had failed to obtain accreditation without affiliation owed it to the students to take this step so that they could truthfully say they had done everything possible to obtain accreditation. The trustees who voted for affiliation were not, in our judgment, susceptible to being overwhelmed by emotionalism. Each one of them was experienced in making difficult and significant decisions under pressure. They included an experienced ***1296** bank officer (Milione), a state senator (Steele), a Common Pleas judge (Stefan), and veteran practicing lawyers (Maddock, Williams, Lodge, Scharfenberger).

We have found that Widener did not exercise duress or compulsion and was not aware of duress or compulsion by any other party. We also find that the activities of Dean Weeks, and more particularly, the students and parents do not constitute coercion or duress. In the first place, this theory which we have dubbed the doctrine of "ambient coercion," does not state a valid cause of action. Without the acquiescence in or knowledge of Widener of such activities, plaintiffs may not achieve a rescission of the Widener agreement. Dean Weeks was the employee and agent of DLS; it is DLS, not Widener, which is chargeable with responsibility for his conduct.[32] In any event, the conduct of Dean Weeks and the students and parents does not rise to the level of duress or unlawful compulsion cognizable in law. Plaintiffs focus on several sporadic incidents of student threats and improper conduct nuisance letters to Plechner, "threats" to Avins, the disruption of a class. Aside from the fact that there is no proof that these incidents influenced anyone, they do not show a systematic pattern of extreme conduct such as would warrant concluding that unlawful conduct was a matter of serious concern. Rather, the incidents are consistent with and were more clearly viewed by all concerned as part of a charged and excited atmosphere when students were extremely worried about getting accreditation so that their years at DLS would not be a total waste. There is no evidence that Dean Weeks had anything to do with these miscellaneous incidents. There is no evidence of an unlawful threat or act on Dean Weeks' part. Dean Weeks favored affiliation with a college or university from the time he came to DLS and urged this solution to the accreditation problem throughout the next year. There is no evidence that Dean Weeks held this view for any reason other than his good faith belief, based on his experience as a law school dean, that it would result in accreditation.[33]

Beyond these miscellaneous activities, the "pressure" complained of by plaintiffs comes down to the lobbying by students and parents for affiliation (through letters, personal pleas, and legal representations) and the threat of a lawsuit for breach of fiduciary duty if the trustees did not endorse affiliation. None of these activities constituted unlawful conduct.[34] On the contrary, they were the proper method of expression of a legitimate concern of those most drastically affected by the need for accreditation. In view of the "track record" of DLS in regard to accreditation, and the impending graduation, no one can seriously doubt that the students and parents had a legitimate and reasonable grievance against the trustees and Avins in particular. The students had waited since 1971 for accreditation. They saw DLS turned down three times by different inspectors. They were aware that affiliation was given positive consideration by the ABA (ABA Standard § 210) and more importantly that Dean White had formerly argued that it was in the "best interests" of DLS and would "enhance accreditation." Furthermore, there

were no disadvantages to the students as a result of affiliation. There was thus, as Mr. Lodge put it, nothing to lose and everything to gain from affiliation. Affiliation was not even a new idea to DLS students, since the first catalogue suggested the possibility of affiliation to entering students. Indeed, the only disadvantage of affiliation suggested in the entire record is that Avins and his supporters would lose control of DLS.

***1297 B. *Undue Influence***

Plaintiffs' claims of undue influence are founded upon Restatement of Contracts §§ 496 and 497 and, again, some inapposite case law. The Restatement of Contracts, § 497 defines undue influence as follows:

> Where one party is under the domination of another, or by virtue of the relationship between them is justified in assuming that the other will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.

Clearly Widener does not hold the requisite relationship to the DLS Trustees for the concept of undue influence to apply. Plaintiffs originally alleged undue influence by the ABA but withdrew such claims. That leaves only Dean Weeks, students and parents as the possible targets of this charge. Obviously, the trustees were not under the "domination" of students and parents, and the students and parents owed no obligation to the DLS trustees. It was the DLS trustees who had an obligation to the students and parents.

