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"A Task of No Common Magnitude": The Founding of the American Law Institute

William P. LaPiana*

In February 1923 Justice Oliver Wendell Holmes wrote to Harold Laski:

Some of the virtuous under the call of Elihu Root and William Draper Lewis meet here [in Washington] next week to talk of restatement of the law (I believe).... I will try to [look in on them] but I will take no hand and won't believe till they produce the goods. You can't evoke genius by announcing a corpus juris.¹

Fortunately for the American Law Institute few leading lawyers shared Justice Holmes' skepticism. Over three hundred lawyers, judges, and law teachers did meet in Washington on February 23, 1923, and enthusiastically created the Institute which did indeed concern itself primarily with the collection, arrangement, and restatement of the most important principles of American case law. That meeting and the resulting institution were the outgrowth of forces which had been working for legal reform throughout the preceding two decades. This essay will trace those forces and try to show how their interplay culminated in the meeting of February 23, 1923.

I

According to Max Rheinstein, three basic problems have dominated the thinking of American jurists: adaptation of the common law to the circumstances of the New World; endowing with specific content the broad prescriptions of the federal Constitution and the adaptation of those prescriptions to changing social conditions; and the preservation of the unity of the common law in the face of the multiplicity of

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To these William Twining has added two more: “modernization of the law in the wake of the industrial and technological revolution that swept the United States in the period after 1870,” and “simplification of the sources of law, as the legal profession and the courts became more and more swamped by the prodigious output of legislation, regulations and reported cases.”

A concern with these problems, however, does not necessarily lead to an active interest in legal reform. In its everyday workings the Anglo-American legal system undergoes constant change. Each decision of the appellate court is a potential modification of the law, however slight. Over time these gradual changes can lead to important changes in legal rules. Especially in the eyes of those for whom conservatism is a virtue, one of the glories of the common law system is its ability to accommodate change without the need for sudden and wholesale innovation.

The concept of legal reform, on the other hand, evokes a much more rapid process, an imposition of a scheme thought out in advance on the organic development of the common law. Not surprisingly, in the Anglo-American system reform often involves legislation which is the antithesis of court-made law. The great medieval statutes—Quia emptores, the Statute of Uses, the Assize of Novel Disseisin—were all rather radical modifications of the customary law. In the ante-bellum United States legislative reform of common-law pleading and the adoption of collections of revised statutes in many of the states represent the same sort of legal reform pressed into service to accomplish the American ends described by Rheinstein and Twining.

As Twining points out, however, the conditions of material life in the United States changed rapidly and drastically after 1870 and brought new challenges to the law as well, of course, as to other areas

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of society. Not surprisingly, these changes helped to bring out new structures which were transformed by technological and industrial change. They also, however, transformed the way in which actors on the American legal scene thought about legal reform.

The influence of industrial and technological change was indirect. First, certain aspects of law appeared to be out of step with the reality of the new world of industry in which more and more Americans labored. Second, changes in social structure accompanying changes in material life challenged the self-image of the legal profession in ways which helped to shape the sort of legal reform the profession sponsored in an attempt to respond to the perceived dichotomy between social reality and law.

The changes in American life brought about by the innovations Twining mentioned did not, of course, go unnoticed by those who lived through them. The facts of daily life had indeed changed and many self-conscious attempts were made to bring American society and government into line with the changed material conditions of life. While the history of these attempts at change cannot be neatly summarized in a phrase, it is convenient to refer to the Progressive era and the Progressive movement, and to describe this as the "age of reform." And it is equally convenient to accept as a starting point the assertion that the legal system and the legal profession were to a great degree out of step with the progressive elements of society because they appeared to be obstacles to the most broadly accepted goal of Progressivism, social justice.

Part of the quest for social justice in the Progressive era involved improving the lot of laboring men and women. Much of this melioristic desire found expression in state statutes limiting the hours of work, improving working conditions, requiring payment of wages in currency rather than in script, and in the creation of workmen's compensation schemes. Such laws did involve redistributing some of the wealth of society, although they stopped far short of creating a socialistic system. They nonetheless met severe opposition and had no more dedicated opponents than some of the judges of the appellate courts who invalidated many of these laws in the name of freedom of contract.

The growth of the doctrine of freedom of contract and its incorporation through the fourteenth amendment into the corpus of liberties which is the possession of every American is itself a history of legal

7. Twining, supra note 3.
change. The story culminates in the United States Supreme Court’s decision in *Lochner v. New York.* The case involved a New York statute which ordered that “No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day . . . .” Writing for a bare five member majority, Justice Peckham held that

> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being me, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantive degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

Against this rather mechanical use of doctrine Oliver Wendell Holmes hurled one of his most memorable aphorisms: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” In Holmes’s view the case was “decided upon an economic theory which a large part of the country does not entertain.”

The *Lochner* case was only one of many clashes between court and legislature. Throughout the period statutes designed to further generally Progressive reform — measures ranging from the income tax to the Sherman Anti-Trust Act to various sorts of labor legislation — were resolutely opposed by at least some members of the bar and by the judges of the appellate courts. Whatever the reason for this diver-

8. 198 U.S. 45 (1905).
9. *Id.* at 46 n.1.
10. *Id.* at 64.
11. *Id.* at 75; for a discussion of Holmes’s brief dissent, see M. White, *Social Thought in America: The Revolt Against Formalism* 103-06 (rev. ed. 1957).
gence between the two institutional sources of law in the American version of the common-law system, its existence posed special problems for the bar, which is the self-appointed guardian of American legal culture and of the principle of justice.

The American bar seems to have taken to heart Alexis de Tocqueville's encomiums.14 In the late nineteenth and early twentieth centuries it was an opinion shared by few others. For many dedicated to reform in the name of social justice the repeated failure of specific reforms in the courts was to be blamed on the corporation lawyer, the demon pressing the claims of wealth on the courts to the detriment of the worker. Even those friendly to the profession saw cause for concern in the apparent increasing subjugation of the practitioner to the corporate wealth which was his client. This was viewed as being detrimental to the profession's traditional independence born of mastery of the intricacies of the science of the law. "To an imagination of any scope," said Holmes in an 1897 speech which must have made some lawyers uncomfortable, "the most far-reaching form of power is not money, it is the command of ideas."15

If these developments within the profession of the law were not disquieting enough, changes in society as a whole exacerbated the problem. The Progressive era was a time in which the concept and role of the professional acquired new importance.16 As social structure changed and America became more and more a national society, mastery over a politically neutral body of scientific knowledge became an important way to make one's place in society respectable and secure.17 As practitioners of one of the oldest professions lawyers should have fitted easily into the scheme, but the political atmosphere made their

of many of the important Supreme Court cases of the period see J. Semonche, Chartering the Future: The Supreme Court Responds to a Changing Society 1890-1920 (1978).

14. "The special information that lawyers derive from their studies ensures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect." I A. de Tocqueville, Democracy in America 283-90 (Bradley ed. 1945).


claims to scientific neutrality appear hypocritical. To complicate matters more, the new profession of law teaching had arisen, claiming a more perfect grasp of the science of the law.\textsuperscript{18} As \textquotedblleft keepers of the professional conscience\textquotedblright{} they only drew more attention to the practitioners\textquotesingle dilemma.\textsuperscript{19}

Out of this tangle of conflict and confusion came proposals for reform, for change swifter and more directed than the slow development of judge-made law. This essay will trace the proposals presented by the legal profession itself (both practitioners and teachers), principally as expressed through the American Bar Association and the Association of American Law Schools.\textsuperscript{20} Each of the four major plans for change — codification and classification, procedural modernization, reorganization of the courts, and a new jurisprudence — drew on the history of thought about American law. The patterns of advocacy and of opposition show how the strands of historical experience were rewoven into a new pattern in the face of the rapid changes of the late nineteenth and early twentieth centuries. The story of this give and take, culminating in the founding of the American Law Institute, illustrates the strongest influence on the process of reconsideration — the desire to solidify the place of the legal expert in a changing society.

II

Of the four basic approaches to legal reform evident in the Progressive era, the most venerable sought salvation in the codification of the common law. The goal of codification is to reduce the mass of law contained in the decisions to a relatively few simple, clear propositions which could be assembled into a code and enacted into law. The legislature rather than the courts establishes the ground rules.

The battle over codification is one of the most familiar episodes in American legal history and also one of the least thoroughly understood. Its roots go back into the late eighteenth century and are firmly anchored in the bedrock of hostility to lawyers. Hostility to the profession was linked to hostility to all things English, including, of course,

\textsuperscript{18} Auerbach, \textit{Enmity and Amity: Law Teachers and Practitioners, 1900-1922, 5 Perspectives in American History} 555 (1971).
\textsuperscript{19} Hofstadter, \textit{supra} note 15.
\textsuperscript{20} On the usefulness of studying the ABA, and by implication the AALS, in an attempt to answer the kinds of questions that are posed in this essay, see Auerbach, \textit{supra} note 18, at 564 n.42.
the common law.\textsuperscript{21}

The theme of opposition to English ways was prominent in the more extreme rhetorical manifestations of support for codification, especially William Sampson’s 1824 address to the New-York Historical Society and Robert Rantoul, Jr.’s “Oration at Scituate” of 1836.\textsuperscript{22} Both men heaped well-deserved scorn on the supposed history of the common law which portrayed it as the legatee of pure Saxon ideas of liberty. Both used irony to great and no doubt irritating effect. And both firmly believed that the only law fit for America was written law, embodied in a code adopted by the legislature. For Sampson, however, the production of such a code was the province of learned lawyers. Rantoul placed his faith in the elected representatives of the people and belittled the supposedly disinterested pursuit of legal truth by a profession which was merely one more selfish interest opposed to the public good.