The relationship between Dean Weeks and the DLS trustees one of employer-employeehas not been treated as the type of relationship which invokes the concept of undue influence. The comments to the Restatement state: "The relationships that ordinarily fall within the rule are those of parent and child, guardian and ward, husband and wife, physician and patient, attorney and client, clergyman and parishioner." Section 497, comment a. Although other relationships may be included, undue influence is generally considered in a situation of virtual dependence or absolute trust, *e. g., Appeal of Robie,* 141 Me. 369, 44 A.2d 889 (1945); *Webber v. Phipps,* 95 N.H. 1, 56 A.2d 538 (1948). Since the Board of Trustees had the power to fire Dean Weeks, he certainly could not exercise power over the trustees. Dean Weeks was the agent of the DLS trustees, and his conduct may not be attributed to Widener. However, even assuming *arguendo* that Dean Weeks owed a fiduciary duty to the board as plaintiffs argue, he did not mislead the board or act unfairly so as to breach that duty. His conduct was completely consistent with his obligations to DLS and its students. Plaintiffs' claim of undue influence must therefore fall.

**C. *Delaware Corporation Law***

**1. *Introduction***

To support their assertion that the mechanism by which DLS affiliated with Widener violated the Delaware Corporation Law, plaintiffs cite cases involving business corporations. DLS, however, is a nonprofit corporation, which has no shareholders with

a direct pecuniary interest in it. Plaintiffs do not challenge this characterization nor could they very well do so, since a law school that is proprietary in any sense cannot be accredited.[35] Furthermore, the school was initially financed by $175,000 in prepaid tuition collected from students who were led to believe that DLS would be accredited by the time they graduated and who therefore had reason to expect that appropriate efforts were being made to achieve that goal.

The certificate of incorporation of Delaware Law School spelled out that:

> EIGHTH: This corporation is not organized for pecuniary profit of its trustees or officers, nor may it issue stock or declare or distribute dividends, and no part of its net income shall inure to the benefit of any of the aforementioned persons, and any balance of money or assets remaining after full payment of corporate obligations of all kinds shall be devoted to the educational purposes of the corporation; provided, that the corporation may pay actual expenses and salaries of officers for services actually rendered to the corporation.
>
> . . . . .
>
> TWELFTH: This corporation shall have the power to merge, affiliate, or contract with another non-profit educational institution ***1298** under the terms and conditions to be set by the Board of Trustees.

These were representations on which the public and notably the students and their parents had a right to rely.

Tuition was being paid to a school in which the trustees (or "members") would have no pecuniary stake and which the trustees would have the power to merge or otherwise affiliate with an existing institution of higher learning, if their disinterested discretion and recognition of their fiduciary obligations made them think that this was the wisest course. What the trustees ultimately did is exactly what the charter authorized them to do turn over control of the affairs of DLS to an existing institution of higher learning for the benefit of the students.

**2. *The Issue of Consideration***

In support of its allegations that the transfer of all the stock of DLS to Widener for the sum of $1 violates the Delaware Corporation Law because of the inadequacy of consideration, plaintiffs' complaint invokes and alleges violations of §§ 152 and 153 of the Delaware Corporation Law.[36] Section 152 deals with the use and valuation of consideration other than cash. Section 153 specifies the price to be paid, and in the case of par value stock provides that:

> (a) Shares of stock with par value may be issued for such consideration, *having a value not less than the par value thereof,* as is determined from time to time by the board of directors, or by the stockholders if the certificate of incorporation so provides. [Emphasis supplied]

We believe that the DLS-Widener transaction complied with the terms of this statute. The only requirement as to payment for the issuance of shares with a par value is that the amount of the par value be paid. The par value of the share received by Widener was $1, and Widener paid $1.

Needless to say, strict compliance with the statute will not in all cases terminate the inquiry. Obviously, if the price represents self-dealing on the part of those in control of a corporation or other oppression of minority shareholders, then protection of the latter will be warranted. *Bennett v. Breuil Petroleum Corp.,* 34 Del.Ch. 6, 99 A.2d 236 (1953). But there is no basis for the application of such principles here. None of the minority trustees has any cognizable financial stake in the corporation. And we have found good faith on the part of the majority who authorized the issuance of the share of stock.

There is no determinable "value" of the share which was issued to Widener. Widener, itself a nonprofit corporation, remains subject to the same provisions of the original DLS corporate certificate prohibiting it from realizing any financial benefit from DLS, *i. e.* it is impressed with the same trust. Widener cannot profit from its control of DLS or use the latter's assets except for the benefit of the school and its students, or to reimburse legitimate expenses. By affiliation Widener has assumed major responsibilities for the conduct of the law school and staked its own reputation on the future of "The Delaware Law School of Widener College, Inc." Moreover, we have found that the transaction was for the betterment of DLS. There is no relationship between the value of the assets of DLS and the "value" of a share of stock which gives Widener only the power (and duty) to administer those assets for the public benefit.[36a] Widener as "stockholder" thus has nothing more than the "old" trustees had as "members," and it cannot be contended that they should have paid for their memberships. Plaintiffs' contentions about the matter of consideration for transfer of the stock must therefore be rejected.

**3. *The Power to Issue Stock and Defense of Ultra Vires***

Plaintiffs contend that as a Delaware nonprofit corporation, DLS could not issue ***1299** stock and that the issuance of such stock was *ultra vires.* The General Corporation Law of Delaware embraces both profit and nonprofit corporations. E. Foulk, *The Delaware General Corporation Law* 6 (1972). When a power or limitation is phrased generally, it is equally applicable to profit and nonprofit corporations. When a distinction is intended, the separate treatment of the nonprofit corporation is spelled out. See, *e. g.,* §§ 102(a)(2), 255, 256, 257, 276.

The power to issue stock is given generally to "[e]very corporation." Section 151(a). The point is emphasized by § 102(a)(4) which begins with general rules about the information to be included in the certificate of incorporation with respect to the corporation's authorized stock. At the end, however, an exception is included for those nonprofit corporations which are not to have authority to issue stock:

> The foregoing provisions of this paragraph shall not apply to corporations which are not organized for profit *and* which are not to have authority to issue capital stock. *In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation.* The conditions of membership of such corporations shall likewise be stated in the certificate of incorporation or the

certificate may provide that the conditions of membership shall be stated in the by-laws; [Emphasis added.]

We do not believe that the Delaware legislature used such language to prohibit the issuance of stock by a nonprofit corporation. Plainly such a corporation was being given the option to be a stock or non-stock corporation, and was being required only to state which it was in the certificate. If it was to have the authority to issue stock, it was bound to set forth the same information as a corporation for profit; otherwise, it was bound to state expressly that it would not have the authority to issue stock.

Moreover, § 257 (relating to the merger of domestic stock and non-stock corporations) specifically refers to the existence of nonprofit stock corporations:

Any 1 or more non-stock corporations of this State, whether or not organized for profit, may merge or consolidate with one or more *stock* corporations of this State, *whether or not organized for profit* . . [Emphasis added.]

Since Delaware recognizes nonprofit stock corporations, there is no reason that DLS could not become one. As previously noted, the stock or non-stock status is a function of the certificate of incorporation. Delaware grants the broadest possible power to amend the certificate in any respect, including the authority to issue shares not previously provided for. §§ 151(g), 242. Moreover, the DLS certificate provided:

This corporation reserves the right to restate or amend, alter, change or repeal any provision contained in its certificate of incorporation in the manner now or hereafter prescribed by law.

This reservation clearly included the right to change the provisions of the certificate with respect to non-stock status.[37]

It should also be noted that even if the issuance of stock was beyond the power of Delaware Law School, this would not justify rescinding the fundamental transaction between Delaware Law School and Widener. Delaware strictly limits the relief available in the event of an *ultra vires* transaction, and this relief does not include upsetting a consummated contract at the suit of the corporation or its shareholders. § 124.