These differences between the two men were surely due at least in part to the changing pattern of American politics. Sampson wrote just before the era of Jacksonian democracy; Rantoul was a prominent Democratic politician in Whig-dominated Massachusetts. They shared, however, a certain scorn for things English; Sampson also exhibited a reverence for the French legal experience, especially the Code Napoleon.\textsuperscript{23}

Not all support for codification, however, came from outside the mainstream of the profession. In 1837, Joseph Story, the greatest legal scientist of the day, proposed in a report to the Massachusetts legislature a limited sort of codification encompassing not the entire common law but rather the criminal law and the law of evidence. In addition, Story suggested that in the field of substantive civil law there would be a codification of

\begin{quote}
\textit{those principles, and details . . . which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established, as to admit of a scientific form and arrangement, and are capable of being announced in distinct and}
\end{quote}

\begin{itemize}
\item[\textsuperscript{21}] For a general treatment see M. Bloomfield, \textit{American Lawyers in a Changing Society, 1776-1876} at 32-58 (1976).
\item[\textsuperscript{22}] Samson’s and Rantoul’s speeches are both most easily consulted in P. Miller, \textit{The Legal Mind in America, From Independence to Civil War} 119-34, 220-28 (1962).
\item[\textsuperscript{23}] Bloomfield, \textit{supra} note 21, at 59-60.
\end{itemize}
determinate propositions.24

In spite of the stature of its author, Story's report did not mark a new stage in an ongoing national debate. Both before and after the issuance of the 1837 report, codification of statute law in several states and a growing number of treatises on various areas of law (some of the most important of which were written by Story himself) seemed to defuse the drive for codification of the common law.25 An exception, however, was the situation in New York, where the year 1848 saw the most spectacular example of codification up to that time. In that year the New York legislature adopted a code of procedure that radically changed the law governing the mechanics of carrying on law suits in the state and thereby swept away a vast amount of common law learning. The Field Code, named after its principal author, became the most important symbol of codification in America.26

It is an understatement to call David Dudley Field (1805-1894) the chief proponent of the procedural code which came to bear his name. Starting in the 1830s he was a persistent advocate for legal change. Nor did he rest with the passage of the code of procedure. Until his death he remained perhaps the most prominent advocate in the American legal profession of codification of both procedural and substantive law, domestic and international. He was also one of the most prominent practitioners in the City of New York, famous, or notorious, depending on the observer's point of view, for representing some of the most flamboyant characters of the age, including Jay Gould and Boss Tweed. He was nothing if not controversial and persistent.27

His opponents, led by James C. Carter, were deeply fearful of clumsy legislative interference with the orderly development of the common law. Judges were superior law makers who could be depended on to mold the law according to the needs of the time; a code would

27. For a brief exposition of Field's role see Pound, David Dudley Field: An Appraisal, in id. at 3-16.
freeze it into sterility.\textsuperscript{28} Underneath their disagreements, however, Field and Carter shared certain assumptions: "They both valued flexibility in the law; liked a businesslike rationality; distrusted the role of non-experts, of laymen, in the making of law."\textsuperscript{29} Unlike the antebellum disputes over codification, however, the debates between Field and Carter and their respective supporters found an audience made up almost exclusively of legal professionals.

In light of the emphasis both sides gave to expertise, it is not surprising that the problem of codification came before the American Bar Association. Founded in 1878 in Saratoga Springs by a few dozen wealthy lawyers, the ABA spent most of its first few years providing an added dimension to the summer vacations of its members. It was, however, representative of the concerns of a segment of the elite of the profession, which was deeply concerned with promoting "safe, conservative reform" in the face of the demands for innovation and change which reflected the changing conditions of material life in late nineteenth century America.\textsuperscript{30} After an address on the subject in 1884 by Judge John F. Dillon, the Association decided that one of the defects of the legal system which could be safely and conservatively reformed by lawyers was delay and uncertainty in judicial administration. In 1885 and 1886 the Association had before it lengthy reports on the problem. Both reports were authored by committees in which David Dudley Field and Dillon were the moving forces.\textsuperscript{31} Not surprisingly, both documents called for codification as a solution. After much debate\textsuperscript{32} the ABA did approve by a vote of fifty-eight to forty-one a resolution which, in terms reminiscent of Story, called for the reduction of the law "so far as its substantive principles are settled, to the form of a statute," but the sound and fury of debate seem to have exhausted the interest of the Association in the subject.\textsuperscript{33}

\textsuperscript{28} L. Friedman, A History of American Law 403-04 (2d ed. 1985).
\textsuperscript{29} Id. at 405.
\textsuperscript{31} Special Committee on Delay and Uncertainty in Judicial Administration, Report, 8 Reports of the A.B.A. 323, 323-449 (1885); Special Committee on Delay and Uncertainty in Judicial Administration, 9 Reports of the A.B.A. 325, 325-502 (1886).
\textsuperscript{32} 8 Reports of the A.B.A. 46-62, 67-83 (1885); 9 Reports of the A.B.A. 11-74 (1886).
\textsuperscript{33} 9 Reports of the A.B.A. 74 (1886); see also Yntema, The American Law
A facet of the codification movement lived on in the Association, however, and indeed in the larger arena of legal reform. One of the assumptions underlying the theory of codification is the idea "that legal system is best, and works best, and does the most for society, which most conforms to the idea of legal rationality — legal order which is most clear, orderly, systematic (in its formal parts), which has the most structural beauty, which most appeals to the modern, well-educated jurist." The mere rearrangement of the law on the printed page in accord with an appropriate scheme of classification would effect great good by elucidating the basic principles of the law, whether or not those principles are put into statutory form.

The American Bar Association first took up the problem of classification in 1888 in response to a letter on the subject from Henry T. Terry, who called for an arrangement of American law based on "ultimate principles." The committee formed in response to this appeal made elaborate reports in 1891 and 1902 but was discontinued after 1907. In 1917 another committee concerned with classification was formed, perhaps in response to Elihu Root's comments on the necessity of a classification of American law made in his presidential address to the ABA in 1916. This committee was continued until 1924, when its aims were judged to be sufficiently provided for by the new American Law Institute.

Classification was also taken up at the state level, New York being an example. There the chairman of the Board of Statutory Consolidation, Adolph J. Rodenbeck, expected great things from a classification of the law into a gigantic outline whose headings would be formulated
according to the principles of logic enunciated by Archbishop Richard Whately, nineteenth-century English cleric and author of a widely-read treatise first published in 1823. The thrust of all these efforts was well summarized by the ABA committee in 1920: "The elements here referred to, involve carrying to the lawyers a comprehension and understanding of fundamental legal principles and by classification showing that these principles form a thread or clue through and to the mass of decisions."

Clearly, the idea of classification had a much fuller play than the idea of codification, in part because it did not evoke the overheated emotions that the Field-Carter controversy lent to all discussions of the latter. It also had a more distinguished and less controversial lineage. It was the vigorous contemporary representative of a notion of legal science which completely dominated American legal thought before the Civil War when the very idea of science reflected the overwhelming prestige accorded the thought of Francis Bacon.

Allegiance to "Baconianism" was a mark of scientific orthodoxy in antebellum America. While the orthodox did not all adhere to a single version of the creed, in general Baconianism meant empiricism, the avoidance of hypotheses, a belief that careful observation of the material world and proper classification of the facts observed would allow the induction of the principles underlying the processes of nature. This would reveal, ultimately, the very mind of God.

This model of science could easily encompass the common law. What are individual cases but the data to be observed? What is to be drawn from an observation of all cases but legal principles the ordering of which will lead to rational understanding of the legal universe? It was the primary tool of lawyers like Story; these lawyers, Perry Miller chronicled, attempted to construct and maintain the temple of law in the face of opposition based on the popular and democratic strains in American thought.

40. Special Committee on Classification and Restatement of the Law, Report, 6 A.B.A. J. 420, 424 (1920).
42. P. Miller, Life of the Mind in America: From the Revolution to the Civil War 99-265 (1965). For typical examples of the invocation of Bacon by antebellum legal thinkers see 2 J. Wilson, The Works of the Honorable James Wilson,
The idea of legal science survived the Civil War and helped to inform the thought of, among others, Christopher Columbus Langdell who as the first dean of Harvard Law School made all things new in American legal education. His definition of legal science, found in the preface to his first casebook, the 1871 *A Selection of Cases on the Law of Contracts*, illustrates both the premises of the classifiers and what they hoped to accomplish:

Law, considered as a science, consists of certain principles or doctrines. . . . Moreover the number of fundamental doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable

L.L.D. 43-44 (1804); D. Mayes, An Address Delivered Before the Trustees and Faculty of Transylvania University at the Opening of the Session of the Law Department on the 7th Nov. 1831 at 16 (1831); An Introductory Lecture Delivered to the Law Class of Transylvania University on the 5 of November 1832 at 7, 17 (1832); J. Gould, A Treatise on the Principles of Pleading in Civil Actions xiii (F. Heard ed. 4th ed. 1887) (1st ed. 1832); Kent, The Rise and Progress of Commercial Law in English Jurisprudence, in Inagural Addresses, Delivered by the Professors of Law in the University of the City of New-York, at the Opening of the Law School of the Institution 49 (1838); Notes of Professor Greenleaf's Introductory Lecture, At the Present Term, 1 The L. Rep. 218 (1838) (a reprint of the "Notes" in the Harvard Law School Library Treasure Room bears in Greenleaf's hand the inscription "with the respects of S. Greenleaf" and in another hand the notation "Gift of Prest. Quincy." Greenleaf no doubt considered the "Notes" to be at least an accurate summary of his views.; F. Lieber, Legal and Political Hermeneutics 80-81 (rpt. 1970) (1st ed. 1839); Ingraham, An Address Delivered before the Law Academy of Philadelphia, at the Opening of the Session of 1828-1829, 12 Hazard's Register of Pa. 323, 326 (1833); Hopkinson, An Address Delivered before the Law Academy of Philadelphia at the Opening of the Session of 1826-1827, 12 Hazard's Register of Pa. 289, 290 (1833); Sergeant, A Lecture Delivered before the Law Academy of Philadelphia, on Tuesday Evening, November 28, 1843, 3 Pa. L.J. 93, 97; Rawle, A Discourse on the Nature and Study of Law, 14 Hazard's Register of Pa. 181, 182 (1834); J. Willard, Address To The Members of the Bar of Worcester County, Massachusetts, October 2, 1829 at 113 (1830); Story, Developments of Science and Mechanic Art [1829], in The Miscellaneous Writings of Joseph Story 479 (W. Story ed., rpt. 1972) (1st ed. 1852); Story, Characteristics of the Age [1826], in id. at 350-51; for further praise of Bacon see Progress of Jurisprudence [1821], in id. at 207.
Although the law schools would eventually move beyond this taxonomic ideal, as incarnated in the classifiers it would play an important role in the founding of the American Law Institute.

Whatever the differences among them, the promoters of codification and classification met the challenge of the late nineteenth and early twentieth centuries with proposals going to the basic cause of all problems. Once properly codified or at least classified, the law would never again be out of step with society. Other proponents of reform had far more modest goals. While they often spoke the language of clarification of the law, simplification of the practitioner's task, and the abolition of anachronisms, they turned their attention not to the substantive law but to procedure, the adjective law which governs the mechanics of an action before the court. These mechanics can be summarized by a timetable which indicates when papers are to be filed and a list of rules which dictate what must be in the papers if the desired relief is to be obtained. Problems begin when the rules become complex and rigid. The smallest mistakes can then result in the dismissal of an action or in a decision which may be contrary to clear principles of justice. Complex rules can also provide rich raw material from which lawyers who are so inclined can fashion delay and obfuscation.

Not surprisingly, therefore, when dissatisfaction with the legal system includes complaints about the law's delay, the defeat of justice by technicality, and the mystification of the law, relief is often sought through procedural reform. The Progressive era was just such a period, although surely not the first. Field's code of civil procedure was meant to answer such complaints. Its principal feature was the abolition of the distinction between law and equity and the creation of a single form of action through which an aggrieved private party could obtain whatever


44. For discussions of the concept of law as science in the period under consideration, see Yntema, supra note 33, at 320-22; Twining, supra note 3, at 12; S. Yeazell, The Ideology of Legal Method 1880-1925, at 9-13 (unpublished seminar paper, Harvard Law School, 1974).

sort of relief was appropriate, be it the money damages of the common law courts or the more flexible remedies of the equity tradition. This was a revolutionary change: It meant the end of all special pleading, forms of actions and writs, and the closing of the chasm between equity and law—the destruction at one blow of "the paraphernalia of this most recondite, most precious, most lawyerly area of law." The Field Code was not a success in New York, perhaps because of its revolutionary nature. Nonetheless, the Code had some success in the newer states of the West and even in England. It was not the only force for procedural reform, however. In the 1880's and 1890's Chief Justice Charles Doe of New Hampshire was able to radically simplify the civil procedure of his state, although his success was prefaced by twenty years of struggle. What the Field Code established by statute, and more, Doe did by judicial decision. Indeed, he was credited with saving New Hampshire from the problems of code practice.

In short, the reform of procedure is supposed to promote efficiency and economy in the courts through the alteration of the most craft oriented segment of the lawyer's work. Procedural reform is thus excellent professional reform. It is politically neutral, having no object except the common good. It emphasizes the technical and scientific, the most abstruse portion of the lawyer's work, something which is his alone. "The fact is that technical law reform, whether or not it fills any general social needs, fills an important need of the profession; and in this lies its magic." In a time of crisis of professional identity, like the Progressive era, a turn to procedural reform should be expected. Such an expectation is not disappointed. The movement to reform civil procedure was one of the most widely supported legal reforms of the period.

46. Friedman, supra note 28, at 392.
47. Friedman maintains, however, that "[t]he real vice of the code probably lay in its weak empirical base." Id. at 394.
49. Reid, supra note 45, at 93-108
51. This statement rests on an examination of the Green Bag, Case and Comment, Bench and Bar, and the Central Bar Journal for the period 1906-1920. These periodicals were not university law reviews but commercial publications. Presumably they had to publish more material of current interest than a law review did and they all
The third strain of legal reform evident during the Progressive era was also concerned with efficiency and economy but turned its attention to the courts, which were governed by the procedural rules as well as to the rules themselves. The most prominent advocate of the reorganization of the courts was the American Judicature Society, founded in 1913. Concentrating on efficient and expert administration, especially as applied to urban areas, the AJS fits the traditional conception of Progressive reform very nicely.

The Judicature Society spent its first seven years drafting model court administration statutes both for states and metropolitan areas. While the Society’s materials provided alternative systems to suit local needs, the favored model for a state-wide system featured a unified General Court of Judicature, an elected chief justice who appointed the judges of the lower divisions of the unified court, and elected county judges. The model municipal court also featured an elected chief justice who appointed his associates who sat in functionally distinct divisions — appellate, chancery, domestic relations, civil jury, and civil non-jury — in whose peculiarities they should become expert. In both cases the chief justice was to be responsible for the organization and efficiency of both the judicial and administrative sides of the court and answerable for his performance at the polls.

The American Judicature Society itself claimed that its plans were simply “the short ballot and the commission form of government applied to the judiciary and to the administration of justice by the courts.” The Judicature Society was thus in tune with the main line of Progressive urban reform. One of its most prominent members, Albert Kales, advocated the short ballot and the commission not only on the urban but also on the state level. The Society’s secretary, Robert

devoted considerable space to procedural reform. Examination of the classified bibliography in *Case and Comment* from 1910 to 1917 shows sixty-one articles on procedural reform appearing in various legal publications. An idea of the geographical dispersion of the movement can also be obtained from an examination of the letters in the Pound MSS, *supra* note 35. One of the leaders of the movement, Pound received requests for help from reformers in Illinois, Washington, Missouri, Texas, the District of Columbia, Ohio, and California.

52. *First Draft of a State-Wide Judicature Act*, AMERICAN JUDICATURE SOCIETY BULLETIN VII passim (1914); *First Draft of an Act to Establish a Model Court for a Metropolitan District*, AMERICAN JUDICATURE SOCIETY BULLETIN IV passim (1914).

53. *Id.* at 4.

54. A. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 170 (1914).
Harley, expected to "sail to glory with the short ballot and the commission-manager form of government" and illustrated the need for the reforms advocated by the group with a revealing metaphor: "[One could] as well conceive of a department store being successfully run without a manager as to conceive of the manifold duties involved in administering justice in the modern city accomplished by the mere voluntary acts of unorganized judges."5

Such an examination of administration, of "proper procedures and continuous enforcement rather than . . . simple self-fulling rules,"56 is characteristic of the Progressive era. On the other hand, the reformers of procedure and of classification approached reform in a way more characteristic of the nineteenth century. They expected great results from fairly simple changes.57 Thomas Shelton, chairman of the ABA's Committee on Uniform Judicial Procedure, believed a grant by Congress to the Supreme Court of the power to write the procedural rules for the law side of the federal courts would create "a new era of scientific judicial relations" in which lay criticism would be answered by "instant relief" for procedural inequities, a complete reorganization of the courts would be effected, and "an equitable division of power and duty between the legislative and judicial departments of government" would result.58 Rodenbeck saw great benefits from the classification of the law since "the very lack of scientific interest and study of the law in the profession . . . has caused the law to be looked upon and treated by many, not as a science but as a livelihood."59 By putting one bill through Congress and reducing the law to an outline, Shelton and Rodenbeck would have aided the professionalization of the bar, cleared the way for scientific development of the law, and restored the proper relationship between legislature and court.

The reformers associated with the AJS also exhibited some of the weaknesses of Progressive reform. The most prominent was their great faith in norms established by psychological testing. John H. Wigmore,
dean of the Law School at Northwestern University and a leader of the Society, returned from his service in the Judge Advocate General's Corps after the First World War and announced that the time had come to institute psychiatric examinations for all criminal defendants.\textsuperscript{60} Apparently the poor results from psychological screening of draftees did not diminish his faith. Robert Harley wished to see a "psychopathic laboratory" attached to every criminal record,\textsuperscript{61} where those who could not cope with "the fierce competition of metropolitan life" would be identified and sent to rural colonies rather than prisons. Such people were not criminal "but simply unable because of brain lesions to live up to the multitudinous regulations of metropolitan society." Harley did not believe in limiting a good thing: "We will go further, even, by testing the minds of the witnesses and jurors in civil as well as criminal cases."\textsuperscript{62}

The men associated with the AJS were certainly representative of certain aspects of Progressivism. In addition, the four most prominent — Harley, Kales, Wigmore, and Nathan William MacChesney — were all law teachers. Their embrace of reform-oriented attitudes and newer ways of thinking set them apart from the practitioners agitating for procedural reform and classification through bar associations.\textsuperscript{63} These differences would eventually move from the intellectual sphere to the field of political conflict.