**4. *The Wishes of the Founder***

Avins has asserted some vague claims based upon his alleged rights as a "founder." However, the Delaware Corporation Law and the DLS certificate of incorporation clearly vest all the powers of the corporation in the trustees (members). The fact that Avins was the incorporator ***1300** means nothing, since the power of an incorporator terminates when the directors (here trustees) are elected. Delaware General Corporation Law, § 107. Indeed, Article 7 of the certificate of incorporation provides:

Upon the filing of this certificate with the Secretary of State, the incorporator's powers shall terminate and the powers of the corporation shall immediately vest in a Board of Trustees as the governing body of this corporation.

Neither can Avins be considered the equivalent of the settlor of a charitable trust; DLS was a corporation whose affairs by statute and its certificate of incorporation were entrusted to the trustees. Moreover, even if DLS had been a trust, Avins would not be the "settlor." The financial contribution which got the trust going came from the students, not Avins.

The notion of the rights of a founder seems to us to be antithetical to the spirit of free inquiry and the search for knowledge which should permeate institutions of higher learning. Any ideological orientation of the school would have been an obstacle to ABA accreditation in view of ABA standards 205, 405(d), and 504. Avins' reliance on the famous case of *Trustees of Andover Theological Seminary v. Visitors of Theological Inst.,* 253 Mass. 256, 148 N.E. 900 (1925) is misplaced for there the Court relied on express limitations in original documents. The beneficiaries of DLS are (and should be) the students, and the community,[38] not the founder (Dean Emeritus Avins).

**5. *The Matter of Plaintiffs' Derivative Claims***

Plaintiffs have essentially brought this as a derivative action.[39] However, the purpose of a derivative action is to vindicate a wrong or injury to the corporation, not to a particular shareholder or member. *Druckerman v. Harbord,* 174 Misc. 1077, 22 N.Y.S.2d 595, 597 (Sup.Ct.1940); 13 *W. Fletcher, Cyclopedia, Corporations,* §§ 5939, 5908 (Perm.ed.1970). Defendants have challenged plaintiffs' standing to bring the action derivatively, asserting that Plechner was a "stand-in" for Avins and that Avins is not a proper representative in a derivative action in that because of his conflict of interest he does not "fairly and adequately represent the interests of the shareholders or members similarly situated." Defendants note that plaintiffs are ultimately seeking to reverse the fundamental policy decision made by the majority of the Board of Trustees, and that this decision to affiliate with Widener is not and cannot be challenged as beyond the power of the Board of Trustees.

Defendants further contend that in the typical derivative action the ultimate relief sought by a minority representative is unarguably advantageous to the entity for which the representative has undertaken to act *e. g.* a simple repayment of money to a corporation, and that in the present case, there is no unambiguously "favorable" relief that could be accorded to DLS, and there has been not even a challenge to the good faith of the majority trustees who made the policy decision which the would-be "representatives" now seek to disaffirm. A minority shareholder (or member), defendants continue, is not entitled to maintain a derivative action to attack a transaction which remains within the discretion of management. 13 *W. Fletcher, Cyclopedia, Corporations,* § 5951, at 348-49 (Perm.ed. 1970); 2 *Hornstein, Corporation Law & Practice,* § 717 (1958).

In view of the allegations of plaintiffs' complaint, we believe that this case was appropriately *brought* as a derivative ***1301** action. Indeed, there was no other way that Plechner and Avins could bring it. However, there has been an utter failure of proof of plaintiffs' derivative claims for they have not proved any injury to DLS resulting from affiliation. It was only as a result of affiliation that DLS acquired its most valuable asset, accreditation. Plaintiffs' individual influence is all that was diluted. There is no allegation that Widener is mismanaging DLS. Plaintiffs have offered evidence of some transfer of

funds from DLS to Widener, but any assertion that this represents some kind of "looting" would be frivolous. As Dr. Moll testified, the corporate fees were paid to Widener for services actually rendered.