The final mode of legal reform actively pursued in early twentieth century America was designed to provide a jurisprudential foundation for the other types of reform. Sociological jurisprudence was to provide a sound theory of law and of judicial decision-making which would prevent the sorts of opinions which had focused so much hostility on the courts.

Roscoe Pound was the prophet of sociological jurisprudence in America. His work, as he freely admitted, rested heavily on Continental, especially German, scholarship, and the extent of his own originality is still an open question.\textsuperscript{64} Whatever his sources, however,

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\item 60. Wigmore, \textit{Some Lessons for Civilian Justice to be Learned from Military Justice}, 10 J. CRIM. L. & CRIMINOLOGY 170, 175 (1919).
\item 63. Auerbach, \textit{supra} note 18, at 554-58.
\item 64. Among the sources for sociological jurisprudence Pound listed: VACCARO,
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by 1910 . . . he had formulated a systematic critique of American law. The central theme of his criticism was that the deductive method and nineteenth century legal theory had created a closed system of legal rules, one that enshrined ephemeral anachronisms as fundamental principles in conscious disregard of the society that law served.65

The old jurisprudence was mechanical, the new would be sociological.

Pound recognized that with the new century had come a new conception of justice — social justice as opposed to the older legal justice. Society had decided to pit "the organized brains of the community against the aggressive individual brain" in order to prevent exploitation and oppression.66 This desire was reflected in legislation which put social interests above individual interests. Unfortunately, not only was legislation itself scorned by the common law tradition, but the anti-individualist notion embodied in the legislation ran contrary to the intellectual outlook which dominated the courts.67

To counteract the obstacles to the new legislation, sociological jurists insisted on six main points:

1) "Study of the actual social effects of legal institutions and legal doctrines,"

2) "sociological study in connection with legal study in preparation for legislation,"

3) "study of the means of making legal rules effective,"

4) "a sociological legal history" designed "to show us how the

Les Bases Sociologiques du Droit et de L'Etat (1898); Vanni, Lezioni di Filosofia del Diritto (1902, 1908); Stammler, Wirtschaft und Recht (1906); Ehrlich, Soziologie und Jurisprudenz (1906); Grasserie, Les Principes Socio-
logiques du Droit Civil (1906); Gumplowicz, Allgemeines Statsrecht (1877, 1907); Demogué, Les Notions Fondamentales du Droit Privé (1911); Duguit, Le Droit Social, Le Droit Individuel et la Transformation de L'Etat (1908, 1911); Rolin, Prolegomenes a la Science du Droit (1911). All are cited in Pound, The Scope and Purpose of Sociological Jurisprudence, 24 Harv. L. Rev. 591, 612 (1911); see also R. Pound, Law and Morals 150-53 (1924) (bibliography).

67. See Pound, Courts and Legislation, 7 Am. Pol. Sci. Rev. 361-83 (1913); Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 383-407 (1908). Much of what Pound wrote was repetitive. The notes to these paragraphs indicate only some of the sources which support the statement made. For a full list of Pound's writings on jurisprudence in this period, all of which have entered into the synthesis presented here, see F. Setaro, A Bibliography of the Writings of Roscoe Pound (1942).
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law of the past grew out of social, economic, and psychological conditions, how it accorded with or accommodated itself to them, and how far we can proceed upon that law as a basis, or in disregard of it, with well-grounded expectations of producing the results desired;”

5) “the importance of reasonable and just solutions of individual causes,”

6) all with the hope of making “effort more effective in achieving the purposes of law.”

In short, the sociological jurist criticizes legal systems, doctrines, and institutions “with respect to their relation to social conditions and social progress.”

Once the sociological view of jurisprudence came to dominate legal thinking, all that would be well for the cause of the current problem was to be found in the intellectual realm and had nothing to do with politics or economics. Judges made antisocial decisions because they had antiquated ideas about law and society. They were still living in a world in which the sole purpose of law was to free the human will and abolish the invidious distinctions based on status.

Much in American judicial decisions with respect to master and servant, liberty of contract, and right to pursue a lawful calling, which it has been the fashion of late to refer to class bias of judges or to purely economic influences, is in reality merely the logical development of traditional principles of the common law by men who if they had not been so taught, read every day in their scientific books of the progress from status to contract and the development of law through securing and giving effect to the human will.

The bench and the bar needed reeducation, and the business of legal education belonged to the law school and its faculty. Just as faulty law teaching was responsible for the antiquated ideas still controlling the courts, so reformed teaching would train “the rising gen-

69. Id.
70. Pound, Political and Economic Interpretations of Jurisprudence, 9 PROC. OF THE AM. POL. SCI. ASS'N 100 (1912); see also Pound, Liberty of Contract, 18 YALE L.J. 454, 454-87 (1909); Pound, Taught Law, 37 REPORTS OF THE A.B.A. 977 (1912).
eration of lawyers in a social, political and legal philosophy abreast of our times.” It was the mission of that new profession to raise up a new generation of practitioners trained in a law appropriate to the modern world. Pound did not underrate the importance of the task:

It is . . . the duty of American teachers of law to investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction, and while teaching the actual law by which courts decide, to give to their teaching the color which will fit new generations of lawyers to lead the people as they should, instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists.

These four suggestions for reform put forward by public-spirited members of the profession can be linked one with the other according to several different criteria. Classification and sociological jurisprudence were concerned with legal science, although one rested on old and the other on new notions of what that was. Procedural reform and the reform of court organization, on the other hand, were concerned with the day-to-day operation of the courts, yet one was the darling of academics in touch with relatively advanced social and political thought while the other was the pet of practitioners who may have been far more conservative. Several actors in the events leading to the founding of the ALI operated across the entire field, advocating the same reforms for different reasons. In the end, the American Law Institute became the institutional embodiment of legal reform because it best served the needs of the legal professionals involved in a time of change. What those needs were and how the ALI met them is the subject of the final part of this essay.

III

The period of most intense interaction of the four major strands of legal reform is bounded by two important events: Roscoe Pound’s speech at the American Bar Association convention of 1906 on “The Causes of Popular Dissatisfaction with the Administration of Justice”

and the founding of the American Law Institute in 1923. The configurations of reform notions in the two years were quite different. In the intervening years one strain — the classificatory — came to dominate the others under the relentless pressure for the complete professionalization of the practice of law.

In 1906 Roscoe Pound was dean of the law school at the University of Nebraska. The recipient from Nebraska of a Ph.D. in botany, he had studied law for only one year at Harvard before returning to Lincoln to practice law. By 1906, he had achieved great prominence in his native state, having served on the commission appointed to hear cases backed up on the docket of the state supreme court. He was at St. Paul in August 1906 at the invitation of the president of the ABA, who had heard him speak at the annual meeting of the Nebraska State Bar Association in 1905.74

Pound diagnosed the causes of popular dissatisfaction with the administration of justice.75 He noted that American political institutions de-emphasized bureaucratic control in favor of local government, that all law inherently tended toward uniformity, and that it was an age of transition from extreme individualism to a more collective outlook. These causes, however, "will take care of themselves." "But too much of the current dissatisfaction," Pound continued, "has a just origin in our judicial organization and procedure."76 The principal result of the failings of judicial organization and procedure is "a deep-seated desire to keep out of court, right or wrong, on the part of every sensible businessman in the community."77

Pound's far from radical speech infuriated some members of the ABA. A resolution to reprint the speech and distribute it to the members of the Association and to a joint committee of Congress then considering a judiciary bill was met by vigorous attacks on Pound's propositions. In the end the subject matter of the speech was referred to the Committee on Judicial Administration and Remedial Procedure.78 The following year that committee reported that Pound had not been "iconoclastic" or "antagonistic" and urged the creation of a special committee to "Suggest Remedies and Formulate Proposed Laws to

74. D. Wigdor, supra note 65, at 1-123.
76. Id.
77. Id. at 408-09.
78. 21 REPORTS OF THE A.B.A. 11, 12, 55-65 (1906).
Prevent Delay and Unnecessary Cost in Litigation." The committee's recommendation was adopted and the ABA officially bent its efforts toward procedural reform.\(^7\)

During the entire period under consideration here the Special Committee focused its attention solely on procedure in the federal courts, leaving the state field to state bar associations. The Special Committee was able to secure the passage of bills requiring a showing of probable cause before the granting by the United States Supreme Court of a writ of habeas corpus, working a limited procedural unification of law and equity and simplifying the process for amending pleadings, broadening the scope of review by the United States Supreme Court, and requiring that new trials be refused if the errors complained of in the court below did not effect the substantial rights of the parties; it also provided advice to the committee of the Supreme Court which wrote the new equity rules of 1912.\(^8\)

The Special Committee also published lengthy reports in 1909 and 1910 on comprehensive procedural reform. These reports, which were the work of Pound, advocated the creation of a system of procedure by rules of court rather than through statutory enactment. Actual implementation of this notion on the federal level was left to another committee, headed by Thomas Shelton, which worked for congressional passage of a bill allowing the Supreme Court to make such rules for the law side of the federal courts. Although Shelton met nothing but frustration — Senator Thomas Walsh of Montana kept the bill bottled up in the Judiciary Committee seemingly forever — after his death his reform was finally adopted and resulted in the Federal Rules of Civil Procedure.\(^9\)

As pursued by the ABA, procedural reform would fulfill important professional aims. By removing rule-making from the legislatures it would reinforce lawyers' claims to professional status: to the experts belonged the making of rules for the practice of expertise.\(^10\) Improving

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82. It is significant that under the most widely supported plan for procedural reform the judges would be making the rules. For a discussion of the image of the judge as the expression of the highest professional aspirations, see Botein, What 'We
the mechanism for managing business in the courts would, Pound frankly said in 1906, help preserve the profession's near monopoly of the means of resolving commercial disputes. In spite of the allure of the goal, the ABA's efforts for procedural reform made only slow progress, principally because nothing could be done without the cooperation of Congress. The classification movement, however, drew its impulse from and was directed by the legal profession itself. The great enthusiasm engendered was damped by the First World War before any practical results could be seen, but it revived after the great conflict was over and played an important part in the founding of the ALI.

The ABA first took up classification in response to Henry T. Terry's letter of 1888. The committee then formed ceased to exist after 1907, just as procedural reform received the Association's sanction. The lengthy 1902 report of the Committee on the Classification of the Law expressed rather typical sentiments: "The great fundamental principles upon which the fabric of our law rests, constitutes a system, and it is the reverse of science to treat the expressed rules as the whole, or as the most important part of that system." This brief statement clearly shows the Baconian heritage of classification. The "expressed rules," the holdings of cases, are merely illustrative of the principles which lie behind and which really are the law.

The classificatory ideal did not disappear, however, with the demise of the ABA committee. In 1910 one issue of the Green Bag, a magazine for lawyers, was entirely devoted to the question of the creation of an American corpus juris, a gigantic classification and statement of the principles of American law. The centerpiece of the presentation was a long "Memorandum in re Corpus Juris" prepared by practitioners Lucien Hugh Alexander and James De Witt Andrews and by a distinguished teacher, George Kirchwey of Columbia. The heart of the proposal was the creation of a group of law teachers who would write a complete statement of American law according to a scientific scheme of classification and then submit their work to an advisory board of practitioners, judges, and other teachers. In this way all American law could be "completely exhibited as the product of the best


84. Memorandum in re Corpus Juris, 22 GREEN BAG 59 (1910).
thought in the profession." 86

Both the method chosen to prepare the corpus juris and the claim that it would be the highest accomplishment of the profession would reappear in the discussions surrounding the founding of the ALI thirteen years later. In the meantime, however, the 1910 agitation seems to have come to nothing. In 1916 the idea was revived within the ABA once more, probably in response to Elihu Root’s presidential address of that year, “Public Service by the Bar.” 86

Root’s speech urged the profession to take an active part in society to insure that the people of the United States benefitted from the best possible administration of justice. The true spirit of the profession required such service. “Commercialization” of the bar, the attitude that lawyering is merely “a career which affords a living without manual labor,” must be opposed through strict control over admission to the bar and the requirement that admission be governed by the standards of the best law schools. Preserving standards is only part of the solution, however. Even the most honorable members of the profession need help in understanding the rapidly changing American law. Judges and lawyers engaged in the administration of justice needed a new American Corpus Juris Civilis which would “carry to the great mass of them, present and future, a comprehensive and discriminating understanding of the legal principles which form the thread of Ariadne for guidance through the labyrinth of decisions.” 87 Yet again the understanding of principles was the key to knowing law. Discrete cases were at best imperfect guides.

In 1917 the ABA created a Special Committee on the Classification and Restatement of the Law. This Special Committee set its collective mind to producing the corpus juris; one of its leaders was the same James DeWitt Andrews of the 1910 project. Not much was accomplished during the War, but the committee came to life again in 1919 and from then until 1922 Andrews tried to convince the Association that a corpus juris could be created through the dormant American Academy of Jurisprudence. Founded in 1914 by a group of luminaries including William Howard Taft, Elihu Root, George Wickersham, Frederick Coudert, Roscoe Pound, and Samuel Willis-

85. Id. (emphasis in original removed).
86. Root, Public Service By the Bar, 41 Reports of the A.B.A. 355, 365 (1916).
87. Id.
The Academy had the familiar aim of inquiring into all important principles of law which at the present time are in a confused, conflicting, and uncertain stage by reason of conflicting judicial decisions, to the end that the sound principles of right and justice may be discovered and such logical reasons therefore given as will preclude as far as possible future uncertainty and discussion and in this manner unify and clarify the law. 88

The coming of the War ended the group's activities and Andrews' attempt to revive it was frustrated by the coming of the ALI.

The mid-decade revival of the classification idea was not limited to the elite practitioners represented in the ABA. In 1914 the elite law teachers of the Association of American Law Schools heard two speeches, one by Joseph Beale of Harvard on "The Necessity For a Study of Legal System" 89 and the other by Wesley N. Hohfeld of Yale on "A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?" 90 Beale made yet another contribution to the rhetoric of principles, system, and science:

What, then, is the common law which is scientifically studied in the country? It is surely a philosophical system, a body of scientific principle which has been adopted in each of the common law jurisdictions in this country, as the basis of its law. . . . But the general scientific law remains unchanged in spite of these errors [misstatements and misconceptions of the courts]; the same throughout all common law jurisdictions. This is the science which we teach, and this is the science which requires systematic statement in order that progress and reform may be possible. 91

Hohfeld's paper was a detailed outline of such a systematic study. These two speeches, together with the appointment the following year

88. 44 REPORTS OF THE A.B.A. 92 (1922).
89. Letter from James DeWitt Andrews to William Howard Taft, New York City, Paige Box 26, Pound MSS, supra note 35.
92. Beale, supra note 90.
of a committee to investigate the establishment of a center for jurisprudence, were selected by the Director of the ALI as the starting point for his brief official history of the Institute. This beginning was aborted by the War, but when activity began again in 1920 the denouement came rapidly.

The parallel movement of the ABA and the ALI towards the goal of classification of the law might seem surprising in the light of the hostility between the two organizations and the broader differences between the two aspects of the profession which they represented. The meeting of the AALS which heard the speeches of Hohfeld and Beale was the first to meet separately from the annual meeting of the ABA. The split was occasioned, according to the law teachers, by the older organization's slighting of both them and of legal education, symbolized by the proximate cause of the break, the moving of the date of the ABA's meeting from August to October, a time particularly unpropitious for academics.

But the differences went deeper than a disagreement over a convenient time to meet. The men involved had different views on the proper response to the questions raised by the changing circumstances of American life. Beale, for example, was a thorough advocate of sociological jurisprudence. He told his colleagues:

The vocation of our own age, then, is to restudy our law with a view to its readjustment and reform.... We must examine the law objectively to learn its social purpose and to see how far that purpose is being accomplished. Such a study is the object of the new sociological jurisprudence.

Root, on the other hand, not only trusted in the gradual development of the law to solve the current problems, but he even praised the bete noir of the sociological jurist — freedom of contract — as the instrument of the destruction of a society based on status. He further cautioned: "We should not forget that every increase of governmental power to control the conduct of life is to some extent a surrender of individual freedom and a step backwards towards that social condition in which men's lives are determined by status rather than by their own free will." He was

94. Auerbach, supra note 18, at 567.
95. Beale, supra note 90, at 39.
96. Root, supra note 86, at 372.
a believer in a theory of law which Pound had labelled an anachronism.\textsuperscript{97} Nor did all teachers hold the same views. Harlan Stone, then dean of the law school at Columbia, could attack the concept of social justice as a basis for judicial decision and label sociological jurisprudence more a theory of legislation than of the judicial process and still lament the profusion of judicial opinions and call for systematization.\textsuperscript{98}

On the whole, however, law teachers were far more inclined to speak the rhetoric of Progressivism than were the practitioners who concerned themselves with the issues of legal reform.\textsuperscript{99} Through their advocacy of quintessential Progressive reform of the court system the law teachers of the American Judicature Society would, in fact, come into sharp conflict with certain elements of the organized bar.

The AJS was not the original proponent of reform of the organization of the courts. Pound's 1906 speech had emphasized reorganization of the courts as well as procedural reform, and one of the reports he prepared for the Special Committee to Suggest Remedies contained a detailed plan for the reform of state court organization centering on the unification of the courts. Pound acknowledged, however, that since implementation of such a plan would require action in each state, its submission to the ABA was really a propaganda device.\textsuperscript{100} It was the American Judicature Society which took up the cause as Pound had outlined it.

The AJS, however, added one small innovation. The appointed judges of the unified state court were to go before the electorate three, nine, and eighteen years after appointment to allow the people to decide whether they should be retained in office. Should a judge survive all three tests he would continue in office until death, retirement, or impeachment. This system was designed as a safe substitute for judicial recall and as a form of popular selection of judges which would cause the least damage to the quality of the bench.\textsuperscript{101}

\textsuperscript{97} Pound, Political and Economic Interpretations of Jurisprudence, 9 PROC. AM. POL. SCI. ASS'N 94-105 (1912).
\textsuperscript{98} H. Stone, Law and Its Administration 40-49, 212-14 (1924); Stone, The Lawyer and His Neighbors, 4 CORNELL L.Q. 185 (1919).
\textsuperscript{99} Auerbach, supra note 18, at 555-56.
\textsuperscript{100} Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, Report, 34 REPORTS OF THE A.B.A. 595 (1909).
\textsuperscript{101} First Draft of a State-Wide Judicature Act, AMERICAN JUDICATURE SOCIETY BULLETIN VII at 3-14 (1914); Kales, supra note 54, at 225-51; Kales, Methods of Selecting and Retiring Judges, AMERICAN JUDICATURE SOCIETY BULLETIN VI at 29-
The arrangement resembled the judicial recall closely enough, however, to call down the wrath of Rome Green Brown, chairman of the ABA's special committee to oppose the judicial recall.\textsuperscript{102} Theodore Roosevelt's inclusion in the New Nationalism of some sort of judicial recall as a means to remedy decisions such as \textit{Lochner v. New York}\textsuperscript{103} drove the upper reaches of the American bar to distraction in a way no political issue was to do again until another Roosevelt attempted to pack the United States Supreme Court.\textsuperscript{104} Brown's committee was but one manifestation of that exasperation which stemmed from a view of American government and society which was probably widespread at the elite levels of the bar. The most important feature of American government in this view was the check of popular whims and passing fancies exercised by the courts. It was also apparent that the fickle populace was always attacking the security of property, making the courts its greatest defender. Thus judicial recall was anathema. It would destroy the only security the nation, or better, the propertied groups, had against popular usurpation of authority.\textsuperscript{105}