**IV. *Conclusion***

If we have written too much in this opinion, if we have "carried the coals to New-castle," it is only because the subject matter of the case the condition and direction of a school of law, now coming of age (whose graduates are now beginning to appear before this Court and whose present students hope some day to do likewise) seems to us to demand it. Dean Emeritus Avins and his co-plaintiff and trustee Plechner have asked us to set aside the Widener affiliation (hence, return the school to Avins' control), but for the reasons at such length articulated, the relief requested must be denied and judgment entered for the defendants.

Dean Avins is still teaching at DLS with the rank of professor. While the record does not amplify the question, from what evidence we have, it appears that Avins is a good law professor. That, having founded DLS, Avins wanted also to "own" it, and control it, or at least that he "couldn't let go" is obvious from this opinion and, institutions of higher learning being what they are, this he could not do. But though the preceding paragraph ought to have been the end of this opinion, it is not, for it would not be fitting to conclude it without adding some further observations about the efforts of Dean Emeritus Avins, upon whom the events recounted herein have cast some measure of disparagement.

First, and foremost, were it not for Alfred Avins, who came to Delaware as a sojourner in aid of a political campaign, many hundreds of young men and women (and many thousands in the years to come) would not have had the opportunity that they now will have, because of him, to practice law. It was not the pillars of the Delaware bar, or the trustees of the University of Delaware or even of Widener College who saw the need (or at least the demand) for a law school in Delaware and its environs,[40] and took the steps to found one; it was Avins. Second, unlike those who might have started a law school with the aid of considerable financial resources, or an existing educational establishment, Avins started one from nothing, out of nowhere as it were. By application of enormous resourcefulness, remarkable energy and perseverance and considerable intelligence, by acting as the proverbial "chief cook and bottle washer" and partaking of virtually augean labors, Avins single handedly built a physical plant and a library, recruited a faculty and attracted a student body, all of which added up to a viable law school. While it was not an ABA accreditable law school, and it took the efforts of Dean Weeks and Dr. Moll and many others to make it one, it was still a remarkable achievement. We do not know whether these or similar observations have been otherwise expressed in an appropriate forum; in any event, although they do not affect the result of this case, it is appropriate that they be memorialized here.

In consideration of the foregoing opinion, we enter the following order.

**ORDER**

AND NOW, this 29th day of July, 1976, in consideration of the foregoing opinion, it is ORDERED that judgment be and it hereby is entered in favor of the defendants.

**NOTES**

[1] Widener is located in Pennsylvania, but it intends that DLS remain in Delaware. After affiliation DLS became known as The Delaware Law School of Widener College, Inc.

[2] Since DLS had no other outstanding shares, transfer of this single share gave Widener complete control of the school.

[3] The original complaint, in which the only named plaintiff was Richard F. Plechner, a member of the New Jersey bar and one of DLS' original trustees, also alleged that the consultants to the ABA's accreditation committee were political liberals who fraudulently manipulated the inspection and accreditation process so as to delay ABA accreditation of DLS in order to eliminate the influence of the politically conservative Avins. The ABA was not named as a defendant. The action was styled as a derivative action (on behalf of DLS), and jurisdiction was founded upon diversity of citizenship. Plechner's first amended complaint repeated these allegations and augmented them to allege that the issuance of stock by DLS was "pursuant to the undue influence and direction of ABA officials," though ABA was still not named as a defendant. In his second amended complaint Plechner deleted the claims of ABA ideological bias, but added the ABA as a defendant. We then dismissed the ABA as a party defendant (on its motion) because of lack of diversity jurisdiction. We permitted Avins to intervene as a party plaintiff, pro se; he filed a complaint essentially tracking Plechner's (we note that it appeared at trial that Avins selected and paid Plechner's counsel). We have permitted Avins to act as co-counsel throughout. We vacated the previously stipulated intervention of the DLS Student Bar Association, and refused to permit intervention of several other students. We also heard and denied motions of the plaintiffs to strike various defenses and motions of both sides for summary judgment.