Brown was able to wring a compromise out of the AJS which preserved the elections but placed them at the end of fixed terms rather than at points in a life tenure, thus saving them from the stigma of being recall elections.\textsuperscript{106} The fatuousness of this resolution belies the

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\textsuperscript{102} Brown was a wealthy and conservative Minneapolis lawyer dedicated to the fight "against judicial recall and other revolutionary and anti-constitutional doctrines of socialism." In 1919 he resigned from the ABA because 1) the Executive Committee refused to reimburse some of the expenses incurred in his crusade against socialism, and 2) the ABA's 1919 annual meeting rejected a resolution passed by Brown's committee "condemning the revolutionary movement signified by the Red Flag of Socialism and urging a campaign of education in support of the government which is signified by our Flag of the Stars and Stripes . . . ." Letter from Rome G. Brown to George T. Page, President of the ABA, Minneapolis, September 4, 1919, copy in Paige Box 26, Pound MSS, \textit{supra} note 35; Botein, \textit{supra} note 82, at 54-64.

\textsuperscript{103} 198 U.S. 45 (1905).


\textsuperscript{106} Revised State-Wide Judicature Act, American Judicature Society Bulletin VII-A at 170, 186 (1917).
importance of the conflict. The injection of politics into what should have been reform based on scientific ideas of efficient organization was fatal. As Pound put it, "the real difficulty is that Kales, who drew the plan, is an unusual Bull Moose and several of his associates are more or less on the fringe of the Bull Moose herd." 107

Once its suggestions were seen as partisan, the projects of the AJS could not command the support of other academics like Pound, let alone of the profession at large. But Pound himself was the principal exponent of sociological jurisprudence, a way of looking at law that not only seems to have been the peculiar province of academics but also at least implied a view of the issues of social justice different from that of the practitioners, like Root, who supported freedom of contract. Whatever the political tendency of Pound's rhetoric, however, the practice of sociological jurisprudence made it easy to gather all right-thinking lawyers into the fold. In the end, sociological jurisprudence lacked not only political content but in fact had little content of any kind. Pound's grand idea had little life off the printed page.

Given the importance attached to legal education in Pound's work and his position as dean of Harvard Law School from 1916, he might have been expected to welcome expansion of the curriculum in a sociological direction. Pound's practice of legal education at Harvard, however, was remarkably narrow. He found abhorrent Wigmore's plan to add a fourth year of legal study in which courses emphasizing the practical working of the law would be taught. Pound summed up his view in a letter to Harlan Stone: "It has been the glory of the better law schools in the country that they have stood resolutely for thorough work — for doing a few of the things best [worth] doing as well as they could, rather than for paper programmes attempting to cover everything." 108 Nor did he have any sympathy for clinical training or legal aid work, although presumably it would have brought the student into contact with some of the social forces which made a sociological juris-

107. Roscoe Pound to Rome G. Brown, Cambridge, March 23, 1915, Ms. Box 2, Early Period Addenda, Pound MSS, supra note 35. Pound was a director of the AJS but did not keep in close touch with its activities since they were centered in Chicago. He did not see the controversial Bulletin VI before it was published. Roscoe Pound to Rome G. Brown, Cambridge, March 23, 1915, Ms. Box 2, Early Period Addenda, Pound MSS, supra note 35. Botein, supra note 82, at 60-62, has an interesting discussion of the attitudes of some leaders of the ABA who opposed the judicial recall in the name of judicial reform designed to separate courts from electoral politics.

prudence necessary. He was even opposed to separate courses in jurisprudence. Both would have distracted the student from professional training.

In truth, Pound's views do not seem to have advanced beyond those of his predecessor, James Barr Ames, who was prepared in 1902 to lend Joseph Beale to the University of Chicago to be the first dean of its new law school until he discovered that President William Rainey Harper of Chicago intended to put on the faculty Ernst Freund, a professor of political science and specialist in administrative law. Ames wrote Harper that Beale would not go unless the new school was to be "a School with a curriculum of pure law, with a Faculty made up exclusively of professors, who are lawyers," and Beale himself said he would refuse the position unless the school were to teach only "strictly legal subjects" with a "faculty consisting only of lawyers."

The one attempt to put sociological jurisprudence into practice was not made by Pound. Louis Brandeis was in full sympathy with Pound's ideas. The famous "Brandeis brief" in Muller v. Oregon — a few pages of legal argument and hundreds of pages of hard data on the adverse effects on women of long working hours — was truly sociological jurisprudence in action and led the United States Supreme Court to uphold the Oregon ten-hour law. Brandeis went on to more successful defenses of social legislation, primarily at the state level. As Mel-

110. Roscoe Pound to James Parker Hall, dean of the University of Chicago Law School, Cambridge, November 27, 1916, Paige Box 8, Pound MSS, supra note 35.
112. "As one of Brandeis's law secretaries [James M. Landis] has suggested, Brandeis was living proof of the kind of jurist Pound was seeking . . . ." S. Konefsky, The Legacy of Holmes and Brandeis: A Study in the Influence of Ideas 92 (1956); Brandeis's statement of his views is in Brandeis, The Living Law, 10 Ill. L. Rev. 461-71 (1916).
113. 208 U.S. 412 (1908).
115. A. Mason, supra note 114, at 251-53.
vin Urofsky notes, however, "in practice, aside from Brandeis, few lawyers had had great success with data-laden briefs."\textsuperscript{116} Perhaps the most spectacular disappointment was \textit{Adkins v. Children's Hospital},\textsuperscript{117} in which the United States Supreme Court, unmoved by a massive Brandeis brief prepared by Felix Frankfurter, invalidated a statute setting a minimum wage for women in the District of Columbia in the name of "liberty of contract."\textsuperscript{118}

Surprisingly enough, when Pound was involved in defending the Child Labor Act of 1916 before the federal district court for the Western District of North Carolina he made no use of the Brandeis technique, but argued solely in traditional terms about the nature and extent of the federal commerce power.\textsuperscript{119} When Pound was asked to prepare a report on classification of the law for the new American Law Institute in 1923 he produced "little more than . . . a potted history of various theories of classification, only to reject most of them in favor of acceptance of the traditional categories of the common law. . . . [I]t might well have been written by someone who had never heard of sociological jurisprudence."\textsuperscript{120}

What sociological jurisprudence came to mean, then, was not a body of doctrine but an attitude or even a rhetoric which emphasized the well-known ability of the common law to accommodate itself to the times and which emphasized even more strongly the importance of thorough training for the forming of good lawyers. As befits such a blandly acceptable notion, the rhetoric of sociological jurisprudence appeared more and more frequently. It can be seen in the works of prominent New York practitioners like Henry W. Taft and Frederick Rene Coudert.\textsuperscript{121} It even penetrated the discourse of Harlan Stone. "The en-

\begin{footnotes}
\item 116. M. UROFSKY, \textit{supra} note 114, at 145.
\item 117. 261 U.S. 525 (1923).
\end{footnotes}
tire history of our law" he wrote in 1919, only five years after he had rejected the concept of social justice, "has been one of change and adaptation to meet new conditions, social and economic, and to conform to a more enlightened ethical perception." Stone doubted, however, that sociological jurisprudence had "any methodology, any formulae, or any principles which can be taught or expounded so as to make it a guide whether to the student of law or to the judge" in the face of the unordered, unscientific chaos of the American common law.

These words of Stone are revealing. Belief in the need to classify transcended differences, and the teachers, at least those in the schools of the AALS, had a unique contribution to make to that endeavor. They were the masters and advocates of the case method of teaching. Whatever Christopher Columbus Langdell thought he was doing when he started to teach at Harvard using opinions of the appellate courts as the only classroom material, and whatever his successors eventually made of his system, some believers in classification took the Dean at his word when he spoke of the relatively few fundamental doctrines of the law. Root stated the close relationship between the impulse to classify and the case method quite clearly in his 1916 address to the ABA:

The living principle of the case system of instruction in our law schools is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. . . . With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably, and the influence of that study would be universal; and from that condition would evolve naturally the systematic restatement of our law, by men equal to that great work.

122. Stone, The Lawyer and His Neighbors, 4 CORNELL L.Q. 185, 188 (1919); see also Stone, The Significance of a Restatement of the Law, 10 PROC. ACAD. POL. SCI. IN CITY OF N.Y. 6 (1923) (Law and Justice). On Stone's favorable attitude to sociological jurisprudence see Stevens, supra note 111, at 427 n.28; A. Mason, Harlan Fiske Stone: Pillar of the Law 114-20 (1968). Mason asserts that Stone's Some Aspects of the Problem of Law Simplification, 23 COLUM. L. REV. 319-37 (1923), indicates his full conversion to sociological jurisprudence from his critical position evidenced in Law and Its Administration, supra note 98.


124. Root, supra note 86, at 366.
Acceptance of the case method became a shibboleth dividing the professional law teacher from the practitioner or judge whose part-time teaching had been the backbone of what formal legal education there had been in the United States; nevertheless, the case method's intellectual premises were not necessarily opposed to those of "old fashioned" members of the profession. In fact, early opposition to the case method was based on the belief that it obscured principles and turned students into mere "case lawyers." As the new legal scholarship became more common with the growth of the full time professoriate and of the law reviews in which they published, it no doubt became obvious to at least some practitioners who cared about such things that the analysis of cases involved the extractions of the very principles which were at the heart of the conventional theory of law.