On the eve of trial we were presented by plaintiffs with a document called a memorandum of law which was said to be a response to our memorandum and order dated April 22, 1975, in which we concluded that plaintiffs had no right to a jury trial. *See* note 4, *infra.* Plaintiffs' memorandum suggested that we lacked jurisdiction over the subject matter which they themselves had put before us on these grounds: (1) lack of $10,000 jurisdictional amount; (2) lack of authority to affect the title to stock not situate in Pennsylvania; and (3) lack of (visitorial) power over the internal officers of a foreign corporation. Contemporaneous with the memorandum, the plaintiffs filed with the clerk under a new civil action number a new complaint, which was assigned to our docket as related to the original civil action. The only theory added by the new complaint is an allegation of (allegedly improper) transfer of funds from DLS to Widener; the apparent purposes of the new complaint are to supply an amount in controversy, and to state a damage claim, and thus to support a demand for a jury trial. The three points raised in plaintiffs' memorandum of law are without merit. As to jurisdictional amount, we note that plaintiffs have contended and also introduced evidence that funds in excess of $10,000 have been paid by DLS to Widener for administrative services. Restoration of the status quo might have required the return of these funds to DLS. The interest of DLS in these funds alone would satisfy the jurisdictional amount requirement. *See*

*Comprehensive Group Health Services Bd. v. Temple University,* 363 F. Supp. 1069, 1094 (E.D.Pa.1973) (stake of plaintiff Board in budget appropriation for their organization satisfies jurisdictional amount requirement). As to plaintiffs' second point, it is perfectly clear that this Court has in personam jurisdiction over defendant Widener and thus has power to order it to undo the challenged transaction. See 14 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3631 at 4, 19 (1976). Plaintiffs' third point may be a valid statement of the law, but it is not applicable here, since we are asked not to regulate the internal affairs of the corporation, but to undo a transaction of the corporation involving an unrelated third party. In fact, one of plaintiffs' contentions is that this transaction resulted from the undue influence of still another third party, the American Bar Association. We are thus not required to defer to the courts of Delaware in this case.

[4] In a memorandum opinion filed April 22, 1976, we struck the plaintiffs' jury demands, finding that the issues before us were equitable in nature and not the proper subject of a jury trial.

[5] We do, however, accept Avins representation that the actual course teaching at DLS has not been ideologically oriented.

[6] The school's first students were obtained from lists of students rejected by other area law schools. DLS' initial capital came from a loan from Avins, who, during the early stages, also loaned DLS all of his salary, except $5,000.

[7] The vast majority of the tenured faculty of major law schools do not have such degrees.

[8] Mr. Crutchfield resigned on June 5, 1974.

[9] Among other things, the report noted that Avins was referred to as "Mr. Secretary, Dean and Mr. Everything;" the library was not current, the Delaware bar was hostile; the budgeting process was informal; the faculty had very limited teaching experience, was underpaid and was not full-time; the physical facilities ranged "from poor to inadequate;" minutes of only one faculty meeting existed; and there was no qualified librarian.

[10] The report criticized the physical facilities, the library (staff and collection), the faculty and the accounting procedures. In addition, the report severely criticized the one-man nature of the school and the lack of delegation of responsibility, as well as the poor relations with the Delaware bar. It also commented adversely on the requirement of a J.S.D. for tenure as "unrealistic," "result[ing] in little or no tenure for almost all members of the faculty."

[11] Indeed, Avins even formed a Wyoming corporation in an attempt to obtain degree-granting power.

[12] Three recommendations for inspectors were to be made: one by DLS, one by students, and one by parents. The Attorney General would then select one of the three as an inspector. Dean Pasco Bowman of Wake Forest Law School, who was ultimately selected, approved the school in November, 1974.

[13] On September 8, 1974, two new trustees were also added to the Board: Judge Louis Stefan, a Montgomery County, Pa. Common Pleas Judge and U.S. Senator Jesse Helms of North Carolina. Senator Helms never attended a Board of Trustees meeting and resigned in March, 1975.