A project of classification could thus unite the elite practitioners and the elite law teachers, the two most vocal and most prominent parts of the profession, by emphasizing a shared view of what the law was really all about.

America's entry into the First World War put an end to agitation for legal reform on the part of the AALS and the ABA. Once the crisis was over and the nation returned to "normalcy," classification reemerged as almost the sole focus for reform. In part, classification triumphed through a lack of competition. The one active form of sociological jurisprudence received a severe set back in the Adkins case, and freedom of contract had a renaissance while the concept of sociological jurisprudence itself was revealed more and more to be empty rhetoric. The AJS continued to peddle its model statutes, but more quietly. The procedural reformers in the ABA began to lose some of their energy as the leadership, especially Everett P. Wheeler, who had been chairman of the Special Committee from the beginning, grew old.

125. For representative discussions see J. Bishop, Common Law and Codification, or The Common Law as a System of Reasoning (1888); Schouler, Cases Without Treatises, 23 Am. L. Rev. 1 (1889); Dwight, Columbia College Law School, New York, 1 Green Bag 141-60 (1889); S. Dickson, The Methods of Legal Education, An Address to the Law School of the University of Pennsylvania 25 (1891); Penfield, Text Books vs. Leading Cases, 25 Am. L. Rev. 234-38 (1891); Phelps, Keener, Tiedeman, & Gray, Methods of Legal Education, 1 Yale L.J. 139 (1892); Wurts, Systems in Legal Education, 17 Yale L.J. 86-97 (1907); R. Stevens, Law School: Legal Education in America from the 1950s to the 1980s at 57-60 (1983).

126. 261 U.S. at 525.

127. P. Murphy, supra note 118, at 63.
The committee formed in response to Pound's 1906 speech became the Committee on Jurisprudence and Law Reform and turned away from grand procedural designs to small reforms of the substantive law. Symbolic of the change, Pound himself was omitted from the committee in 1920, to his annoyance.128 The bill granting the Supreme Court rule making powers was still bottled up in the Senate Judiciary Committee and its great supporter, Thomas Shelton, would spend the rest of his life in a futile effort to dislodge it.129

The one type of reform to reemerge with vigor was classification. The ABA committee came to life again in 1919, under James DeWitt Andrews' leadership. By 1920 he was trying to revive the American Academy of Jurisprudence as a vehicle for the creation of a restatement of the law according to a scientific scheme of classification, and that same year persuaded the ABA to pass a resolution ordering his committee and the Executive Committee of the Association to cooperate with any group working towards a restatement and classification of the law.130

Andrews almost got his way. The Executive Committee looked with favor on his project, and at the annual meeting in 1922 he presented a plan to finance the operation through a publishing company whose initial capital would be supplied by individual subscriptions of $800 to whatever series of books would be produced. The Executive


129. Successful Annual Meeting Crowns Year of Real Accomplishments, 18 A.B.A. J. 705, 760 (1932); Association's Fifty-Sixth Annual Meeting is Marked by Notable Features, 19 A.B.A. J. 553, 603 (1933).

130. 45 REPORTS OF THE A.B.A. 82-87 (1920).
Committee, however, reversed itself and recommended defeat of this idea, presumably, as Andrews himself charged, because it looked with greater favor on the recent activities of the AALS.\(^{131}\)

The law teachers had returned to the problem of classification and restatement in 1920 and appointed a Committee on Juristic Center to investigate the creation of a permanent body dedicated to the improvement of the law. The Committee reported with enthusiasm in 1921 and the Association resolved "to invite the appointment of similar committees representing the courts, the bar associations, the professional and other scientific bodies engaged in the study of the substantive and adjective law and its administration, for the purpose of jointly creating a permanent organization for the improvement of the law."\(^{132}\) Three months later, in March 1922, a member of the AALS committee, William Draper Lewis, dean of the law school at the University of Pennsylvania, approached Elihu Root, "the leader of the American Bar," for his support. It was forthcoming and on March 22, 1922, the AALS committee and some distinguished practitioners met under Root's chairmanship in New York City and formed the Committee on the Establishment of a Permanent Organization for the Improvement of the Law. This group produced a lengthy diagnosis of the failings of American law and called the great meeting of February 23, 1923, which failed to impress Mr. Justice Holmes but which accepted the report and created the American Law Institute.\(^{133}\)

The report of the Committee on the Establishment of a Permanent Organization focused on the uncertainty and complexity of American law. No one could be blamed for this situation. The bench and bar were the prisoners of a system which demanded the resolution of individual cases and thus worked against any ordered development of the law. Nevertheless, the defects constantly undermine respect for the law and "disrespect for law is the corner-stone of revolution."\(^{134}\) It would not be impossible, however, to stave off the apocalypse:

The community possesses a force tending toward the certainty of the law as well as its adaptation to the needs of life in proportion as our judges and lawyers have that grasp of legal principles which

\(^{131}\) 47 REPORTS OF THE A.B.A. 84-96, 391-93 (1922).


\(^{133}\) Lewis, supra note 93, at 2-3; 2 P. JESSUP, ELIHU ROOT 470-71 (1938).

\(^{134}\) Committee on the Establishment of a Permanent Organization for the Improvement of the Law, Report, 1 PROC. AM. L. INST. 6-7, 68 (1923).
enable them to see the real issues presented by the facts of a case, and the skill to apply consistently the proper principles to its solution.  

All that was needed was "constructive scientific work."  

Although other strains of legal reform had become moribund by 1920, the scientific classifying strain which triumphed in the ALI did not succeed because of a total lack of competition. Alternatives were expressed by persons who were at the very least not anathema to the elite represented in the ABA and the AALS. The 1920 meeting of the AALS which appointed the Committee on Juristic Center heard the then president of the Association, Eugene A. Gilmore of the University of Wisconsin, give an address in which he suggested three methods of improving legal education and thus the law itself.  

One was the creation of "a national seminar or institute of law" with a membership of practitioners, judges, and teachers who would concern themselves with wide-ranging problems. This suggestion was related to the ALI but the other two certainly were not. One concerned a closer involvement of law schools in legislative law making and the other advocated a closer relationship between law schools and colleges and a smoothing of the transition between the two by bringing the social sciences into the legal curriculum and some law into the college.  

Neither of these suggestions had any real success, although there was a legislative drafting bureau associated with Columbia University in 1920. The Association's committee on curriculum retained a narrow view of legal education. Wigmore had to present his views on widening the curriculum and lengthening the course of the study as a minority report.  

Another suggestion was made in 1921 by Benjamin Cardozo in his article "A Ministry of Justice."  

Cardozo proposed to gather judges,
professors, and practitioners who would mediate between the legislature and the courts, pointing out which legal problems could be solved by statutory enactments and which should be left to the courts. Cardozo himself, however, found the suggested law institute an even better idea. He told the 1921 meeting of the AALS:

Well, this Academy, if we found it, will be able to cooperate with the Ministries of Justice and may even render them superfluous. It will supply the judges the ideals and the standards to which they will increasingly repair to shape the law and change it within the limits of judicial power.\textsuperscript{142}

These failed alternatives have one thing in common — they did not support professionalism as strongly as did the American Law Institute. Both the legislative drafting bureau and the ministry of justice had a political function, and involvement in politics was the antithesis of professionalism. Professionals were the masters of a neutral body of scientific knowledge, but politicians were not. Broadening the law school curriculum diluted those very claims to mastery of a useful body of knowledge. It would also call into doubt lawyers' self-sufficiency and autonomy, thus working a particular hardship on teachers who become the masters of a difficult or incomplete discipline. The position of the legal academic was of great importance because his existence testified to the scientific worth of the discipline. Its proper study required an academic class. The importance of the academic as opposed to the mundane can be seen in the treatment received at the 1921 ABA convention by the ALI's most direct competitor, Andrews' revived American Academy of Jurisprudence. It was strongly attacked in floor debate because its commercial nature made it hopelessly unscientific and unscholarly.\textsuperscript{143}

\textsuperscript{142} AALS HANDBOOK AND PROCEEDINGS 119 (1921).

\textsuperscript{143} Remarks of G. Wickersham, 47 REPORTS OF THE A.B.A. 90-91 (1921); see also Letter from Roscoe Pound to James DeWitt Andrews, Cambridge, May 6, 1921, Paige Box 32, Pound MSS, supra note 35.