[14] The ABA standards state: "Affiliation between a law school and a University is desirable, but is not required for approval. If the law school is affiliated with or part of a University, that relationship shall serve to enhance the program of the law school. If the law school is an independent institution, it shall endeavor to secure the advantages that would normally result from being part of a University." Section 210.

[14a] *See* note 11, *supra.*

[15] In this Report the inspectors again pointed to poor relations with the Delaware bar. They pointed to specific standards, (201, 203, 209, 301, 306, 402, 501 and 701) which they felt were not complied with. Some of the main criticisms included lack of resources and long-range planning and stability.

[16] Messrs. Lodge and Maddock became trustees in December, 1975. Mr. Lodge is a senior partner in one of Wilmington's largest law firms. Mr. Maddock is general counsel to Hercules, Inc.

[17] Avins was critical of Weeks' presentation to the Committee; however, as we read plaintiffs' Reply Memorandum, Weeks' greatest sin was in even considering that the Third Inspection Report might be accurate. We reject these criticisms of Dean Weeks.

[18] We find, contrary to Avins' suggestion, that there was no contact between Widener and DLS prior to late February, 1975.

[19] All the trustees except Dr. Roberts were present at the April 12, 1975, meeting.

[20] During the course of the May inspection, negotiations with the University of Delaware broke down, and it was clear that there would be no affiliation with that institution.

[21] A preliminary report, not in evidence, was apparently received some time after May 24, 1975.

[22] Plaintiffs introduced evidence that Avins' tires were slashed or the air let out, but this behavior was not ascribed to either Weeks or Widener and was not even linked to students.

[23] Prior to May 24, 1975, no representative of Widener addressed the students at DLS. Moreover, all contact between Dr. Moll and DLS students was at the request of the DLS students.

[24] The relevant portion of the ABA's Fourth Inspection Report stated:

[T]here is little probability that an independent Delaware Law School could attract the broad support which is required to afford a reasonable expectation of its future stability and development without a dramatic and drastic restructuring of membership of its governing body.

[25] Mr. Maddock voted for affiliation with Widener at the May 24, 1975, meeting of the Board. Judge Stefan voted for it at the April 12, 1975, meeting, since he was not present on May 24.

[26] Prior to the July 22, 1975 meeting, Mr. Lodge, a Delaware lawyer, satisfied the other trustees that the issuance and transfer of stock was valid under Delaware law.

[27] *Warner-Lambert Pharmaceutical Co. v. Sylk,* 471 F.2d 1137, 1143 (3d Cir. 1972); *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.,* 372 F.2d 753, 757 (2d Cir. 1967); *Gummed Tapes (PTY) Ltd. v. Miller,* 155 F. Supp. 267, 271 (E.D. Pa.1957); *Pleuss v. City of Seattle,* 8 Wash. App. 133, 504 P.2d 1191, 1193, 1194 (1972); *People ex rel. Marcoline v. Ragen,* 132 Ill. App.2d 523, 270 N.E.2d 643, 645 (1971); *Austin Instrument, Inc. v. Loral Corp.,* 35 A.D.2d 387, 316 N.Y.S.2d 528, 533 (1970), modified, 29 N.Y.2d 124, 324 N.Y.S.2d 22, 272 N.E.2d 533 (1971); *Capps v. Georgia Pacific Corp.,* 253 Or. 284, 453 P.2d 935, 939 (1969); *Dunbar v. Dunbar,* 102 Ariz. 352, 429 P.2d 949, 952, 953 (1967); *Mayor & Council v. Brookeville Turnpike Construction Co.,* 246 Md. 117, 228 A.2d 263, 287 (1967).

[28] *Western Natural Gas Co. v. Cities Service Gas Co.,* 57 Del. 436, 201 A.2d 164, 169, *cert. denied,* 379 U.S. 905, 85 S. Ct. 189, 13 L. Ed. 2d 177 (1964).