Pound was suspicious of the Committee on Classification and Restatement of the Law, writing to Harlan Stone that he had accepted a place on it only because of his fear of "enthusiasts" and to enable himself "to sit on the lid." Pound to Stone, Cam-
The founding rites of the ALI were permeated by the rhetoric of professionalism. In the first place, the Report of the Committee to Establish a Permanent Organization insisted that the proposed organization “should not promote or obstruct political, social or economic changes” but should remain on the high plane of science, leaving for the legislatures such questions as tax and fiscal policy, government administrative policy, and “novel social legislation” like old age pensions or methods for composing differences between capital and labor.\textsuperscript{144} Another familiar note was sounded when the Committee blamed “not a little of the existing uncertainty in the law” on low educational requirements for admission to the bar and on the politicization of judicial office.\textsuperscript{145} Finally, the report could not emphasize too strongly the legal profession’s “obligation to the American people to promote the certainty and simplicity of the law, and its adaptation to the needs of life,” analogizing it to the “duty of the doctors of medicine to organize to increase medical knowledge.”\textsuperscript{146}

The ultimate glorification of the legal profession was saved for the report’s speculations on the future of the proposed restatement. An early draft of the report expressed the hope that if the restatements were done well enough then state legislatures would adopt the principles they contained as a “guide and aid to the Courts” having authority equal to that of the decisions of the highest court of the state.\textsuperscript{147} This hope was reduced to a speculation in the final draft. It was not of current importance. “The important thing now is so to plan the work that the restatement from its inception shall be recognized as a work of great public importance for the execution of which the American legal profession as represented by its leaders on the bench, in practice, and in the schools, is responsible.”\textsuperscript{148} The goal has clearly become the exaltation of the profession and the preservation of that leadership which

\textsuperscript{144} 1 PROCL. AM. L. INST. 4-5, 15-16 (1923).
\textsuperscript{145}  Id. at 74.
\textsuperscript{146}  Id. at 74.
\textsuperscript{147}  The drafts of the Committee's report are gathered in a volume entitled American Law Institute, \textit{Preliminary Reports, Etc.}, in the Harvard Law School Library.
Pound praised in his 1906 speech. As Elihu Root told the founding meeting, their action "points the pathway where we will be acknowledged the natural leaders of the democracy in its struggles towards better life, towards permanency of institutions."\textsuperscript{149}

The concern with professionalization was not new, of course. Throughout the period examined the question of the role of the expert — the place of the self-proclaimed exponent of neutral science — had been in question. Never before, however, had it been so prominent. The successful establishment of the ALI in 1923 suggests a crisis of professionalism even more acute than that of the preceding two decades. Pound for one judged the situation in terms recalling Holmes's comments in "The Path of the Law."\textsuperscript{150} To a southern correspondent he complained that "mammon has a fearful hold upon the bar north of Mason and Dixon's Line."\textsuperscript{151} He also complained to Harlan Stone that no one seemed willing to stand up to A. Mitchell Palmer and denounce his illegal acts as Attorney General. "There was a time when the bar would have taken this matter up vigorously as of course. Has the profession become so immersed in client-caretaking as to have forgotten its duty to the law?"\textsuperscript{152}

Granted that the Palmer Raids and the general suppression of civil liberties were new elements, but they did not seem to rouse any great number of lawyers.\textsuperscript{153} A more immediate threat to professionalism was evident. The bar was being flooded by undesirables trained at third-rate law schools, many of which were no better than cramming schools for the bar exams and did nothing to instill their students with the spirit of the profession.\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{149} Remarks by E. Root, \textit{PROC. AM. L. INST.} 55 (Part 2) (1922).
\item \textsuperscript{150} Holmes, \textit{supra} note 15, at 201.
\item \textsuperscript{151} Pound to Charles A. Woods, Cambridge, December 23, 1920, Paige Box 32, Pound MSS, \textit{supra} note 35.
\item \textsuperscript{152} Pound to Harlan Stone, Cambridge, February 5, 1921, Paige Box 32, Pound MSS, \textit{supra} note 35; \textit{see also WIGDOR, supra} note 65, at 236-37.
\item \textsuperscript{153} Pound was one of the signers of a report to the American people on the illegal practices of the Department of Justice. \textit{See FRANKFURTER & PHILLIPS, supra} note 118, at 173-74.
\item \textsuperscript{154} On the exuberant "patriotism" of the bar during and after the First World War, see Auerbach, \textit{supra} note 18, at 580-84.
\item \textsuperscript{155} \textit{Id.} at 586-601. Much of what follows is based on Auerbach's article, although the reader will note some differences in emphasis.
\item An interesting example of deference toward the law school can be seen in the letters of Learned Hand to some of the members of the Harvard Law School faculty — \textit{e.g.}, "To a judge of the first instance who spends most of his time in settling questions
While lawyerly fears of undesirables, principally immigrants and Jews, seems to be a staple of the American profession, after the First World War they became more pronounced.186 The ABA appointed a committee on legal education chaired by Elihu Root to investigate the problem, while Alfred Z. Reed undertook a similar study for the Carnegie Foundation. Reed's report basically advocated the formalization of the actual situation. There were two American bars which practiced two very different kinds of law, and the divisions were along economic and class lines. Reed was therefore willing to have the night, or part-time schools train the lower bar, leaving the training of the upper bar and the improvement of the law to the full-time schools of high standard.186

The Root committee totally rejected the idea of a divided bar but accepted the part-time school provided it offered a course of as many working hours as there were in the standard three-year full-time program. It demanded, however, two years of collegiate education before of fact, it [metaphysics and the larger questions involved in law] all seems pretty remote, but we look to you in the school to reform us out of our traditionalism." Letter from Learned Hand to Zechariah Chafee, Jr., New York, March 30, 1921, Ms. Box 15, folder 26, Learned Hand Papers, Harvard Law School Library, Cambridge, Massachusetts; see also Letter from Hand to Chafee, October 28, 1920, December 3, 1920, March 26, 1924, all from New York City and all in Ms. Box 15, folder 26 of the Hand Papers, also Hand to Joseph Beale, New York City, March 27, 1922, Ms. Box 13, folder 13, Hand Papers, and Hand to Thomas Reed Powell, New York City, April 23, 1922, Ms. Box 35, folder 8, Hand Papers. I would like to thank Professor Gerald Gunther for his kind permission to examine the Hand Papers.

For those who believed in the scholarly law school the statistics relating to legal education must have been frightening. Of the six largest law schools during the 1919-1920 school years, only one, Harvard, enrolling 883 students, required any college work for admission. Of the other five (Georgetown, New York University, George Washington, Fordham, Suffolk), enrolling 4,061 students (16.58% of all law students), only two had full-time programs and all five had part-time afternoon or night programs in the same year 42.9% of the law students in the United States were enrolled in full-time schools, and only 13.9% of the total were enrolled in schools requiring at least two years of college work for admission. A. Reed, Training for the Public Profession of the Law 452 (1921); A. Reed, Present-Day Law Schools in the United States 531, 532-35 (1928).

155. For an early example (1874) see IV A. Nevins and M. Thomas, The Diary of George Templeton Strong 544 (1952): "This [requiring a college diploma or an examination including Latin for admission in Columbia Law School] will keep out the little scrubs (German Jew boys mostly) whom the School now promotes from grocery counters in Avenue B to be 'gentlemen of the bar.'"

156. A. Reed, Training for the Public Profession of the Law 403-420 (1921); Auerbach, supra note 18, at 588-91.
entering law school. It was the latter requirement that was seen by opponents of the new guidelines as limiting access to the bar along economic lines. The AALS followed the Root committee’s lead, rejected the divided bar and agreed to accept part-time schools as members while raising its entrance requirements over a number of years to two years of college. The departure from settled policy regarding part-time schools as members so infuriated Pound that he wrote to Harlan Stone, suggesting that “Columbia and Harvard, and a few other institutions which have consistently stood for what ought to be in legal education . . . pull out of this Association and let it run as an Association of second-rate institutions.” Pound’s fulminations came to nothing, however, and the net result was that the ABA and the AALS each gave a little and patched up their differences as they slammed the door through which came those who could never be properly professional lawyers.

The agreement between the ABA and the AALS on standards for legal education and admission to the bar did not alter state laws governing admission in the slightest, but the significance of the agreement should not be underrated. For once the upper levels of the profession, at least, both practitioners and teachers, were speaking with one voice on the subject of what made a good professional. At the same time they both testified to the scientific nature of the law and their own great sense of responsibility to the nation — and thus reaffirmed their right to lead — through the American Law Institute. The legal profession could at least face American society with a secure knowledge of its own worth.

Security, however, can be a fleeting thing. The treaty between the practitioners and the teachers did not work perfect reconciliation. The resulting alliance carried within itself, as so many compromises do, the seeds of its own destruction. Some law teachers, of course, like Pound, were unhappy with any compromise of what they saw as high and necessary standards, no matter how strongly required by the practicalities of the situation. On the whole, however, the exclusionary intent of the new rules for the legal education seem to have been widely sup-

157. Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association, Report, 46 REPORTS OF THE A.B.A. 667-88 (1921); Auerbach, supra note 18, at 593-98.
158. Roscoe Pound to Harlan F. Stone, Cambridge, January 2, 1923, Ms. Box 33, folder 15, Pound MSS, supra note 35.
159. Auerbach, supra note 18, at 599-601; Yeazell, supra note 44, at 43-45.
It was the centerpiece of it all, the American Law Institute, which was the weakest element.

The ALI at first glance was indeed the highest manifestation of the idea of professionalism. Here were judges, teachers and practitioners drawn together in a self-perpetuating body charged with deciding by vote the true principles of the science of law. These principles would then be sent into the world to triumph by their own worth without being subjected to the corruption of the political process as practiced by state legislatures. Indeed, the Institute had triumphed over competing programs of reform at least in part because it did the most to remove the legal professional from the defilement of partisan politics and place it squarely with the experts. Yet the very basis for the entire undertaking was an idea of law unchanged from the early nineteenth century, an idea which underlay, so it seems, the thinking of both practitioner and teacher. The Institute was a twentieth century bottle holding distinctly nineteenth century wine.

Almost at the very moment the ALI was being born Pound's intellectual heirs were beginning to mount a real challenge to the view of law which lay behind it. Legal realists had no place for ultimate principles revealed through the mere evidence of cases. No matter what divided the teachers and practitioners who helped to found the ALI, their intellectual histories were far more alike than different. What was coming in legal education was different and would help to guarantee that the profession of law would continue to question itself as the century unfolded.

160. Auerbach, supra note 18, at 591-600.