[29] Restatement of Contracts, § 486; *W. R. Grimshaw Co. v. Nevil C. Withrow Co.,* 248 F.2d 896 (8th Cir. 1957), *cert. denied,* 356 U.S. 912, 78 S. Ct. 669, 2 L. Ed. 2d 585 (1958).

[30] As Mr. Lodge stated, "[W]e certainly had nothing to lose by pursuing the matter of affiliation hoping it would help the school to get accredited, but everyone was concerned that one more turndown may be the last go-round for the Delaware Law School."

[31] Since neither Avins nor Plechner voted for affiliation, there is therefore no real issue of coercive impact on their behavior.

[32] *See* N.T. 169; *Litten v. Jonathan Logan, Inc.,* 220 Pa.Super. 274, 286 A.2d 913, 917 (1971).

[33] We reject Avins' charge sounding in fraud or misrepresentation that Dean Weeks withheld from the Board a preliminary draft of the Norvell inspection team which was "favorable."

[34] *See* cases at page 1300, *infra,* holding that good faith threats of lawsuits do not constitute unlawful activity.

[35] ABA Standard 203.

[36] All references to sections of the Corporation Law are also references to the same sections of 8 Del. C.

[36a] See also the discussion of "The Wishes of a Founder" at § III.C. 4, pages 1299-1300, *infra.*

[37] We see no distinction between a "nonprofit corporation" and a "charitable corporation" for this purpose.

[38] The community's interest is at least twofold: the improvement of the legal profession and the advancement of learning.

[39] They have no cognizable individual claims. The only injury alleged by plaintiffs individually is a diminution of their voting power. Plaintiffs, however, must take their rights from the Certificate of Incorporation. Since the Certificate permits amendments and modification, they have no vested rights in the original Certificate of Incorporation. When the Certificate was amended to issue stock to Widener, that amendment and the attendant rights of the new shareholder to name additional trustees were binding on plaintiffs.

[40] Actually, the largest geographical source of DLS students is Pennsylvania, followed by New Jersey and Delaware in that order.

**PREFACE (To Maryland Practice)**

The past COVID year saw some significant rulemaking. A helpful schedule was published outlining fees in civil cases, without altering fees (1.12). Authority was given for different forms of oath for persons of diminished capacity (8.18). New Titles 13 and 14 regulate receiverships, assignments and foreclosures (10.20, 81.24). A new rule imposes required findings for preliminary injunctions (23.4, 58.1). There were rules relating to 'virtual' jury trials (60.14) and important changes relating to discovery in aid of execution (68.23, 76.3, 76.24). There were drastic changes in Court of Special Appeals rules relating to informal briefing, extensions of time, and requests for, waivers of and scheduling of oral arguments (93.1, 93.11, 93.17, 94.15 and 94.20)

New forms were provided for basic actions, including affidavits of service (1.31), assignments of claims (10.22), advice of rights in guardianships (11.36), motions to dismiss (26.19), answers (32.6), child support and custody complaints (53.24, 53.25), continuances (55.16), automatic stays (55.17), motions for remote proceedings (55.18), proceedings in aid of execution (76.8, 76.24), petitions for contempt (84.9), and notices of and petitions for appeal (87.1, 87.3, 87.6).

Major cases included adoption of the Daubert for the Frye-Reed standard for expert testimony (59.6), on failure to obtain a marriage license (10.15), on forfeiture of corporate charters (10.16), on de facto parents (16.22), on fiduciary liability (16.32, 56.10) on discovery of mental health records (49.3), on character evidence (59.6), on challenges to criminal statutes (71.2) and on continuing liens (82.1)

Major statutory developments included the repeal and replacement of the Law Enforcement Officers Bill of Rights and increase in liability ceilings (30.7) and disclosure requirements relating to corporate parties to litigation (18.5). A proposed constitutional amendment to be voted on in 2022 would raise the jurisdictional amount for civil jury trials from $15,000 to $25,000.

The text incorporates statutes of the 2021 session and cases and rules changes reported as of June 12, 2021.